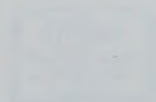


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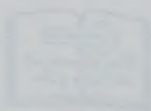
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Sept. 29, 1930.

1. Admiralty ⇨13.

Assistant wharfinger employed by city *held* land employee, and contract of employment not maritime.

Employee was charged with the care and custody of goods and property placed on the dock adjacent to navigable waters. He was required to check all property arriving on or leaving wharf, but took no part in actual loading or unloading of vessels. Ordinarily, manifest papers of vessels tied to dock were delivered to him on land, though occasionally he boarded vessel to secure such papers.

2. Admiralty ⇨20.

That employee suffered injury while temporarily on navigable waters *held* not alone determinative of exclusiveness of maritime jurisdiction (St. 1917, p. 831, as amended).

3. Admiralty ⇨20.

That employee, at moment of injury, was performing services maritime in character *held* not alone determinative of exclusiveness of maritime jurisdiction (St. 1917, p. 831, as amended).

4. Admiralty ⇨20.

Tests determining exclusiveness of maritime jurisdiction in case of injury to employee temporarily on navigable waters and, at moment, performing maritime service, stated.

The tests to determine whether maritime jurisdiction is exclusive in such cases are: (1) Had the injured person's activities at the time of accident "direct relation to navigation or commerce"? (2) Under the circumstances of the particular case, would the regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule, necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with its proper harmony or uniformity?

5. Admiralty ⇨20.

State Workmen's Compensation Statute may be treated as modifying maritime law, where concerning purely local matters and not occasioning interference with uniformity of maritime law in international and interstate relations (St. 1917, p. 831, as amended).

6. Admiralty ⇨20.

Notwithstanding general admiralty jurisdiction, state Workmen's Compensation Act is applicable when injured employee was engaged in work not so directly connected with navigation and commerce that operation of local law would interfere with essential uniformity of general maritime law (St. 1917, p. 831, as amended).

7. Seamen ⇨2.

Assistant wharfinger employed by city *held* not "seaman," as regards exclusiveness of maritime jurisdiction for injury.

[Ed. Note.—For other definitions of "Seaman," see Words and Phrases.]

8. Admiralty ⇨20.

Workmen's Compensation Act *held* applicable to injury to assistant wharfinger, employed by city, while temporarily on ship tied to dock on navigable waters, to receive manifest papers (St. 1917, p. 831, as amended).

In Bank.

Proceeding under the Workmen's Compensation Act by Bessie K. Teahan and others, claimants, for the death of Joseph D. Teahan, opposed by the City of Oakland, employer. To review an order of the Industrial Accident Commission denying compensation, claimants apply for a writ of review.

Order and decision denying award set aside, and cause remanded.

Marcus L. Samuels and George C. Faulkner, both of San Francisco, and Hudson Ford, of Oakland, for petitioners.

Edward O. Allen, of San Francisco, Markell C. Baer, Port Atty., and Hilton J. Melby, Asst. Port Atty., both of Oakland, for respondents.

WASTE, C. J.

Joseph D. Teahan, a civil service employee of the city of Oakland, a municipal corporation, sustained injuries to his head and spine when he fell on the steamer Washington, at the time tied up at one of the city's wharves and afloat on navigable waters of the United States. Upon his death several months later his dependents filed an application with the respondent commission for adjustment of claim. The city of Oakland, which is self-insured, opposed the application, contending that the injury was of a maritime character and that, therefore, the Workmen's Compensation Act (St. 1917, p. 831, as amended) was without application by reason of the paramount force of the law maritime. Evidence addressed to this jurisdictional question was taken by the commission, which found that "said injuries were sustained by the employee while upon navigable waters of the

United States, and the work being done by deceased at said time was maritime in character." A dismissal of the application for adjustment of claim followed, and the cause comes to this court on a writ of review to determine whether or not the respondent commission has jurisdiction in the premises. In denying an award of compensation the commission apparently assumed the position, vigorously urged by the employer, that, since the unloading of vessels has been held to be a maritime occupation, the delivery of the manifest papers, which is a prerequisite to such unloading, partakes of the nature of the unloading and is also essentially maritime in character.

The evidence discloses that, as an assistant wharfinger at the Livingston street dock, Teahan was charged with the care and custody of goods and property placed thereon. While he was required to check all property arriving on or leaving the wharf, he took no part in the actual loading or unloading of vessels and exercised no control over persons engaged for that purpose. His duties were performed almost entirely on land, though occasionally he would board a vessel tied to the dock in order to secure the manifest papers and thus facilitate the work of unloading. The testimony of the captain of the steamer Washington shows that it is the usual and customary thing for the captain of a vessel to take the papers ashore. His testimony also discloses that "most of the time" he took the manifest papers ashore when he docked at the Livingston street wharf. However, on February 7, 1929, Teahan, varying this procedure, boarded the steamer Washington, which had just docked, to get the manifest papers. After securing them and while returning to the dock, but while still on board the vessel, he fell down a ladder or stairway and sustained the injuries above described.

[1-6] A wharfinger has been described as the "owner or occupier of a wharf." Encyc. Brit. In *Chapman v. State*, 104 Cal. 690, 694, 38 P. 457, 458, 43 Am. St. Rep. 158, he is referred to as "one who for hire receives merchandise on his wharf, either for the purpose of forwarding or for delivery to the consignee on such wharf. * * * Docks and wharves are not a part of the navigable waters, but are extensions of the land. *Ind. Comm. v. Nordenholt*, 259 U. S. 263, 272, 273, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013; *Lon. G. & A. Co. v. I. A. C.*, 279 U. S. 109, 122, 49 S. Ct. 296, 73 L. Ed. 632; *Smith v. Taylor*, 276 U. S. 179, 181, 48 S. Ct. 228, 72 L. Ed. 520. Teahan was a land employee. His contract of employment was nonmaritime, and the services required of him were not maritime in character, but, in the main, had to do solely with the custody and protection of property placed on the dock. Here we have

the deceased working for an employer whose business is on land and whose contract in its essential details was to be performed on land, temporarily boarding a vessel tied to a dock in order to procure its manifest papers, which, under the evidence, ordinarily would have been delivered to him on the dock by the captain of the vessel. The fact that such employee suffered injury while thus temporarily on navigable waters is not alone determinative of the exclusiveness of maritime jurisdiction to adjudge the rights and obligations growing out of such a situation (*Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 475, 476, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008), nor is the fact that, at the moment of his injury, the employee was engaged in performing services which might be classed as maritime in character. *Sultan Ry., etc., Co. v. Dept. of Labor*, 277 U. S. 135, 48 S. Ct. 505, 506, 72 L. Ed. 820. The later decisions of the United States Supreme Court lay down additional tests, namely: (1) Had the injured person's activities at the time of the accident "direct relation to navigation or commerce"? (2) Under the circumstances of the particular case, would the regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule, necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with its proper harmony or uniformity? *Grant Smith-Porter Co. v. Rohde*, supra; *Millers' Indem., etc., v. Braud*, 270 U. S. 59, 64, 46 S. Ct. 194, 70 L. Ed. 470; *Alaska Packers' Ass'n v. I. A. C.*, 276 U. S. 467, 469, 48 S. Ct. 346, 72 L. Ed. 656. State statutes providing compensation for injured employees may be treated as amending or modifying the maritime law in cases where they concern purely local matters and occasion no interference with the uniformity of such law in its international and interstate relations. *Oakland v. I. A. C.*, 198 Cal. 273, 275, 276, 244 P. 353, 355. If a reasonable view of the facts involved in any particular case warrants a negative answer to the above questions, admiralty will yield to the local law, even though such law be a Workmen's Compensation Statute. It is not necessary, therefore, to determine whether admiralty could have jurisdiction, but only whether or not our state Workmen's Compensation Act can apply, notwithstanding general admiralty jurisdiction; or, otherwise stated, whether the deceased, when injured, was engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. It is difficult to lay down any general rule by which to judge whether a particular set of facts constitute a "purely local" situation, within the mean-

ing of the federal authorities, to which a local act may apply, or a situation governed exclusively by the maritime law.

After reviewing the decisions of the United States Supreme Court, it is concluded in *La Casse v. Great Lakes Eng. Works*, 242 Mich. 454, 219 N. W. 730, 733, that: "1. If an injury occurs on land, the maritime law does not operate. 2. If it occurs on navigable waters, the jurisdiction of admiralty is *prima facie* exclusive. 3. If an injury occurs on navigable waters and in the performance of a *maritime* contract, it is certainly within the exclusive jurisdiction of admiralty unless (a) the contract is of merely local concern; and (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' 4. State Workmen's Compensation Laws, contractual in character, are applicable to *maritime* service on navigable waters, when, and only when, the service is within exceptions (a), (b), and (c) above. 5. If, however, the injury occurs on navigable waters, but in the performance of a *nonmaritime* contract, it is, at least *prima facie*, local and within the operation of state laws. If there are any exceptions to this rule, they are yet to be developed."

Teahan was essentially a land employee, engaged under a nonmaritime contract. The parties thereto unquestionably contracted with reference to the state statute, and the application of the local law to their rights and liabilities "cannot materially affect any rules of the sea whose uniformity is essential." *Grant Smith-Porter Co. v. Rohde*, supra, page 477 of 257 U. S., 42 S. Ct. 157, 158. If Teahan had been injured on the dock little doubt could exist as to the applicability of the Compensation Act. *Ind. Comm. v. Nordenholt*, supra. Since his contract of general employment is not shown to have been other than a land contract, the mere incident that in its performance he occasionally went on navigable waters is not sufficient, in our opinion, to cause that employment, and the rights and liabilities which pertain to it, to be so deprived of their essentially local character that admiralty would take jurisdiction to the exclusion of a helpful state law. While the kind of work Teahan was doing at the time of his injury bore a certain relation to navigation, in that delivery of manifest papers is a prerequisite to the unloading of vessels, we are not prepared to say that it bore such a "direct" relation thereto as to preclude the application of the

provisions of the Workmen's Compensation Act.

In the cases cited by respondents where admiralty has taken jurisdiction to the exclusion of the local law, the person injured was either employed under a maritime contract or was engaged in activities which had a much plainer and more direct relation to navigation than the work of Teahan. *Northern Coal Co. v. Strand*, 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. 232; *So. Pac. Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; *Nogueira v. N. Y., etc., Ry. Co.*, 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754; *Baizley Iron Works v. Span*, 281 U. S. 222, 50 S. Ct. 306, 74 L. Ed. 819; and *Employers' Liab. Assur. Corp. v. Cook*, 281 U. S. 233, 50 S. Ct. 308, 74 L. Ed. 823. The concurring opinion of Mr. Justice Stone very clearly explains the majority decision in the *Northern Coal Co.* Case as being based on the conclusion that a stevedore, while working on a ship in navigable waters, is a "seaman" within the meaning of the Jones Act, 41 Stat. 1007 (46 USCA § 688), and must therefore look to that act for redress, to the exclusion of state legislation.

[7, 8] The three more recent cases above cited fell squarely within the earlier rulings of the Supreme Court, and therefore added nothing of a new or novel character to its prior adjudications. For the respondent commission to assume jurisdiction of this proceeding will not, in our opinion, do violence to any of these decisions. The deceased in this case was not a seaman in any sense of the word. His boarding of vessels was merely casual and prompted solely by a desire to facilitate the discharge of his duties under a nonmaritime contract. To permit the rights and liabilities of the parties to this proceeding to be determined by the respondent commission under the provisions of the Workmen's Compensation Act will not in any way interfere with the characteristic features of the general maritime rules. This conclusion makes it unnecessary for us to determine petitioners' remaining contention that the city of Oakland is precluded under the decision in *City of New York v. McEntee*, 263 U. S. 688, 44 S. Ct. 229, 68 L. Ed. 507, from urging that the respondent commission is without jurisdiction of this cause.

The order and decision denying the petitioners an award in this case is set aside, and the cause is remanded for further proceedings before the commission.

We concur: SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.

210 Cal. 339

DREYER et ux. v. COLE et al.**S. F. 13195.****Supreme Court of California.****Sept. 29, 1930.****1. Appeal and error ⇨607(1).**

Where no notice of denial of new trial by operation of law was served, contention transcript could not be considered because notice for preparation thereof was not filed within ten days was without merit (Code Civ. Proc. §§ 660, 953a).

It was contended that reporter's transcript, prepared under Code Civ. Proc. § 953a, could not be considered because notice for its preparation was not filed within ten days after motion for new trial was denied by operation of law due to mandatory provisions of section 660.

2. Judgment ⇨248.

That description fixing boundaries in findings and judgment in action to quiet title differed from description in complaint and summons was immaterial, if supported by evidence.

3. Adverse possession ⇨112.

Person claiming title by adverse possession has burden of showing all elements essential to prescriptive title.

4. Appeal and error ⇨931(1).

All intendments and inferences favor judgment, and all conflicts and discrepancies in evidence must be resolved in support of judgment.

5. Appeal and error ⇨1010(1).

Findings, if supported by any substantial showing, will not be disturbed.

In Bank.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by William J. Dreyer and wife, against Willard C. Cole, Mary Easdale, John Doe Easdale, and another. From a judgment for plaintiff, defendants named, except defendant first named, appeal.

Affirmed.

Barrett & McConnell, of Santa Rosa, for appellants.

H. W. A. Weske, of Santa Rosa, and R. M. J. Armstrong, of San Francisco, for respondents.

WASTE, C. J.

[1] This is an appeal from a judgment in favor of plaintiffs quieting their title to real property. Respondents first contend that this court may not consider the reporter's transcript prepared under the provisions of

section 953a of the Code of Civil Procedure, for the alleged reason that the notice for its preparation was not filed within the time provided for by statute. This contention is based on the fact that the notice was not filed within ten days after a motion for a new trial, made in the case, was denied by operation of law by reason of the mandatory provisions of section 660 of the Code of Civil Procedure. No notice of such termination of the motion for a new trial was served upon appellants. There is, therefore, no merit in respondents' contention. *Anstead v. Pac. G. & E. Co.*, 201 Cal. 198, 200, 256 P. 209; *Preo v. Roed*, 99 Cal. App. 372, 375, 278 P. 928.

[2] On the merits, the main point involved on this appeal is whether or not the finding of the trial court, incorporated in its decree, fixing the boundary line between the appellants' and respondents' properties, is supported by the evidence. Appellants denied title in respondents to the portion of land in dispute. From an examination of the description fixing this boundary in the findings and judgment, it is at once apparent that the description therein contained is different from that in the complaint and summons. In the complaint and summons the respondents' westerly boundary is described as a straight line, but by the findings and decree this line has a different point of beginning and follows an irregular course along certain fences and other monuments. Appellants complain of this variance, respondents having neglected at the trial, upon the true situation developing, to ask leave to amend their complaint. However, we deem this immaterial, if, in fact, there is any evidence to support the finding of the trial court. Appellants contend there is no such evidence.

[3-5] Upon a reference to the deeds constituting respondents' record title it is apparent that the westerly boundary described therein is the same boundary described in the complaint. It therefore follows that whatever claim respondents may have to the irregular boundary described in the decree (inasmuch as that line includes some land not included within the line described in the complaint) is based on adverse possession. The trial court made the appropriate findings of adverse possession. It is, of course, elementary that the burden is upon one claiming title by adverse possession to show all of the elements essential to a prescriptive title (*San Francisco Clearing House v. Wells*, 196 Cal. 701, 705, 239 P. 319; *Ward v. Parkford*, 74 Cal. App. 318, 322, 240 P. 521; *Biaggi v. Mainero*, 60 Cal. App. 608, 610, 213 P. 541), but it is likewise elementary that all intendments and inferences are in favor of the judgment of the trial court, and that all conflicts and discrepancies in the evidence must be resolved on appeal in support of the judgment of the trial court. It would serve no useful purpose to review herein the evidence produced at the trial of this action.

Sufficient it is to say that upon a reading of the entire record we do find evidence directly and indirectly tending to support the findings in reference to the description found in the decree, and likewise find sufficient evidence tending to support the finding of adverse possession. This evidence, it is true, is far from being as satisfactory as it might have been, but that was a matter for the trial court to determine, and, as long as there is any substantial showing in behalf of the court's finding, it will not be disturbed on appeal.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: SHENK, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

S. H. CHASE LUMBER CO. et al. v. RAILROAD COMMISSION.*

S. F. 13870.

Supreme Court of California.
Sept. 26, 1930.

Rehearing Granted Oct. 23, 1930.

I. Constitutional law ⇨15.

Constitutional provisions in pari materia must be construed together.

2. Eminent domain ⇨172.

Jurisdiction to try eminent domain cases is vested solely in superior courts, with exception of rights of Railroad Commission under Constitution to fix compensation for taking property of public utility (Const. art. 1, § 14; art. 12, § 23a).

3. Eminent domain ⇨172.

Constitutional provision authorizing Railroad Commission to fix compensation for taking property applies only to acquisition of public utility property by political subdivision of state, not to acquisition of property held in private ownership (Const. art. 12, § 23a).

4. Constitutional law ⇨14.

Enumeration of specific things in constitutional provision is construed as exclusion of matters not enumerated, under maxim expressio unius est exclusio alterius.

5. Constitutional law ⇨12.

Constitutional provisions cannot be extended to include something not expressed therein directly or by necessary implication.

6. Constitutional law ⇨13.

Statutes ⇨131(1).

In construing constitutional or statutory enactments, courts are limited to language of enactments themselves.

7. Constitutional law ⇨50.

Constitutional jurisdiction cannot be enlarged or restricted by statute.

8. Public service commissions ⇨6.

Railroad Commission's constitutional powers are limited to regulation and control of public utilities (Const. art. 12, §§ 22, 23, 23a).

9. Eminent domain ⇨209.

Constitutional provisions creating and conferring powers upon Railroad Commission held not intended to deprive owner of private property of right to have value determined by jury in eminent domain proceedings (Const. art. 1, § 14; art. 12, §§ 22, 23, 23a).

10. Eminent domain ⇨167(2).

Statute, insofar as conferring upon Railroad Commission power, in proceedings pertaining to separation of grades, to condemn property of private individuals or corporations not engaged in public service operations and fix compensation therefor, held unconstitutional (St. 1927, p. 1215, amending St. 1915, p. 137, § 43 (b, c), as amended and added by St. 1917, p. 320; Const. art. 1, § 14).

Const. art. 1, § 14, provides that private property shall not be taken or damaged for public use without just compensation having first been made.

11. Constitutional law ⇨81.

Police power is subject to rule that Legislature may not exercise powers expressly or impliedly forbidden by Constitution.

12. Eminent domain ⇨167(2).

Statute authorizing Railroad Commission, in proceedings involving separation of grades, to condemn and fix damages for taking private property, not owned by public utility or used for public service, held not proper exercise of police power (St. 1927, p. 1215, amending St. 1915, p. 137, § 43 (b, c), as amended and added by St. 1917, p. 320; Const. art. 1, § 14; art. 12, §§ 22, 23, 23a).

13. Eminent domain ⇨167(3).

No public necessity, however urgent, will justify taking contrary to law (Const. art. 1, § 14).

14. Eminent domain ⇨167(2).

Proceeding to condemn and fix damages caused to private property, not used in public service, by relocation of track and separation of crossings resulting in closing of street, held not germane to regulation of public utilities, as regards legislative power to invest Railroad Commission with jurisdiction (St. 1927, p. 1215, amending St. 1915, p. 137, § 43 (b, c), as amended and added by St. 1917, p. 320; Const. art. 1, § 14; art. 12, §§ 22, 23, 23a).

The application for condemnation here involved was one to fix full compensation

for damages resulting to certain private property owners from an improvement involving the relocation of railroad tracks and the separation of crossings, necessitating the construction of a subway in front of property owned by them and the closing and abandonment of a street, thus allegedly destroying all ingress to and egress from such property.

15. Eminent domain ⇨106.

Construction of subway in front of property and closing of street on which property fronts, destroying ingress and egress, as result of track relocation and grade crossing elimination, *held* to constitute "taking" (Const. art. 1, § 14).

[Ed. Note.—For other definitions of "Taking," see Words and Phrases.]

16. Eminent domain ⇨288(1).

Limitations of Public Utilities Act as to remedies therein provided *held* not to affect private property owners not within commission's jurisdiction, seeking to restrain commission from condemning property (St. 1915, p. 115, as amended).

17. Courts ⇨207(5).

Granting of prohibition is entirely within Supreme Court's discretion.

18. Courts ⇨207(5).

Supreme Court's power to issue writ of prohibition is derived from Constitution.

19. Prohibition ⇨1.

Prohibition is usually granted when there is unauthorized assumption of jurisdiction.

20. Prohibition ⇨6(2).

Where Railroad Commission was without jurisdiction to condemn private property not used in public service, in crossing separation proceeding, prohibition was granted (St. 1927, p. 1215, amending St. 1915, p. 137, § 43 (b, c), as amended and added by St. 1917, p. 320; Const. art. 1, § 14; art. 12, §§ 22, 23, 23a).

SHENK, J., WASTE, C. J., and PRES-
TON, J., dissenting.

In Bank.

Application by the S. H. Chase Lumber Company and another for a writ of prohibition to restrain the Railroad Commission from hearing a petition of the City of San Jose to condemn certain property of the petitioners and fix compensation for the acquisition thereof or damage thereto.

Writ granted.

Rea & Caldwell, of San Jose, for petitioners.

Arthur T. George, Ira H. Rowell, and Rod-
erick B. Cassidy, all of San Francisco, for
respondent.

Archer Bowden, of San Jose, and E. J. Foulds and R. S. Myers, both of San Francisco, amici curiæ for S. H. Chase.

Nat Schmulowitz, George B. Harris, Gavin McNab and Schmulowitz, Wyman, Atkins & Brune, all of San Francisco, amici curiæ for petitioners.

C. C. Carleton, of Los Angeles, amicus curiæ for California Department of Public Works.

Harry A. Encell, of San Francisco, amicus curiæ for California Division of Highways.

Ivan Kelso and John R. Berryman, Jr., both of Los Angeles, amici curiæ for Automobile Club, of Southern California.

Edwin P. Werner, of Los Angeles, amicus curiæ for City of Los Angeles.

J. J. O'Toole, of San Francisco, amicus curiæ for City and County of San Francisco.

E. J. Sinclair, of Berkeley, amicus curiæ for City of Berkeley.

Thomas M. Carlson, of Richmond, amicus curiæ for City of Richmond.

J. LeRoy Johnson, of Stockton, amicus curiæ for City of Santa Barbara.

J. F. Goux, of Santa Barbara, amicus curiæ for City of Santa Barbara.

Hugh B. Bradford, and Joseph L. Knowles, both of Sacramento, amici curiæ for City of Sacramento.

Claude L. Rowe, of Fresno, amicus curiæ for City of Fresno.

Archer Bowden, of San Jose, amicus curiæ for City of San Jose.

TYLER, Justice pro tem.

Application for a writ of prohibition to restrain the Railroad Commission from hearing a petition of the city of San Jose to condemn certain property of the petitioners, and fix compensation for the acquisition of or damage thereto under section 43(c) of the Public Utilities Act of this state (St. 1927, p. 1215, amending St. 1915, p. 137, § 43(c), as added by St. 1917, p. 320).

The controversy arises out of a grant by ordinance to the Southern Pacific Railroad Company by the city of San Jose of a franchise to construct, maintain, and operate a steam railroad over and upon certain streets within the boundaries of such city. For more than fifty years last past, the main line of the railroad company between San Francisco and Los Angeles has been located on Fourth street in the city of San Jose. The maintenance and operation of this line on such street having become undesirable, upon the expiration of the franchise, the city refused a renewal of the same, but in lieu thereof granted one for a new line along and across other and different streets. The railroad company thereupon made application to the Railroad Commission for the purpose of obtaining an order from such commission determining that public convenience and necessity required the relocation of certain of its tracks within such city and adjacent thereto.

the construction of tracks over certain streets and highways at grade, and the construction of tracks over certain other streets and highways at separated crossings.

The commission rendered its opinion and order in this proceeding, declaring, among other things, that the proposed tracks should cross certain designated streets within the city at separated grades, in accordance with the descriptions filed with the application, the cost to be borne in accordance with the ordinance passed by the city of San Jose. The city had agreed in the franchise granted to the railroad to pay all property damage, other than to railroad property, that might result to the owners by reason of the separation of certain grades and crossings made necessary by the relocation of the new line. The city then filed its application before the commission to have it ascertain and fix compensation to be paid for the property damage made necessary by the contemplated improvement in accordance with section 43 (c) of the Public Utilities Act. The commission thereupon issued its order to the persons named in said petition whose property was affected thereby, including petitioners herein, directing them to show cause why the commission should not proceed after hearing to order condemnation to be entered and to fix the just compensation to be paid for the acquisition of or damage to their lands. Petitioners failed to appear, and instituted the present proceeding to prevent the commission from further proceeding in the matter, claiming that it was without jurisdiction or power to condemn their lands or to fix the compensation to be paid for the taking thereof or the damage thereto, as neither of them was engaged in any business subject to the Public Utilities Act, but on the contrary, the properties owned by them were held in private ownership, the same not being used for any public service. In their application for the writ, petitioners have set forth the nature and extent of the damage they will suffer by reason of the improvement.

It is disclosed by the petition that the contemplated improvements include a subway to be constructed on Julian street in front of the property of petitioners, together with the elevation of the grades of such street at least six feet higher than the present elevation thereof and petitioners' adjacent lands facing thereon, and the complete abandonment, closing, and change of grade of Center street, which improvements will, it is alleged, result in destroying all ingress and egress to petitioners' property and render it unfit for the purpose for which it is being used or for any other purpose. It further discloses that the petitioner, S. H. Chase Lumber Company, is the owner of a considerable tract of land fronting on Center street and also on certain other streets to be affected by the proposed change of grade, and that it operates a large lumber mill upon said property and has for

many years used Center street as its main means of egress and ingress to its property. The other petitioner, Alice F. Farney, also owns property affected by the improvement, and her only means of egress and ingress to such property is through such street. Both petitioners own the fee in said street to the center thereof, subject only to the rights of way of the city and the railroad company as they existed prior to the institution of the proposed proceedings. It also is claimed that the plans and specifications approved by the Commission call for the taking of a strip of land off petitioner Farney's property on Center street, and, likewise, provide for the taking of a strip along the entire frontage of the S. H. Chase Lumber Company's property on Center street. The contemplated improvement also affects the rights of numerous other property owners not parties to this proceeding.

Petitioners claim that if the Railroad Commission is allowed to proceed with the matter thus presented to it, it will be undertaking to fix the compensation for and to condemn not only the ownership which the petitioners have in the fee of Center street, but will also be undertaking to fix the compensation for and damage sustained by them to their private property and the use thereof adjacent to and fronting upon said street. This they contend amounts to a violation of the provisions of section 14 of article 1 of the Constitution. Respondent commission seeks to justify its assumption of jurisdiction on the ground that it is regularly proceeding under the authority of section 43(c) of the Public Utilities Act, the provisions of which are necessary, convenient, and essential to the proper and effectual exercise of other powers of regulation and control of railroads delegated to the commission under such act and under section 43(b) thereof in particular. It is the contention of respondent commission that section 43(c) of the act is constitutional under the provisions of sections 22, 23, and 23a of article 12 of the Constitution as being cognate and germane to the purposes of the act as a whole, for which reason section 14 of article 1 of the Constitution must yield to it.

Section 14, article 1, of the Constitution provides that "private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * * which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law."

Sections 22 and 23 of article 12 of the Constitution create the Railroad Commission and grant to it powers to supervise and regulate public utilities, and the powers granted are declared to be plenary and unlimited by any provision of the Constitution. Section 23a

of article 12 provides that the Railroad Commission shall have and exercise such power as shall be conferred upon it by the Legislature to fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings by the state or any county, and this right is declared to be plenary and unlimited by any provision of the Constitution.

Section 43(c) of the Public Utilities Act, as amended in 1927 (Stats. 1927, chap. 704, p. 1215), passed in pursuance of sections 22, 23, and 23a, of article 12, of the Constitution, provides that the Railroad Commission shall have power to fix the just compensation to be paid for property or any interest in or to property to be taken or damaged in the separation of grades at any crossing specified in subdivision (b) thereof or for property or any interest in or to property to be taken or damaged in the construction, alteration or relocation, under the order or with the approval of the commission, of elevated tracks or subways, etc., and upon payment of the compensation to make a final order of condemnation. Subdivision (b) referred to in subdivision (c) relates in general to the powers of the Commission over crossings of railroads upon highways. Subdivision (c) is declared in the act to be an aid to the jurisdiction of the commission in the supervision and regulation of railroads.

[1-10] The question here presented for determination under the different contentions is whether or not the Legislature has attempted to vest in the Railroad Commission the exclusive right under section 43(c) of the Public Utilities Act (Stats. 1927, p. 1215) to fix the just compensation to be paid for property, or any interest therein, held in private ownership, to be taken or damaged in the separation of grades, and to make a final order of condemnation when it appears that the property sought to be condemned is not the property of a public utility, and if so, is the section in its enforcement against the petitioners constitutional. In other words, have or have not, private property owners the right under section 14 of article 1 of the Constitution to have compensation assessed when their property is about to be taken for public use by a jury as in other civil cases, notwithstanding the constitutional and statutory provisions invoked by respondent commission. The solution of the question depends upon the proper construction to be given to the constitutional provisions above referred to. These provisions are in pari materia and are to be construed together. So construed, it seems plain that the jurisdiction to try cases in eminent domain is vested solely in the superior courts of the state, with the exception of the rights conferred to the commission by section 23a of article 12 of the Constitution. This section does not authorize the Legislature to take away from an individual the rights conferred by section 14,

article 1, of the same organic law. It only authorizes the exercise of the power conferred upon the commission where political subdivisions of the state are involved and the property of a public utility is being acquired, and it has no application to the acquisition of property held in private ownership. Under the maxim *expressio unius est exclusio alterius*, the enumeration of certain specific things in a constitutional provision will be construed to exclude all that is not thus enumerated. Constitutional provisions cannot be extended to include something which is not expressed therein either directly or by necessary implication. The proceeding, as above indicated, is one in invitum for the valuation and acquisition of property held in private ownership for the purpose of involuntary acquisition. It may be conceded for the purpose of this case that the power of eminent domain, or a power akin thereto, in matters involving public utilities over which the commission has gained control, has been vested in that body and that the exercise of this power, including the making of awards thereunder without the intervention of a jury, are not in violation of the Constitution where the powers are cognate and germane to the purposes for which the commission was created, i. e., the regulation of public utilities. It may further be conceded that the control of the manner of constructing railroad crossings is a vital and material part of the regulation of railroads and is cognate and germane to that subject within the purview of sections 22 and 23 of article 12 of the Constitution where jurisdiction exists. *City of San Jose v. Railroad Commission*, 175 Cal. 284, 165 P. 967. But these considerations do not enter into or in any manner control the question here involved. Here it is sought to acquire on behalf of a railroad company, and for its benefit and use, substantial property rights of numerous individuals property owners who do not come within the purview of the Public Utilities Act, as their property is held by them in private ownership and not devoted to any public use. The case does not present the ordinary situation of the construction of grade crossings where private property rights are not involved, but rather the transportation of an extensive portion of railroad tracks from one portion of the city to another for a very considerable distance. The constitutional provisions invoked by respondent do not attempt to affect private property. Courts in construing constitutional enactments or statutes are limited to the language of the enactments themselves. Constitutional jurisdiction can neither be enlarged or restricted by legislative act. There is no possible connection between the regulation and control by the commission of public utilities and the control of private property by individuals. It is not possible to read into a plain certain grant of power in a constitutional provision something not therein contained. Whatever powers, therefore, plenary or otherwise, the com-

mission may have as a regulatory body having full control of matters cognate and germane to the regulation and supervision of utilities and whatever rights it may have under the Constitution are limited and restricted to the regulation and control of public utilities. This is the declared purpose of the provisions invoked by respondent. These provisions were never intended to do away with the right of an owner of private property to have the value of such property determined by a jury in eminent domain proceedings, and this very question has been so determined by this court. In *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 647, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, it was held that such an attempted taking on the part of the commission was at variance with article 1, § 14, of the Constitution. There the constitutional provisions were construed together and the determination reached that as to public utilities there may be a taking by the commission if germane and cognate to regulation, but that as to all other property, especially as to that held in private ownership, a taking is only justified in accordance with the provisions of article 1, § 14. See, also, *East Bay M. U. Dist. v. Railroad Commission*, 194 Cal. 603, 229 P. 949. The *Eshleman* and *East Bay Cases* extensively consider and pass upon the very question here involved, and they hold that whenever the commission by order, either directly or indirectly, attempts to acquire private property for a public use, or attempts to fix the compensation to be paid therefor, it entirely exceeds its power and its order is void. In view of these decisions, a further discussion of this question becomes unnecessary. Section 43(c) of the Public Utilities Act therefore, in so far as it purports to give the Railroad Commission power to condemn property of private individuals or corporations, who are not engaged in public service operations, is a despotic grant of power and therefore unconstitutional and void.

[11-15] In a brief filed by certain amici curiae it is claimed that section 43(c) is constitutional, irrespective of sections 22 and 23 of article 12 of the Constitution, as being a valid exercise of the police power of the state. However broad the scope of the police power, it is always subject to the rule that the Legislature may not exercise any power that is expressly or impliedly forbidden by the Constitution. Nor does the fact, if it be a fact, as claimed by respondent, that the present proceeding is a more complete, speedy, and effectual method of obtaining results than a proceeding in a court, alter or change the situation. No public necessity, however urgent, will justify a taking contrary to law. *Pacific Tel. & Tel. Co. v. Eshleman*, supra. The same may be said in answer to the argument that there is no relation between damages suffered by property owners by reason of separation of grades at crossings and damages due to the closing of certain streets and

that each taking can be determined when necessary in separate suits. The application to the commission is one to fix the full compensation for the acquisition of or damage to the property of persons affected by the improvement, and the record shows that the commission has approved the plans of the subway, the relocation of the tracks, and nothing remains to be done except to acquire by purchase or condemnation the property of the particular individuals in accordance with the order of the commission to carry out the general plan. The application prays that the commission fix the compensation to be paid to the individual property owners named therein and that it make such final order of condemnation as may be proper in the premises. As we have seen, the commission has no power to make any order affecting the property of petitioners, as it is totally without jurisdiction in the matter, and lacking jurisdiction, the proceedings are not cognate and germane to the regulation of public utilities. The whole controversy, so far as it affects the property of petitioners, is one that should be determined in a single proceeding in the proper forum, as each of the contemplated acts constitute a taking within the meaning of the law.

[16-20] Something is said in the briefs of respondent concerning the remedy invoked by petitioners, it being claimed that mandamus and certiorari are exclusive under the statute. If petitioners do not come within the confines of the act for the reason that they are not public utilities, and the commission is therefore without jurisdiction over them or their property, they are in no manner affected by the provisions of the act and the limitation contained therein as to the pursuit of remedies has no application to them. The granting or refusal to grant prohibition is entirely within the discretion of the court. Its power to issue the writ is derived from the Constitution. The writ is usually granted when there is an assumption of unauthorized jurisdiction. Here the commission being without jurisdiction, the writ should be granted in the interest of justice. Respondent concedes the importance of the issues involved and, recognizing the necessity of a speedy determination of the case, waives this objection.

Considering the conclusion we have reached, it is ordered that the Railroad Commission be and it is hereby restrained from entertaining, passing upon, and deciding what properties of petitioners should be condemned for the purposes as set forth in the petition of the city of San Jose and from fixing the compensation or damage to said properties.

We concur: SEAWELL, J.; CURTIS, J.
RICHARDS, J. (concurring).

This proceeding does not involve merely the elimination of an isolated grade crossing at the intersection of two already established roadways, wherein any private interests

which might be affected would be of a minor and incidental concern. This proceeding involves the transposition of that portion of the main line of the railway of the Southern Pacific Company which for many years heretofore has occupied Fourth street in the city of San Jose, from that location to the western portion of the city, such transposition when completed to traverse the entire length from north to south of the city, and thence to proceed southward for several miles to Lick station, the point where it will be reunited with the main line.

This proceeding had its inception in the year 1917, when the franchise of the railroad, which entitled it to occupy Fourth street, expired. It began in a public agitation having for its end the removal of the main line of said railroad from the central portion of the city to the western limits thereof. It took a preliminary form in the application of the railroad, an interstate line, to the Interstate Commerce Commission, for permission to make such transposition, which application was granted on October 11, 1928. 145 I. C. C. 515. On December 5, 1928, the city of San Jose granted a franchise to said railroad "to construct a line of railroad through the city of San Jose over, along and across the several streets, lanes, alleys and highways herein-after described," etc. The description of the character and route of the railway to be constructed in conformity with said franchise provides expressly for the closing of Center street throughout its entire length of several blocks, and further provides for the construction of overhead tracks at eight street crossings in said city, one of which is at Julian street. This franchise contains the following express provisions: "It is understood that the grantee shall at the time of applying for authority to construct the crossings as above specified in order to avoid unnecessary grade crossings, ask the Railroad Commission for an order directing the city of San Jose to close and abandon the following streets within the following limits, that is to say: San Fernando street, Kearny street, Center street between Lenzen avenue and San Augustine street, Pine street, Cahill street, San Carlos street, Jerome street, Mariin avenue, Fuller avenue, Bartlett avenue, Goodyear street and Sunnyside avenue; the closing of said streets shall be a condition precedent to the carrying out of this franchise."

Following the granting of said franchise, the city of San Jose presented to the Railroad Commission a petition under section 43(c) of the Public Utility Act "to fix compensation to be paid for property damaged in separation of grades at crossing of Julian street and proposed Southern Pacific track in the city of San Jose." In this petition the private property of every property owner along the entire course of Center street from a point several hundred feet northward of Julian

street to a point several hundred feet southward thereof and to the end of Center street is described, and the commission is asked to fix "the just compensation to be paid for the damage to each piece or parcel of property specified herein, and declare that such compensation be paid as provided in decision No. 20559, and that the Commission make such final order of condemnation as may be proper in the premises." The decision No. 20559 above referred to is the decision of the Railroad Commission "In the Matter of the Application of the Southern Pacific Company for an order authorizing construction at grade and at separated grades of railroad tracks across certain streets, lanes, alleys and highways and across the track of the Western Pacific Railroad Company at locations herein-after described in the city of San Jose and in the vicinity of San Jose, county of Santa Clara, state of California." Said application of the Southern Pacific Company, presented after receiving its foregoing franchise, was an application "for authority to construct the various crossings over public thoroughfares involved in the relocation of its main line tracks through the city of San Jose and the unincorporated territory immediately south of the city of San Jose." The decision recites, after providing with much of detail for the construction of the several street crossings at separated grades within and beyond said city, including the Julian street crossing: "The above opinion and order is based on the express condition that the following streets and alleys in the city of San Jose be legally abandoned and effectively closed at the respective points of crossing with existing or proposed track of applicant." Here follows a list of eleven streets which are to be wholly or partially closed, at the head of which list is Center street, which is to be wholly closed. In order to construct the several crossings at elevated grades, as provided in said decision, and particularly in order to construct the crossing at Julian street, it is provided in said decision that said railroad shall begin to rise at or near Cinnebar street, several hundred feet north of Julian street, and shall reach an elevation at the latter street at its intersection with Center street of sufficient height to permit a subway with a minimum clearance of twelve feet at the Julian street crossing, and that such elevation of the railroad shall continue along the remaining distance of Center street to the end thereof with the entire width thereof occupied by said elevation and the tracks laid thereon, so as to effectually and completely close Center street to public travel and to ingress and egress on the part of the private property owners along the entire course of said street.

It is in order to prohibit the Railroad Commission from thus carrying into effect its aforesaid decision and order, with the consequent destruction of whatever private prop-

erty rights the property owners along Center street have in the fee therein and in the right of ingress and egress thereto, without having their rights and the damages thereto declared and determined under the provisions of section 14 of article 1 of the Constitution of the state of California, that the instant application for a writ of prohibition has been presented by the Chase Lumber Company and Alice K. Farney, both of whom are property owners on and along the line of Center street.

It would seem to be obvious from the foregoing recital that the matter pending before the Railroad Commission involves not merely the grade crossing at Julian street, but the entire and unseverable matter of the transportation of the main line of the Southern Pacific Company from a central street in San Jose to a location near the western limits of said city, but across the entire length thereof, which involves and will involve in the course of the accomplishment thereof the private property rights of many persons, having relation particularly to the closing of such streets as the transposition and placement of said main line of railway require.

It should also be obvious that the construction of this main line of railway at the elevation required in order to the elimination of the grade crossing at Julian street will involve necessarily the private property rights of all of those persons owning property along the entire course of Center street, and which will be destroyed or damaged by the necessary closing of said street throughout its entire course to the northward and southward of said crossing, and that this being so, the proceeding before the commission and the order and decision thereof which is herein sought to be reviewed should be treated and considered in its entirety, and that neither the city of San Jose, nor the Railroad Commission, nor the railroad, should be permitted to chop up said proceeding into a large number of proceedings for the elimination of grade crossings and the condemnation of the property rights of private persons without the admeasurement of a jury, as provided for in the aforesaid section of the state Constitution.

I am in agreement with the main opinion prepared by Mr. Justice TYLER pro tem, and with the authorities cited by him therein to the effect that a proceeding of this character does not come within the regulatory powers with which the Railroad Commission is invested by the terms of sections 22 and 23 of article 12 of the Constitution and which I insist were never intended to work a repeal of section 14 of article 1 of said Constitution. I am further of the opinion that section 23a of article 12 of the Constitution is the only section thereof which purports expressly to confer upon the Railroad Commission the right to exercise the power of eminent domain and that by the express terms of that section such

power and jurisdiction is limited to "the taking of any property of a public utility." If the framers of this the latest amendment to this article of the state Constitution intended to invest the Railroad Commission with power and jurisdiction to fix the just compensation to be paid for the taking of any property of a private person in eminent domain proceedings, here was the place to have done so; and the fact that it not only was not done, but that the power and jurisdiction of the commission in eminent domain was by the terms of said section expressly limited in its exercise to the property of public utilities, furnishes to my mind the clearest reason for holding that the cases of *Pacific Tel. & Tel. Co. v. Eshleman*, supra, and *East Bay M. U. Dist. v. Railroad Commission*, supra, cited in the main opinion, should be given full application to the facts of the instant case.

SHENK, J.

I dissent. In these days of automobile transportation the question of the elimination of crossings of highways and railroads at grade is of prime importance. The main opinion strikes down the power of the state through its Railroad Commission to eliminate such grade crossings in a prompt and effectual manner. The proceeding before the Railroad Commission is an endeavor to relocate the main line of the railroad company through the city of San Jose and through unincorporated territory immediately south thereof. Upon the completion of the project eighteen grade crossings would be abolished and certain streets as such will be abandoned.

The part of the proceeding now under review involves the separation of the grade at the intersection of Julian and Center streets. Incidental damage to private property will result. Section 43 of the Public Utilities Act specifically vests in the Railroad Commission the power to require the separation of grades and to apportion the expense thereof between the public utility corporation and the public corporation or public agency wherein the same takes place. Section 43 also vests power in the Railroad Commission to fix the just compensation to be paid for property taken or damaged, by reason of the separation of the grade. The procedure laid down by the statute for the ascertainment of such amounts is elaborate and complete and provides for notice and hearing on behalf of all parties interested.

The sole question presented is the validity of said section 43 under the constitutional grant of power to the Railroad Commission. The main opinion denies the right of the Railroad Commission to proceed under the statute because of the general requirement of section 14 of article 1 of the Constitution that the compensation to be assessed for the taking or damaging of private property for public use

shall be ascertained by a jury as in other civil actions in a court of record. I cannot agree that said constitutional provision is applicable to the taking or damaging of private property incidental to a grade crossing authorized or required by the Railroad Commission.

Section 22 of article 12 of the Constitution provides: "No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this Constitution, and the authority of the legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution." Again section 23 of the same article provides that "the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution." This court has declared that the powers conferred on the Railroad Commission under the foregoing broad authorization must be cognate and germane to the subject of the regulation of public utilities. *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 647, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. If the power to fix the compensation for private property taken or damaged by the separation of grades be so cognate and germane, the general provisions of section 14 of article 1 are necessarily superseded and controlled by the specific provisions of sections 22 and 23 of article 12 and acts of the Legislature passed in pursuance thereof. That the fixing of such compensation by the Railroad Commission in authorizing or directing a separation of grades is so cognate and germane to the general purposes of the power conferred seems to me to be beyond question. Without the right to fix such compensation, the power to provide for or to eliminate grade crossings is either thwarted entirely or is restricted to such an extent as to render it ineffectual from a practical standpoint. It is no sufficient answer to say that some one may voluntarily or by direction proceed in the superior court to have the compensation fixed by a jury. Such a proceeding would entail expense and delay and uncertainty not at all in harmony with the ends and purposes of the full and complete determination and accomplishment of the matter specially intrusted to the Railroad Commission. It cannot be rightly urged that just compensation will not be awarded if the same be fixed by the Railroad Commission. Commenting on this phase of the matter with reference to fixing the compensation for a taking of the property of a public utility, this court said in *Pacific Telephone, etc., Co. v. Eshleman*, 166 Cal. 640, at page 684, 137 P. 1119, 1137, 50 L. R. A. (N. S.) 652, Ann. Cas.

1915C, 822: "It is certainly true that in the vast modern development of public utilities in their multifarious activities, in their complicated interrelations, where a taking of property is involved, a great saving of time, and a more just award may be expected from a learned, skilled, and dispassionate tribunal such as the Railroad Commission than can ever be hoped for from the haphazard verdicts of juries. And very good reasons therefore appear why, for the benefit of the state as well as for the benefit of the public service companies, awards as to the latter should be made by this body, and not by a jury." There need be no apprehension of the undue enlargement of the powers of the Railroad Commission when the exercise thereof in fixing compensation is confined, as in this proceeding, to the specific matter of the separation of the grades at a railroad crossing. Nothing else is involved. The power of the commission to apportion the cost of the separation of the grades has been recognized and confirmed as cognate and germane to regulation (*City of San Jose v. Railroad Commission*, 175 Cal. 284, 165 P. 967), and there would seem to be no difference between the power to apportion the cost of the improvement and the power to fix the amount of the cost thereof. Both are necessary to the full exercise of the power granted.

Furthermore, section 43(c) of the Public Utilities Act provides: "The legislature hereby declares that subsection (c) hereof [providing for the fixing of compensation in the elimination of grade crossings] is enacted as a germane and cognate part of and as an aid to the jurisdiction of the railroad commission in the supervision and regulation of railroad and street railroad corporations." St. 1927, p. 1222. While this declaration may not in a strict sense be binding upon this court, it should not be disregarded except when the court must say as a matter of law that there is no reasonable relation between the fixing of such compensation and the main purpose of the proceeding, which is to prevent or eliminate grade crossings and thus provide safety for the traveling public.

The case of *East Bay M. U. Dist. v. Railroad Commission* is not in point. There a public agency not then authorized to invoke the powers of the Railroad Commission under section 23a of article 12 of the Constitution was endeavoring to compel the commission to fix and determine the compensation to be paid by the petitioner in contemplation of eminent domain proceedings against the East Bay Water Company, and it was held that under the provisions of the Constitution in force at the time the relief could not be granted. There condemnation was the sole purpose of the proceeding and no question of the regulation of the public utility was involved. Here the condemnation is merely incidental to the main

purpose of regulation and control of the public utility.

In my opinion the petition should be denied and the alternative writ discharged.

We concur: WASTE, C. J.; PRESTON, J.

108 Cal. App. 429

SKAGGS v. WILEY.

Civ. 6938.

District Court of Appeal, First District,
Division 1, California.

Sept. 24, 1930.

Rehearing Denied Oct. 24, 1930.

Hearing Denied by Supreme Court
Nov. 20, 1930.

1. Automobiles ⇨226(2).

Where view is obstructed, motorist's failure to observe statutory requirements as to speed in entering intersection, if failure proximately contributes to injury, constitutes negligence (St. 1923, p. 517, § 113).

2. Automobiles ⇨245(90).

Whether failure of motorist, whose view was obstructed, to observe statutory requirements as to speed in entering intersection proximately contributed to injury, *held* for trial court in nonjury case (St. 1923, p. 517, § 113).

3. Automobiles ⇨242(8).

Burden of proving that plaintiff motorist's failure to observe statutory requirement as to speed in entering intersection proximately caused injury was on defendant (St. 1923, p. 517, § 113).

4. Appeal and error ⇨1010(1).

Reviewing court cannot disturb judgment unless it appears that on no hypothesis is there sufficient substantial evidence to support it.

5. Appeal and error ⇨996.

Reviewing court cannot review finding based on reasonable inference, though in its judgment opposite inference is more probable.

6. Automobiles ⇨245(90).

Whether speed of plaintiff's automobile three miles per hour in excess of that permitted by statute regarding intersections proximately contributed to collision *held* for trial court in nonjury case (St. 1923, p. 517, § 113).

7. Damages ⇨5.

"Special damages," as contradistinguished from general damages, are those which are

natural but not necessary consequences of act complained of.

[Ed. Note.—For other definitions of "General Damages" and "Special Damages," see Words and Phrases.]

8. Damages ⇨142.

Plaintiff must plead special damages which he sustained, or he cannot give evidence thereof.

9. Appeal and error ⇨1170(5).

Where defendant stipulated that amount claimed for medical expenses was reasonable and necessary, error, if any, in permitting proof of such damages, although not pleaded, *held* not prejudicial (Const. art. 6, § 4½).

10. Pleading ⇨250.

In action for personal injuries, trial amendment for medical expenses is not introduction of new cause of action.

11. Damages ⇨132(3).

\$12,750.31 *held* not excessive for injury to vertebra causing from 20 per cent. to 25 per cent. disability.

Facts disclosed that before the accident plaintiff was strong, in good health, and capable of earning \$6.50 per day. After the accident he remained in hospital several weeks, and, after leaving the hospital, wore a brace for eleven months, suffered severe pain, and had his earning capacity impaired.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Thomas R. Skaggs against D. Baldwin Wiley. Judgment for plaintiff, and defendant appeals.

Affirmed.

Superseding 287 P. 518.

J. Hampton Hoge, of San Francisco, for appellant.

Wyckoff & Gardner, of Watsonville, for respondent.

PER CURIAM.

This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligent operation of an automobile. The defendant denied the alleged negligence, and averred that negligence on the part of the plaintiff proximately contributed to the injuries complained of. The action was tried before the court without a jury. The court found for the plaintiff and entered judgment accordingly. Defendant's motion for a new trial was denied, and he has appealed from the judgment. The

grounds for the appeal are that the evidence shows as a matter of law that plaintiff was guilty of contributory negligence, that the court erred in receiving evidence of and awarding judgment for special damages, and that the damages awarded were excessive.

On February 11, 1924, at about 9 o'clock a. m., the plaintiff was operating an automobile in an easterly direction along the right-hand side of Alisal street in Salinas. This street, which is 75 feet wide, runs east and west. It intersects with Soledad street, which runs north and south; the latter street being 50 feet in width. As plaintiff neared the intersection, defendant's automobile approached from the south along Soledad street, and a collision occurred in the northeast quarter near the center of the intersection. According to the plaintiff, he was from 20 to 30 feet west of the westerly curb line of Soledad street when he first saw defendant's car, which was then from 60 to 70 feet south of the southerly curb line of Alisal street. Plaintiff estimated the speed of his car at about 18 miles, and that of defendant's at about 40 miles an hour. Other witnesses testified that the defendant's speed was between 12 and 15 miles an hour. A dwelling house was situated on the lot at the northwest corner of the intersection and about 30 feet west of the westerly curb line of Soledad street. There was another dwelling on the southwest corner of the intersection; this structure being 82 feet west of the westerly curb line of Soledad street. Plaintiff testified that when he first saw the defendant approaching there did not appear to be any danger of a collision, and he assumed that defendant would yield the right of way; also that he entered the intersection first, whereupon, seeing that the defendant continued on his course, he swerved his car to the left in an effort to avoid the collision. The defendant testified that when he reached a point between 75 and 100 feet south of Alisal street he looked to his left toward Alisal street and saw no car approaching; that he had no recollection of having looked in this direction again, and did not see plaintiff's car until after the collision occurred. Defendant contends that the intersection was one where the view was obstructed within the meaning of the California Vehicle Act, and, it being admitted that plaintiff entered the intersection at a speed in excess of 15 miles an hour, he was negligent as a matter of law.

At the time the accident occurred, the California Vehicle Act (Stats. 1923, p. 517) provided as follows: "Section 113. *Restrictions as to Speed.* (a) Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall

drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person. (b) Subject to the provisions of subdivision (a) of this section and except in those instances * * * specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following: * * *

2. Fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of two hundred feet from such intersection."

[1-6] It is clear from the physical conditions shown by the evidence that plaintiff's view of the traffic along Soledad street during the last 100 feet of his approach to the intersection was not clear and uninterrupted for a distance of 200 feet either north or south of the intersection. Where the view is thus obstructed, a failure to observe the statutory requirement as to speed will, if the same proximately causes or contributes to the injury complained of, constitute negligence as a matter of law; the principle that a violation of the statute is negligence per se being subject to the limitation that the act or omission must proximately cause or contribute to the injury (*Mathes v. Aggeler & Musser, etc., Co.*, 179 Cal. 697, 178 P. 713; *Dewhirst v. Leopold*, 194 Cal. 424, 229 P. 30; *Williams v. Southern Pacific Co.*, 173 Cal. 525, 160 P. 660; *Thomas v. German, etc., Society*, 168 Cal. 183, 141 P. 1186), and, when the evidence is conflicting or any reasonable man might differ as to the inferences which ought to be drawn from the evidence, this question is one for the jury (*Smith v. Occidental, etc., Steamship Co.*, 99 Cal. 462, 34 P. 84); the burden of proving by a preponderance of the evidence that the act or omission of plaintiff was a proximate cause of the injury complained of being upon the defendant (*Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066; *Gett v. Pacific Gas & Electric Co.*, 192 Cal. 621, 221 P. 376). A reviewing court is not justified in disturbing a judgment unless it appears that upon no hypothesis is there sufficient substantial evidence to support it (*People v. Tom Woo*, 181 Cal. 315, 184 P. 389), nor can it review a finding based upon a reasonable inference, though in its judgment the opposite inference is the more probable (2 Cal. Jur. "Appeal and Error," § 549, p. 935; *Ryder v. Bamberger*, 172 Cal. 791, 158 P. 753). Granting that the speed of the plaintiff's automobile was 3 miles per hour in excess of that permitted by the statute, it does not follow with certainty that this proximately contributed to his injury. In view of the excessive speed of the defendant

and the other circumstances shown, the court might reasonably have concluded that the sole proximate cause of the collision was defendant's negligence, and, had plaintiff been traveling at the speed allowed by law, the collision would nevertheless have occurred and that he would not have escaped injury. Under all the circumstances, the question was one for the trial court (*Gett v. Pacific Gas & Electric Co.*, supra; *Godeau v. Levy*, 72 Cal. App. 13, 236 P. 354), and we cannot say that its finding is unsupported.

[7-10] The court, over objection, admitted evidence of the expenses incurred by plaintiff for the services of physicians and nurses and hospital expenses aggregating \$1,156.41, which amount was awarded as part of the judgment. A claim for these items was not specifically made in the complaint, and defendant contends that evidence thereof was for that reason improperly admitted. Special, as contradistinguished from general, damages are those which are the natural but not the necessary consequences of the act complained of (*Moore v. Fredericks*, 24 Cal. App. 536, 141 P. 1049; *Morris v. Allen*, 17 Cal. App. 684, 121 P. 690), and therefore, to prevent a surprise on the defendant, it is the general rule that the plaintiff must state in his complaint the particular damage which he has sustained, or he will not be permitted to give evidence of it (1 *Chitty on Pleading*, p. 396; 8 Cal. Jur., *Damages*, § 127, p. 889). In 17 *Corpus Juris*, "*Damages*," § 315, p. 1018, it is said that "in perhaps the greater number of jurisdictions it is essential to the admissibility of proof of payment or incurrence of doctors' bills occasioned by personal injuries that these facts be specifically alleged. In some jurisdictions, however, particularly if the injury be a severe one, such expenses are considered as a reasonably necessary result of the injury and may be proved under a general allegation of damages." No authority in this jurisdiction which is directly in point on this question has been called to our attention, although in *Abalas v. Consolidated Construction Co.*, 32 Cal. App. 732, 164 P. 19, the necessity for such pleadings appears to have been recognized. In the case at bar, however, defendant stipulated, subject to his objection to the admissibility of the testimony, that the amounts claimed were reasonable and necessary. Such damages being a natural conse-

quence of the act complained of and the requirement that the same be pleaded being to prevent a surprise on the defendant, where, as here, the necessity for and reasonableness of the expense incurred is undisputed, the error, if any, in permitting proof of the same, was not prejudicial and could not in any view of the case have resulted in a miscarriage of justice. Under such circumstances, notwithstanding any defect in the pleadings, a reversal would not be justified. Const. art. 6, § 4½; *Baker v. Miller*, 190 Cal. 263, 212 P. 11. Moreover, such amendments are not regarded as a statement of the introduction of a new cause of action (49 *Cor. Jur.*, "*Pleading*," § 697, p. 528; 21 Cal. Jur. "*Pleading*," §§ 135, 138, pp. 195-200; *Stohlman v. Martin*, 28 Cal. App. 338, 152 P. 319; *Barnes v. Berendes*, 139 Cal. 32, 69 P. 491, 72 P. 406); and defendant's contention that the claim for the expense incurred was at the time of the trial barred by the statute of limitations cannot be sustained.

[11] The court awarded plaintiff the sum of \$12,750.31. It is claimed that this amount was excessive. According to the testimony, the plaintiff at the time of the accident was strong, in good health, and capable of earning \$6.50 per day. In the accident he received an impacted or crushed fracture of the fourth lumbar vertebra, three other vertebrae being injured. He remained in the hospital for several weeks, where the surgeons removed a section of the bone of his left leg and grafted the same upon the vertebrae. After leaving the hospital he wore a brace for about 11 months, and has since used a cane in walking. According to a physician, the degree of his disability is from 20 per cent. to 25 per cent., and the condition will be permanent. In addition, it is shown that his earning capacity was impaired, and plaintiff testified that he has suffered and continues to suffer severe pain from the injury. Considering the character of his injury, his loss of earnings and earning power, together with the other elements of damage which the trial court had the right to consider, we cannot say that the award was excessive.

The findings were fairly supported by the evidence, and the record discloses no prejudicial error.

The judgment is accordingly affirmed.

CLARK v. FOSTER et al.*
Civ. 7580.

District Court of Appeal, First District, Division 2, California.
Oct. 2, 1930.

Rehearing Denied Oct. 31, 1930.

Hearing Granted by Supreme Court
Nov. 28, 1930.

1. Corporations ⇨131.

Purchaser of corporate stock at pledgee's sale became legal owner and was entitled to have stock transferred on books of corporation to his name (Civ. Code, § 324).

2. Mandamus ⇨126.

Purchaser of corporate stock cannot enforce right to have stock transferred to his name on books of corporation by mandamus (Civ. Code, § 324).

Petition by George D. Clark for writ of mandate prayed to be directed to Charles T. Foster and another to compel transfer of certain corporate stock to petitioner.

Writ denied.

Morris, Jaffa & Thompson, of San Francisco, for petitioner.

McKinstry, Haber & Firebaugh, of San Francisco, for respondents.

NOURSE, P. J.

This is an original proceeding in mandamus to compel the respondents, as president and secretary, respectively, of the Trinity County Water & Power Company to transfer to petitioner on the books of said corporation 4,995 shares of its capital stock and to issue to him a new certificate therefor. Respondents excuse their refusal to perform this duty on the grounds that petitioner's purchase of the stock from the United Trinity Mines (a corporation) was irregular, as it gave petitioner a preference over other creditors of the latter corporation which was then insolvent.

[1, 2] Petitioner purchased the stock at a pledgee's sale and is the legal owner. His right to have the transfer made and a new certificate issued is fixed by section 324 of the Civil Code. This section provides that such shares of stock are personal property which may be transferred by indorsement and delivery of the certificate, but that the transfer is not complete as to all parties until so entered upon the books of the corporation. The same section declares it to be the duty of the officers of the corporation to make such entry in the books and to issue to the purchaser a new certificate.

The right of a purchaser to have the stock transferred to his name is clear under the statutes, but the courts have declared that

he cannot enforce this right in mandamus. *Kimball v. Union W. Co.*, 44 Cal. 173, 176, 13 Am. Rep. 157; *Spangenberg v. Western Heavy H., etc., Co.*, 166 Cal. 284, 285, 135 P. 1127; *Mahl v. E. A. Portal Co.*, 81 Cal. App. 494, 497, 254 P. 278; *Davidson v. Alameda Mines Co.*, 66 Or. 412, 134 P. 782, and note in 48 L. R. A. (N. S.) pages 847-855.

In the *Spangenberg Case* the Supreme Court said that, "unless some extraordinary emergency exists, a suit in equity to compel the transfer would be found to be the most appropriate remedy." The petitioner insists that such an emergency exists here because the respondents are proceeding illegally to destroy and incur his property. Without discussing the allegations of the petition, it is sufficient to say that they show a series of unlawful acts on the part of respondents calculated to do petitioner injury, but we are not satisfied that petitioner has not an adequate remedy in equity, nor that such remedy is not the most appropriate under the circumstances.

The petition is dismissed and the writ is denied.

We concur: STURTEVANT, J.; SPENCE, J.

108 Cal. App. 700

PEOPLE v. McKENNEY.
Cr. 2002.

District Court of Appeal, Second District, Division 1, California.
Oct. 1, 1930.

Rehearing Denied Oct. 14, 1930.

Hearing Denied by Supreme Court Oct. 30, 1930.

1. Abortion ⇨1.

Conviction for attempted abortion *held* not erroneous for failure to prove agreement to perform operation or charge price therefor.

2. Abortion ⇨11.

Prosecuting witness' testimony that defendant performed incomplete abortion *held* sufficiently corroborated to sustain conviction for attempted abortion.

Prosecuting witness' statement that defendant performed an incomplete abortion was corroborated by incriminating circumstances narrated by woman who accompanied prosecuting witness to defendant's office and by testimony of two physicians who gave prosecuting witness physical examination and medical care shortly following visit to office of defendant when abortion was attempted.

3. Abortion ☞9.

In prosecution for attempted abortion, prosecuting witness' testimony that she paid money to defendant tended to establish relationship between prosecuting witness and defendant and was admissible.

4. Abortion ☞9.

In prosecution for attempted abortion, statements by prosecuting witness to defendant regarding waywardness of prosecuting witness were immaterial and properly rejected.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Mrs. V. I. McKenney was convicted of attempt to commit abortion, and she appeals.

Affirmed.

Hiram R. McTavish and M. G. Macneil, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Bedford, of Los Angeles, for the People.

HOUSER, J.

Defendant appeals from a judgment of conviction of an "attempt to commit abortion"; also, from the "verdict," as well as from each of the several orders made by the trial court by which, respectively, was denied to the defendant her motion for a new trial, her motion in arrest of judgment, and her motion "to dismiss the complaint."

[1,2] The first point made by appellant is that, because "there was no testimony of any agreement with defendant to do anything, or to perform any operation, or to charge any price therefor," and that because the only evidence "that defendant did anything wrong" was the statement made by the prosecuting witness that the defendant "performed an incomplete abortion," it became the duty of the trial court to grant the motion requested by defendant, to wit, to advise the jury to acquit defendant. Such position, however, is untenable for two reasons: First, because the gist of the offense of which defendant was charged consisted in the act of attempting to perform an abortion; and not in what, if anything, she agreed to do, or for what price, if any, she agreed to do it. Secondly, the statement made by the prosecuting witness that "defendant performed an incomplete abortion" was sufficiently corroborated, not only by incriminatory circumstances as narrated in the testimony given by a woman who accompanied the prosecuting witness to the office of defendant on the occasion when, according to such prosecuting witness, defendant attempted to commit the abortion, but as well by the testimony of each of two physicians who gave the prose-

cuting witness a physical examination as well as medical care and treatment shortly following her visit to the office of defendant. *People v. Balkwell*, 143 Cal. 259, 76 P. 1017; *People v. Lee*, 81 Cal. App. 49, 252 P. 763; *People v. Watson*, 21 Cal. App. 692, 132 P. 836; *People v. Brewer*, 19 Cal. App. 742, 127 P. 808.

[3,4] The fact that, as testified by the prosecuting witness, she paid the sum of \$35 to defendant for her services, had a tendency to establish the relationship that existed between the prosecuting witness and defendant at the time in question. Alleged statements made by the prosecuting witness to defendant regarding the waywardness of the prosecuting witness were of no materiality to the defense of the action. Consequently no error was committed by the trial court, either in its order by which evidence relating to the former fact was admitted, or in rejecting the evidence by which the latter fact was sought to be established.

The judgment and the order denying defendant's motion for a new trial are affirmed. The appeals from the "verdict," and from the order denying the motion in arrest of judgment, and from the order denying the motion to "dismiss the complaint," are dismissed.

We concur: CONREY, P. J.; YORK, J.

108 Cal. App. 705
MOORE et al. v. HERON et ux.
Civ. 247.

District Court of Appeal, Fourth District,
California.

Oct. 1, 1930.

1. Specific performance ☞6.

Specific performance of contract will not be granted when its nature is such that one seeking its enforcement could not himself be compelled to perform (Civ. Code, § 3386).

2. Specific performance ☞32(1).

Where original lack of mutuality has been removed at time action is brought, contract may be specifically enforced.

3. Specific performance ☞32(3).

Mining lease containing no obligation to be assumed by lessees could not be specifically enforced by them, notwithstanding they had prospected and discovered minerals.

The parties entered into a prospecting permit whereby the owners granted to the

lessees right to enter and prospect for minerals under an agreement providing that, if lessees should discover mineral deposits having commercial value and worthy of further development, then the owners agreed in consideration of lessees' efforts and expenditures in making such discovery to execute to them a mining lease giving them full rights of ingress and egress, the right to sink shafts or drive tunnels for the development of the deposits and to all other rights and privileges usually contained in mining lease in California mining districts.

4. Specific performance ☞51.

Mining lease whereby lessees assumed no obligation *held* not "just and reasonable" within specific performance statute (Civ. Code, § 3391).

[Ed. Note.—For other definitions of "Just" and "Reasonable," see Words and Phrases.]

5. Specific performance ☞73.

Lessees could not obtain specific performance of mining lease calling for personal services of lessees which could not be enforced by lessors.

6. Specific performance ☞28(2).

Mining lease *held* so uncertain and indefinite that lessees could not obtain specific performance thereof (Civ. Code, § 3390, subd. 6).

The mining lease was indefinite and uncertain since the provision as to duration was that lease should remain in force for — years, or as long thereafter as the minerals in question should be produced in paying quantities, and also for the reason that the lease contained provision that all other rights and privileges contained in mining lease in California should be part of lease, but there was no provision showing rights and privileges contained in such lease.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Leroy Moore and another against George D. Heron and wife. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Preston Turner and Clyde C. Downing, both of Santa Ana, for appellants.

John L. Campbell, of San Bernardino, for respondents.

BARNARD, J.

This is an action for specific performance. The plaintiffs, after alleging that Mary E.

Heron is the owner of the land involved herein, allege that an agreement was entered into, reading as follows:

"Prospecting Permit.

"We, the undersigned, G. D. Heron and Mary E. Heron, husband and wife, owners of the real estate hereinafter described hereby grant to Leroy Moore, Oliver Marriott and associates the exclusive right to immediately enter on said premises and prospect for minerals with the following understanding:

"First—If at any time within a period of 60 days from date said Marriott and Moore should discover mineral deposits which in their judgment has commercial value and worthy of further development, then we agree in consideration of their efforts and expenditures in making such discovery, to execute and deliver to them a mining lease or contract giving them full right to ingress and egress on said premises, the right to sink shafts or drive tunnels for development of said deposits, the right to erect all necessary machinery and equipment for properly mining and treating said ores and minerals, and all other rights and privileges usually contained in a mining lease in California Mining Districts.

"We represent that we are the owners of said premises in fee, including mineral rights.

"It is agreed that Marriott and Moore shall refill all holes made by them in their preliminary prospecting work.

"This permit shall include the right to quarry or mine lime or clay deposits if it should be determined that such deposits exist in commercial quantities.

"The royalty provided in said lease shall be 5% of the gross proceeds from sale of all minerals including lime or clay etc except in the event gold should be discovered the royalty shall be 10% gross proceeds of all sales of gold.

"The period of said lease shall be for — years or as long thereafter as ore or other products covered by this permit shall be produced in paying quantities.

"The premises covered by this permit are described as follows:

"The N. W. ¼ of Sec. 6 Twp. 2 S. Range 2 W. San Bernardino Co. Calif. containing 175 acres more or less.

"It is distinctly understood that this permit does not grant the right to prospect for or develop oil or other petroleum products.

"Witness our hands this 6th day of January, 1927. Geo. D. Heron

"Accepted. Leroy Moore.

"Oliver Marriott."

They further allege that through inadvertence this agreement was not signed by Mary E. Heron, but that she thereafter orally ratified and affirmed all of the provisions there-

of; that within sixty days they expended the sum of \$1,500 in prospecting for ores and minerals upon the land in question, in accordance with the terms of the agreement; that they discovered a vein of gold and silver assaying \$14.22 per ton; that on or about March 1, 1927, they demanded of the defendants the execution and delivery of a mining lease in accordance with the terms of the agreement; and that compliance with their demand was refused by the defendants. A general demurrer to the complaint was sustained by the court, without leave to amend. From the judgment which followed this appeal is taken.

Appellants, apparently following the arguments raised upon the hearing of the demurrer, urge that the agreement set up in the complaint is not void for want of mutuality; that the consideration was just and reasonable; and that the contract and lease described therein are sufficiently definite and certain to be specifically enforced.

[1] The courts will not compel the specific performance of a contract when its nature is such that the one seeking its enforcement could not himself be compelled to perform. Civ. Code, § 3386; *O'Brien v. O'Brien*, 197 Cal. 577, 241 P. 861. In *Poultry Producers, etc., v. Barlow*, 189 Cal. 278, 208 P. 93, 94, the court says: "The doctrine is elementary and impregnably fortified by authority that a contract cannot be specifically enforced unless this remedy is available to both parties. Equity will not enforce a specific performance of a contract when the party asking its enforcement cannot, from the nature of the obligation assumed, be compelled to perform on his part." And, also: "The remedy must be mutual, as well as the obligation, and when the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other."

[2,3] Appellants rely upon the contention that this rule does not apply in this case, for the reason that they have fully performed, and that this performance has removed any lack of mutuality theretofore existing. It has, of course, been held that where an original lack of mutuality has been removed at the time the action is brought, the contract may be specifically enforced. *Sayward v. Houghton*, 119 Cal. 545, 51 P. 853, 52 P. 44; *Spire v. Urbahn*, 124 Cal. 110, 56 P. 794. The justice and reason behind such an exception to the general rule are fully apparent in cases where all, or substantially all, that was to be done by the party seeking the relief has been fully performed. Where a party has agreed to convey a right of way on condition that a railroad be built, the actual building of the road is certainly as beneficial to the land owner, as an enforceable agreement to build the same. The situation is somewhat different in the case of a preliminary agreement,

to be followed by a lease, looking to the exploration or prospecting of land for oil or minerals, and in which the main purpose in view is the actual development of the land in that regard, and the removal therefrom of the oil or minerals when found. The case of *Dabney v. Key*, 57 Cal. App. 762, 207 P. 921, is a case somewhat similar in principle to the case at bar. In that case, the defendants had agreed in writing to execute a lease enabling the land to be prospected for oil. The defendants having later refused to execute such a lease, the action was brought to compel specific performance. The court denied this relief on the ground that the form of lease which was presented to the defendants, and which they refused to execute, was not a mutual obligation, in that the plaintiffs did not bind themselves to drill for oil on the land, but specifically reserved the right to surrender the lease at any time they saw fit, whereas the instrument purported to bind the owners of the land for the term of twenty years, and as long thereafter as oil should be produced in paying quantities. In the instant case, it is not alleged that a form of lease was actually presented to these defendants, but it is alleged that the lease demanded and refused was to be in accordance with the terms of the agreement above set forth. While such a lease as is described in the agreement would not appear to contain a clause permitting its surrender at any time the lessee should see fit, that would undoubtedly be the legal effect of the whole lease. It is provided that the lease claimed shall give to the lessees certain rights which are mentioned, but nowhere is it provided that any obligations shall be assumed by the lessees. While the proposed lease gives them the right to enter the property and carry on mining operations, they do not agree to do so. If they should begin operations, they do not agree to continue them any designated time, nor even as long as they are profitable. Even the omnibus clause covering everything "usually contained in a mining lease in California" (whatever that may be) provides that the lessees shall be given all the rights and privileges known to the industry, but is absolutely silent as to any obligations upon their part. We are unable to find any provision for any right or benefit accruing to the lessors, which they might enforce. That the lessees might abandon the project at any time, regardless of the interests or wishes of the lessors, appears just as certainly from the terms of this contract as it does from the lease tendered in the case of *Dabney v. Key*, *supra*. Even the prospecting permit puts no obligation upon the appellants, providing only that a lease may be demanded, not upon a certain result being obtained, but upon a contingency left entirely to their own judgment. Respondents would be utterly unable to specifically enforce anything against the appellants, ei-

ther upon the prospecting permit or upon such a lease as is therein described. The provision for a lease is included within the prospecting agreement and is an inseparable part thereof; the purpose of the entire agreement being not only to bring about a discovery of minerals in the land, but also to bring about the opening up of mines for the purpose of making such minerals available. Under such circumstances, we feel that the work done by the appellants as alleged in the complaint is not such a full and substantial performance as to bring them within the exception upon which they rely. While the objects and purposes of the agreement were still far from accomplished, under the terms of the instrument, the respondents could neither compel appellants to accept a lease, nor to proceed with the work.

[4, 5] Nor can we consider the agreement in question as just and reasonable, within the meaning of section 3391 of the Civil Code, since it is so entirely one-sided that it cannot be enforced by the respondents. Neither before nor after they receive a lease do they agree to do anything. The real purpose of this agreement is not merely the discovery of minerals, but also the further development of the property. This real purpose must be considered. *Los Angeles, etc., v. Occidental Oil Co.*, 144 Cal. 528, 78 P. 25. Not only is the agreement here unenforceable for lack of mutuality, but it calls for personal services, the right to which could not be enforced by the respondents. *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239. As was said in *Pacific Ry. Co. v. Campbell-Johnston*, 153 Cal. 106, 94 P. 623, 628, equity "will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and which, in order that the performance may be made effectual, will necessarily require the constant personal supervision and oversight of it by the court."

[6] It is next urged that the agreement in question is sufficiently definite and certain to permit of specific performance. This argument is addressed to the duration of the proposed lease, under the provision that it shall be for ——— years, or as long thereafter as the minerals in question shall be produced in paying quantities. If it be assumed that such a clause is not in itself void for uncertainty, when it is remembered that the lessees are not bound for any length of time, the duration of the lease could not well be made more uncertain. There is also the provision that the lease shall contain all the other rights and privileges usually contained in a mining lease in California. This agreement is not only indefinite and uncertain, but it would be practically impossible for any court to say what the terms of the lease should be.

Such an agreement cannot be specifically enforced. Civ. Code, § 3390, subd. 6; *Stanton v. Singleton*, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334. Neither the terms of the lease nor the precise acts which are to be done by the respective parties thereto are clearly ascertainable. *Berry v. Moulie*, 180 Cal. 187, 179 P. 686, 687. In the case last cited, the court said: "The secrets remained within the breast of the defendant, and he alone would know whether or not he had complied with the judgment which required him to deliver the formulas." In the instant case, were the court to order a delivery of the lease described, whether or not the order was complied with, would not even be known to the respondents.

Since we are of the opinion that the complaint fails to set forth a contract which may be specifically enforced, it is unnecessary to consider the other points raised.

The judgment is affirmed.

I concur:

MARKS, J.

Mr. Presiding Justice CARY, being absent, takes no part in this decision.

108 Cal. App. 692

MASSIMINO v. TARANTO.

Civ. 7382.

District Court of Appeal, First District, Division 2, California.

Sept. 30, 1930.

1. Judgment ⇨153(1).

Defaulting party, on discovering default has been entered, must proceed with reasonable diligence to have it set aside.

2. Judgment ⇨143(10).

Refusal to set aside default on attorney's mere statement he did not appear because he believed other attorneys had been substituted held not abuse of discretion.

Affidavit, on original motion to set aside default, recited that attorney failed to plead within time required because of mistaken belief that copy of complaint received from defendant was in another action in which he had already entered appearance. On date set for hearing of motion defendant failed to appear and motion was denied for lack of prosecution. Subsequently second notice of motion to set aside default was filed by substituted attorney. In attempted explanation of failure to prosecute first motion, affidavit

of defendant's first attorney was presented merely stating he did not appear because he believed another attorney had been substituted in his place, without stating facts from which court might determine whether belief was reasonable.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Alfo Massimino against Phyllis Taranto. From an order refusing to vacate a default judgment, defendant appeals.

Affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellant.

Tompkins & Tompkins, of San Jose, for respondent.

DOOLING, Justice pro tem.

Judgment in this action was taken by default for appellant's failure to appear and plead to the complaint within the time allowed by law after personal service of summons upon her. On May 7, 1929, a motion to vacate and set aside the default was filed by the attorney then representing appellant, fixing May 14, 1929, as the date upon which such motion would be made. This notice was accompanied by a proposed answer, and affidavits of appellant and her then attorney. These affidavits recited that on the date of service upon her appellant had personally delivered the copy of summons and complaint to her attorney and that he had failed to plead for her within time because of his mistaken belief that the copy of the complaint was one in another action between the same parties in which he had already entered an appearance for appellant. On May 14, 1929, appellant's then attorney failed to appear to present the motion and the motion was denied for lack of prosecution.

Subsequently, on September 17, 1929, a second notice of motion to set aside the default and judgment was filed by appellant's attorneys, they having in the meantime been substituted for the attorney who filed the first notice of motion. In attempted explanation of the failure to prosecute the first motion, an affidavit of appellant's first attorney was presented in which he stated that he did not appear at the hearing of the first motion because "he believed that another attorney had been substituted in his place." No facts were stated from which the court might determine whether or not this belief was reasonable or justifiable. This second motion was denied, and from that order this appeal is taken.

[1, 2] Once the fact that a default has been entered is discovered, the defaulting party must proceed with reasonable diligence in seeking to have it set aside. *Smith v. Pelton*

Water Wheel Co., 151 Cal. 394, 90 P. 934. Having pyramided one default upon another, it was incumbent upon appellant to show some good reason for the failure to prosecute the first motion as well as for the failure to appear originally in the action. We cannot hold that it was an abuse of discretion for the trial court to refuse to accept as an excuse for the failure to present the first motion the naked assertion of the attorney's belief, in the absence of the recital of any supporting facts upon which the belief was based.

Order affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

108 Cal. App. 606

QUATACKER et al. v. HUTTON.

Civ. 24.

District Court of Appeal, Fourth District, California.

Sept. 27, 1930.

1. Automobiles ⇨244(35).

Speed of over 15 miles per hour at intersection, obstructed within statute, would constitute some evidence of negligence, and might be sufficient to establish negligence (St. 1923, p. 553, § 113, par. (b), subd. 2, as amended by St. 1927, p. 1436).

2. Automobiles ⇨244(37).

Evidence authorized inference that plaintiff was guilty of negligence contributing to accident in driving automobile over 15 miles per hour at intersection (St. 1923, p. 553, § 113, par. (b), subd. 2, as amended by St. 1927, p. 1436).

3. Appeal and error ⇨1010(1).

Findings of trial court, if sustained by any substantial evidence, will not be disturbed on appeal.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Rene Quatacker and another against George Hutton. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Head, Wellington & Jacobs, of Santa Ana, for appellants.

Harvey & Harvey, Z. B. West, Jr., and S. B. Kaufman, all of Santa Ana, for respondent.

BARNARD, J.

This is an action for damages for injuries sustained in an automobile accident at a

street intersection. The complaint sets forth a cause of action for damages to the car belonging to the plaintiffs, and a second cause of action covering personal injuries sustained by plaintiff Marie Quatacker. The answer denies negligence on the part of the defendant and alleges the contributory negligence of the plaintiff Marie Quatacker. After a trial without a jury, the court entered judgment for the defendant, based upon findings of fact to the effect that both parties were negligent, and that any damages sustained by either of the plaintiffs was due directly and proximately to their own contributory negligence, in that Marie Quatacker so negligently operated plaintiffs' automobile at the time and place in question that she by her negligence proximately contributed to the injuries complained of. The plaintiffs have appealed upon the sole ground that the evidence is not sufficient to sustain these findings as to contributory negligence.

[1] It is conceded that the collision occurred at an intersection where the view was sufficiently obstructed to bring it within the provisions of section 113, par. (b), subd. 2, of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1927, p. 1436), as in force in 1927; and a speed of more than 15 miles per hour at that point would therefore constitute some evidence of negligence. *Benjamin v. Noonan*, 207 Cal. 279, 277 P. 1045. Such evidence might be sufficient to establish negligence. That it was established in this case has been held by the trial court. If, then, there is evidence in the record from which the inference may legitimately be drawn that plaintiff Marie Quatacker was in fact crossing said intersection at a rate of speed greater than 15 miles per hour, that her speed was negligent under the existing conditions, and that such excessive speed contributed to the accident, the findings of the court are sustained.

[2] Appellant Marie Quatacker testified at the trial that when she crossed the intersection itself she was going from 13 to 15 miles per hour; that, as she arrived at the intersection, she looked to the right and the left, saw no one coming and did not see defendant's car until she was over half way across; and that she was stepping on the gas when she saw the other car coming and continued to do so, as she tried to get out of the way. As to her speed before she reached the intersection, she said she had not looked at the speedometer, but was sure she was not going over 25 miles per hour, as she never exceeded that speed when she had her baby with her. There was introduced in evidence a written statement made by this appellant shortly after the accident, which contained the following:

"On August 24, 1927, at 3 o'clock in the afternoon, I was driving my Buick Sedan south

on Tustin Blyd. near Santa Ana, and approaching the intersection of McFadden Street, which crosses Tustin at right angles. I was going 25 miles per hour at the intersection, and had reached the edge of the McFadden Street pavement on the north side of the intersection with my front wheels, when I first saw another car coming from my left—that is, from the east. I had no time to stop and did not apply my brakes as it was too late to stop, but I did try to get by across in front of him. I don't remember whether I stepped on the gas or not, or whether I turned any to the right. I wanted to get by so the other car would not hit my car in the middle."

Appellant insists that the speed of 25 miles per hour mentioned in this statement, refers to a point before she had reached the intersection, and that this is not contradictory to her statement at the trial that she was crossing the same at a speed of from 13 to 15 miles per hour. The statement is at least such as to justify the inference that she was going 25 miles per hour as she reached the beginning of the intersection, and this, coupled with her statement that when she reached the edge of the intersection she first saw the other car approaching, that she had not time to stop, did not apply her brakes, but did try to get across in front of the other car, and her statement at the trial that when she first saw the other car she was stepping on the gas and continued to do so in an effort to get across ahead of the other car, seems to justify the inference that she increased rather than diminished her speed. There was also evidence that the car driven by the respondent was first to enter the intersection; that it entered the same at a speed of from 20 to 25 miles per hour; that it struck the appellants' car at the rear door and the rear wheel; and that the collision occurred near the center of the intersection. These facts, taken in connection with her statement that she was stepping on the gas in an effort to cross ahead of the other car, confirm the inference that may reasonably be drawn from the preceding evidence, that she was proceeding at a rate in excess of 15 miles an hour, since she was able to almost clear the path of respondent's car, although he entered the intersection first and at an unlawful speed. Further support is found in the undisputed fact that, when the collision occurred, respondent's car remained at the point of impact, while appellants' car went straight ahead and a little to the right for a distance of 30 feet, where it turned around and tipped over on its side.

[3] The law is well settled that, where there is any substantial evidence to sustain findings of fact by a trial court, they will not be disturbed on appeal. *Ricks v. Adorni*, 86 Cal. App. 284, 260 P. 815; *Angelo American Land Co. v. Heine*, 52 Cal. App. 472, 198 P. 1009. The findings here complained of are

amply supported by the evidence referred to, with the inferences that may legitimately be drawn therefrom.

The judgment is affirmed.

We concur: MARKS, Acting P. J.;
WARMER, Justice pro tem.

108 Cal. App. 683

Ex parte FORBES.

Cr. 1139.

District Court of Appeal, Third District,
California.

Sept. 30, 1930.

1. Criminal law ☞1216(6).

Time that paroled prisoner is at large ordinarily counts same as time served within prison, providing prisoner is lawfully at large (Pen. Code, § 1168, as amended by St. 1929, p. 1934).

Pen. Code, § 1168, as amended by St. 1929, p. 1934, provided that prisoners on parole shall remain under the legal custody of state board of prison directors and be subject at any time to be taken within inclosure of prison.

2. Criminal law ☞1216(6).

Time served on misdemeanor charge in county jail by prisoner paroled from state prison after revocation of parole cannot be counted on previous sentence to state prison (Pen. Code, § 1168, as amended by St. 1929, p. 1934).

Prisoner was sentenced for crime of burglary to serve five years in state prison, and before expiration of term was released on parole. During parole, prisoner was arrested on charge of burglary and violation of statute and sentenced to six months' imprisonment in county jail, whereupon board of prison directors suspended parole and directed that prisoner be retaken to state prison. On expiration of six months' sentence, prisoner was returned to state prison, and all credits earned were forfeited.

3. Criminal law ☞1216(6).

Code including within term time when prisoner is taken from prison by legal means *held* inapplicable to service by paroled prisoner of another sentence after suspension of parole (Pen. Code, § 670, and § 1168, as amended by St. 1929, p. 1934).

4. Criminal law ☞1216(6).

Code relating to escapes *held* inapplicable in determining term of paroled prisoner

serving another sentence after suspension of parole (Pen. Code, § 105, and § 1168, as amended by St. 1929, p. 1934).

5. Criminal law ☞1216(1).

When person is under legal compulsion to serve sentence, execution of sentence can only be had by submission thereto.

6. Pardon ☞10.

Revocation of parole revoked prisoner's right to be outside prison, requiring prisoner to surrender himself or have himself submitted to custody within prison (Pen. Code, § 1168, as amended by St. 1929, p. 1934).

Application of Sidney E. Forbes for a writ of habeas corpus.

Writ denied.

Albert J. McGuire, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

PER CURIAM.

The petition for a writ of habeas corpus herein, in behalf of Sidney E. Forbes, represents to the court that the said Sidney E. Forbes is now illegally detained in the state prison at Folsom by the warden of said prison.

Without following the recitals of the different paragraphs of the petition, the facts may be summarized as follows: On the 6th day of May, 1926, Sidney E. Forbes was received at the state prison, having been sentenced for the crime of burglary. On the 2d day of July, 1927, the term of imprisonment of said Forbes was fixed at five years. On the 17th day of April, 1929, Sidney E. Forbes was released upon parole. On the 28th day of December, 1929, Sidney E. Forbes was arrested on a charge of burglary and violation of section 1, chapter 323, Statutes of 1925, and thereafter sentenced to six months' imprisonment in the county jail in San Francisco. Thereafter, upon these facts being regularly presented to the board of prison directors, said board, on the 25th day of January, 1930, suspended the parole theretofore granted said Sidney E. Forbes and directed that he be retaken and returned to the actual custody of the state prison. On September 2, 1930, upon the expiration of the six months' sentence herein mentioned, Sidney E. Forbes was returned to the state prison at Folsom, and thereafter, upon due notice, all credits theretofore earned and granted, and also all credits which would be possible for him to earn, were forfeited and disallowed by order of the board.

The petitioner's contention for the discharge of Sidney E. Forbes is based upon the

theory that the time Sidney E. Forbes was out of the actual confines of the walls of the state prison at Folsom serving his six months' sentence imposed, as heretofore stated, in the county jail at San Francisco should be counted as time served upon his five-year sentence imposed by the state prison board on July 2, 1927. If such time should be counted, then and in that event the writ prayed for should be granted. If not, it should be denied.

[1] Under section 1168 of the Penal Code and the decisions based thereon the time that a paroled prisoner is at large ordinarily counts the same as time served when within the actual inclosure of the state prison. The authorities are quite numerous to the effect that a prisoner serving a sentence of imprisonment in a state prison is, in contemplation of law, a prisoner therein as well when at work outside, under the surveillance of prison guards, as when confined within its walls, and also that a prisoner, while outside the prison walls upon parole, is likewise within the custody and control of the state prison, but need not be cited for the reason that section 1168 of the Penal Code, as amended (St. 1929, p. 1934), reads as follows: "Prisoners on parole shall remain under the legal custody and control of the state board of prison directors and shall be subject at any time to be taken back within the inclosure of the prison." The contention that time shall run in favor of a paroled prisoner while outside the actual inclosure of the walls of prison depends, however, upon the contingency that he is lawfully at large.

[2-4] In the case of *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047, 1048, the principal case relied upon by the petitioner herein, contains the following significant sentence: "As the appellant was a prisoner absent from the prison by proper authority, under no view of the case, in our opinion, could his imprisonment be continued longer than the period for which he was sentenced, less his credit for good time." The question presented in that case was as to whether the time he was out on parole should be counted in his favor as so many days or months served upon his sentence. It was there held, in support of the prisoner's contention, that he was absent from prison by proper authority. In the case at bar the prisoner was not absent from the inclosure of the state prison at Folsom by or upon proper authority. His parole had been suspended, and during that period of time it cannot be consistently argued that he was absent by proper authority. That he was not brought back to the state prison at Folsom under the order of the prison directors directing that he be returned constitutes no defense. There is no question or dispute as to the sufficiency of the showing that Sidney E. Forbes had violated the

terms of his parole, and of the power of the board to revoke or suspend the same, which, so far as the prisoner at large was concerned, constituted one and the same thing, and, having suspended the right of Sidney E. Forbes to remain at large on parole, he was absent from the inclosure of the state prison without leave and without legal authority. The fact that Sidney E. Forbes was confined in the county jail at the county of San Francisco likewise constitutes no defense; neither do we think that section 670 of the Penal Code, relied upon by the state, is applicable here, as Sidney E. Forbes was not taken by any legal process, as contemplated within the terms of that section. Otherwise, no time would run in favor of a paroled prisoner. We think that section refers to time when a prisoner is taken from the actual confines of a state prison to be tried, for instance, on some other charge. Nor do we think that section 105 of the Penal Code, relative to escapes, and the subsequent sections relative to punishment for escapes, applicable to this case.

In the case of *Ex parte McGuire*, 135 Cal. 339, 67 P. 327, 87 Am. St. Rep. 105, a case involving a sentence to the state prison and a misdemeanor sentence the conclusion must be drawn that, during all the time after the 25th day of January, 1930, Sidney E. Forbes should have been within the actual inclosure of the prison walls at Folsom. That his own wrong in violating his parole prevented his being taken back, whether mistakenly or properly, by the parole officer of the state prison, does not furnish any reason for the granting of the writ herein.

[5, 6] The opinion, *In re Collins*, 8 Cal. App. 367, 97 P. 188, shows clearly that it was within the power of Sidney E. Forbes to have himself immediately returned to actual custody at Folsom. When a person is under legal compulsion to serve a sentence, execution of that sentence can only be had in one way, and that is by submission to the execution of that sentence. *Ex parte Rice* (Okla. Cr. App.) 289 P. 360. Immediately upon a revocation or suspension of the parole on July 25, 1930, by the prison board, which, of course, revoked the right of Sidney E. Forbes to be at large or to be outside the actual inclosure of the state prison at Folsom, it became the legal duty of Sidney E. Forbes to surrender himself and again submit to actual custody within the walls of said prison. He could either do it voluntarily, or by legal proceedings, have himself so submitted. That his own wrong prevented such a procedure without legal steps to enforce his surrender and recommencing the undergoing incarceration within the actual walls of the state prison does not entitle him to have the intervening time allowed as a part service of his sentence.

Any holding that time served upon a misdemeanor sentence of a paroled prisoner, after suspension or revocation of parole, should be counted as so much time served upon the previous sentence to state prison, would subvert the very purpose of the provisions of section 1168 of the Penal Code relative to paroles and take away all the restraining influences of the rules and regulations of the state board, having for their purpose the insuring that the person paroled shall not again become a violator of the law.

The writ is denied.

108 Cal. App. 694

In re WOOD'S ESTATE.
Civ. 7516.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1930.

Hearing Denied by Supreme Court
Nov. 24, 1930.

1. Charities ☞11.

Will *held* to contemplate gift to orphans' home; hence, bequest for charitable purpose authorized by statute (Civ. Code, § 1313).

By residuary clause of will in controversy, testator gave his estate to State Orphans' Home at Carson City, Nev., declaring that board of directors and their successors should hold trust fund as perpetual trust, and each year should expend interest in purchasing useful and pleasing presents at Christmas time for distribution among orphans.

2. Charities ☞20(1).

That Nevada laws authorize directors of Nevada orphans' home to receive bequests referred contention directors were incapable of taking as trustees under will (Civ. Code, § 1313).

3. States ☞119.

Bequest to Nevada orphans' home to purchase "useful" and pleasing Christmas presents *held* not unenforceable as violating Nevada Constitution forbidding use of public funds for sectarian purposes (Civ. Code, § 1313; Const. Nev. art. 11, § 10).

Will in controversy merely directed distribution of presents among orphans, and did not require observance of Christmas Day as religious festival. Fact that presents were to be "useful" showed that testator's intention was purely charitable.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Proceeding to determine heirship and to void the residuary clause of the will of Henry Wood, deceased. From a judgment of the probate court sustaining the will, petitioner appeals.

Affirmed.

Charles B. Younger, of Santa Cruz, for appellant.

Rittenhouse & Snyder, of Santa Cruz, for respondent.

NOURSE, P. J.

This is a proceeding to determine heirship under section 1664, Code of Civil Procedure, and to void the residuary clause of the will of Henry Wood bequeathing the residue of his estate in trust for the benefit of the inmates of the State Orphans' Home of the state of Nevada. The probate court entered a judgment sustaining the residuary clause of the will, from which the petitioner appeals on a bill of exceptions.

The clause under attack reads in part as follows: "I give * * * all the rest * * * of my estate * * * to the State Orphans Home at Carson City, Nevada. All of the sum total of said property bequeathed, shall constitute a perpetual trust fund. * * * The Board of Directors of the State Orphans Home, and their successors thereof, *to have and to hold* the said trust fund as a perpetual trust, and each successive year to expend all the interest derived from the said trust fund for that year in purchasing *useful* and pleasing presents *at Christmas time* of each year for distribution among the orphans of said State Orphans Home." (Italics ours.)

[1] The probate court found that it was the true intent of the testator to make a gift in trust to the directors of the home for the benefit of the inmates thereof. We are in accord with this finding, as such intent is manifest from the face of the will. As such the bequest was one for a charitable purpose (Estate of Sutro, 155 Cal. 727, 736, 102 P. 920) and one expressly authorized by section 1313, Civil Code. To this extent the judgment is supported by Estate of Upham, 127 Cal. 90, 59 P. 315.

[2] Under the laws of the state of Nevada the directors of the orphans' home are authorized to receive and have control of bequests made to the home and to dispose of the property bequeathed in the manner directed by the donor. This disposes of the objection that the directors are incapable of taking as trustees under the will.

[3] The further argument is made that the trust is unenforceable because the observance of Christmas is a ceremony peculiar to the Christian religion, and hence the use of the funds for the purposes designated would vio-

late the provisions of section 10 of article 11 of the Nevada state Constitution prohibiting the use of public funds for sectarian purposes. There are many answers which could be made to the point, but it is sufficient to say that the will merely directs that the trustees distribute among the orphans in the home useful and pleasing presents at Christmas time. It does not require the observance of Christmas day as a religious festival. In directing that these gifts be *useful*, the intention of the testator is shown to be purely charitable, and it cannot be said to offend the provisions of the Nevada Constitution, which, it will be noted, relates to "sectarian," as distinguished from religious purposes. *Evans v. Selma Union H. S. Dist.*, 193 Cal. 54, 57, 222 P. 801, 31 A. L. R. 1121.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

108 Cal. App. 752

CAILLEAUD v. SUPERIOR COURT IN AND FOR MARIN COUNTY et al.

Civ. 7559.

District Court of Appeal, First District, Division 2, California.

Oct. 4, 1930.

1. Depositions ☞11.

Application for perpetuation of testimony relating to anticipated will contest *held* sham (Code Civ. Proc. § 2083 et seq.).

The application was by husband and wife and alleged that husband had executed a will devising property to his son and two grandsons, and but little property to another son, and that applicants anticipated a will contest at some future date by the other son. It was clear that testator could not be a party to the contest of his own will, and that his wife would not be an interested party.

2. Depositions ☞32.

Applicant for perpetuation of testimony must allege, in addition to grounds therefor, general outline of facts expected to be proved (Code Civ. Proc. § 2084).

3. Depositions ☞32.

Application alleging that applicants for perpetuation of testimony "expect to establish" financial circumstances of devisees, reasons for providing more amply for one, and "many facts and circumstances" material in expected will contest, *held* insufficient (Code Civ. Proc. § 2084).

Writ of Review to Superior Court, Marin County; Edward I. Butler, Judge.

Application by Henry Cailleaud, Jr., for certiorari to review an order of the Superior Court of Marin County directing the taking of depositions to perpetuate testimony.

Order annulled.

Bacigalupi, Elkus & Salinger, of San Francisco, for petitioner.

W. B. Crocker, of San Anselmo, for respondents.

NOURSE, P. J.

Petitioner seeks by certiorari to review an order of the superior court directing the taking of depositions to perpetuate testimony under section 2083, et seq., of the Code of Civil Procedure.

The steps necessary to enable a party to have a deposition taken to perpetuate testimony are found in section 2084. The proceeding must be initiated by a verified petition of the applicant showing that he expects to be a party to an action in a court in this state, or "that the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated." The petitioner's attack upon the proceedings in the superior court is based upon the ground that the applicants have not pleaded any facts which bring them within the terms of this section, and that therefore the superior court was without jurisdiction to make the order.

The application upon which the proceedings were initiated alleges that the applicants are husband and wife, that the husband has executed a will in which he has devised property of considerable value to his son, August Cailleaud, and to his two grandsons, and property of little value to his son, Henry Cailleaud, Jr., the petitioner herein. It is then alleged that the son Henry has expressed displeasure over such disposition of the property and that applicants believe he will at some future date institute a contest or other action for the recovery of a larger portion of the property of applicants.

[1, 2] In so far as the application relates to an anticipated will contest, it is sham. The testator would not be a party to a contest of his own will and the applicants show by their petition that the testator's wife would not be an interested party. The allegations that the son Henry may institute some proceeding for the recovery of some of the property heretofore conveyed to the other son would seem to bring the application within the provisions

of the first subdivision of section 2084, Code of Civil Procedure, but it will be noted that the first and second subdivisions of this section are separated by the word "or" and that the second and third subdivisions are separated by the word "and." Thus, it is necessary to allege, in addition to the matters contained in either subdivision 1 or 2, the matters specified in subdivision 3. Under this subdivision it is necessary to state "a general outline of the facts expected to be proved."

[3] To meet this requirement the applicants merely allege that they "expect to establish by their testimony the respective financial circumstances of said Henry Cailleaud, Jr., and August R. Cailleaud, and their reasons for providing more amply for their son August * * * and expect to establish by their testimony many facts and circumstances which would be material in such expected contest, action or other adverse proceedings."

That general allegations of this character are insufficient to support an order to take a deposition has been determined in *Irving v. Superior Court*, 79 Cal. App. 361, 364, 249 P. 236, 237, where such an order was annulled on certiorari. In that case the District Court cited with approval the general rule from 8 R. C. L. 1148, reading: "The bill should describe a subject of controversy so as to identify it, in order to enable the court * * * to direct the interrogatories or specify the matter as to which the witnesses are to be examined." Many authorities from other jurisdictions are cited to the rule by the court but it is unnecessary to enumerate them here. The reason for the rule is emphasized by the district court in this opinion. After pointing out that if the allegation that applicants "expect to prove" certain facts without alleging that the facts were true and without showing that they were material was sufficient then the requirement of the Code section that the application be "verified by the oath of the applicant" was rendered useless, the court said: "Persons should not be compelled to submit to examinations 'concerning their property or business transactions or methods,' except upon allegations of fact, duly verified, reasonably showing that the evidence sought is material to some present or anticipated controversy."

In what respect the reasons why the applicants gave more of their property to one son would be material to any anticipated litigation does not appear from the application while the allegation that applicants expect to establish "many facts and circumstances" is of no force whatever. If an application of this character is sufficient, we might pertinently ask, why should an application be verified if it merely states that the applicant anticipates some litigation and expects to prove in his deposition facts which may be ma-

terial thereto? Any one could verify such an application without fear of perjury.

The order is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

SACRAMENTO BOX & LUMBER CO. v.
ROSENBERG BROS. & CO.

109 Cal. App. 56

Civ. 7369.

District Court of Appeal, First District, Division 1, California.

Oct. 14, 1930.

Rehearing Denied Nov. 13, 1930.

Hearing Denied by Supreme Court
Dec. 11, 1930.

1. Sales ⇨52(6).

Evidence held not to show express or implied contract to pay for merchandise billed to defendant on order of third party without defendant's consent and accepted by defendant under justified belief that seller was merely supplying goods at instance of third party.

Defendant ordered box shooks from third party, who contracted to purchase same from plaintiff and without consulting defendant informed plaintiff that it could bill merchandise to defendant directly. Defendant on receiving invoices objected to having goods billed to it directly and told third party that it had never dealt with plaintiff company. Third party was indebted to defendant in amount of cost of merchandise which had been advanced to third party under contract. Plaintiff demanded payment for merchandise from third party, and on third party's bankruptcy sued defendant for merchandise.

2. Sales ⇨33.

Contract of sale may or may not be implied from facts and circumstances.

3. Contracts ⇨15.

Person cannot be compelled to contract with stranger without his consent.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the Sacramento Box & Lumber Company against Rosenberg Brothers & Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. B. Reynolds and S. H. Jones, both of Sacramento, for appellant.

Bacigalupi, Elkus & Salinger, of San Francisco, for respondent.

TYLER, P. J.

Action to recover the sum of \$5,302.68 for certain box shooks alleged to have been sold and delivered by plaintiff to defendant. The complaint is in two counts; the first being for the reasonable value of the goods alleged to have been sold and delivered, and the second setting forth an express contract to pay the sum as the purchase price.

Trial was had, and the court found that plaintiff did not sell or deliver to defendant the merchandise in question and that it did not agree to pay for the same. It is here claimed as ground for reversal of the judgment that the findings of the trial court are not supported by the evidence. There is no merit in the contention, as the record contains ample evidence to show that there was no contract, either express or implied, between the parties.

There is little dispute between the parties as to the principal facts established by the evidence. So much of it as supports the findings may be briefly summarized as follows: In May, 1928, defendant entered into an agreement with one Omer Denny, who was engaged in the business of dealing in and manufacturing box shooks as White Pine Products Company, a corporation, by which the latter agreed to deliver to defendant Rosenberg Bros. & Co. two million board feet of box shooks at a price of \$37.50 per thousand feet. In November of the same year all of this lumber, except about five carloads, had been delivered and defendant was insisting that delivery be made of the balance. Not being in a position to perform the contract, Denny telephoned to Sacramento Box & Lumber Company, plaintiff herein, to ascertain if it would accept an order for three cars of box shooks to help fill Denny's contract with defendant. Terms were discussed and a price was agreed upon at \$39 per thousand feet. The president of plaintiff corporation expressed a preference to bill the lumber direct to defendant as he was uncertain whether he desired to invoice the White Pine Products Company and accept that credit. Denny informed him that he thought this would be satisfactory, but he would have to confer with defendant to confirm such arrangement. Without consulting defendant in the premises, Denny concluded that the matter would be agreeable to it, and he telephoned plaintiff that the plan was satisfactory. Plaintiff never attempted to have defendant confirm this arrangement. Denny thereafter forwarded plaintiff a written order for two cars of shooks. This order was from White Pine Products Company to plaintiff and it directed the merchandise to be delivered and invoiced to defendant. Subsequently three other carloads were ordered by Denny under the same directions. All five cars were at different times shipped by plaintiff. In each car, nailed on the inside of the door, was a manifest on the bill head

of plaintiff, Sacramento Box & Lumber Company, which stated that the merchandise was sold and shipped to Rosenberg Bros. & Company for its account. Plaintiff also mailed to defendant a duplicate copy of the manifest of each car, original bills of lading and invoices. On receipt of the invoices of the first shipment, the purchasing agent of defendant company discovering that the merchandise had been billed to his company by plaintiff, immediately took the matter up with Denny and expressed dissatisfaction with the method of the shipment, stating to Denny that he objected to having the merchandise charged by plaintiff to defendant company as he had never dealt with that company. Before Denny placed the order with plaintiff, he was indebted to defendant company in the sum of \$5,000, as that sum had been advanced to him under his contract. Denny at this time stated to defendant's agent that the whole matter was a mistake as the merchandise should have been billed to his company and he promised to take the matter up with plaintiff and rebill defendant for the same. The invoices were turned over to Denny, who thereafter sent defendant other invoices on his own bill heads covering the shipments. There is evidence to show that Denny acquainted plaintiff with this fact, and the latter did not protest but merely expressed the thought that it wished to be sure of payment. After all the shipments had been made, defendant settled in full with Denny. Thereafter, plaintiff from time to time demanded payment from Denny and referred to the fact that he had been paid in full for the lumber. Denny promised to make payment, but the promise not being fulfilled, plaintiff brought an action against the White Pine Products Company, through which Denny did business, to recover for goods sold and delivered to it. About this time the White Pine Products Company became insolvent and an involuntary petition in bankruptcy was instituted against it, plaintiff being a petitioning creditor. In its verified petition, plaintiff herein alleged that the White Pine Products Company was indebted to it for the very lumber which forms the subject of this controversy.

[1-3] Under these facts there is no reasonable ground for claiming that defendant was liable to plaintiff on implied assumpsit. Defendant did nothing which could possibly be construed as an implied ratification of the purchase which Denny attempted to make on its behalf. Defendant had the right to select and determine with whom it would contract and could not have another thrust upon it without its consent. As soon as it became familiar with the transaction between Denny and plaintiff, it repudiated the entire matter. Under the facts as narrated, no contract, either express or implied, existed between the parties. They show that plaintiff invoiced and charged to defendant

merchandise without inquiring whether or not the arrangement between Denny and plaintiff would be satisfactory to it. When defendant learned of the arrangement it immediately repudiated the same and received and accepted the goods under the justified belief that plaintiff was merely supplying them at the instance of the White Pine Products Company, and that plaintiff would look to that company for payment. There was no express contract between plaintiff and defendant, nor does the conduct and dealings of the parties show in any manner that defendant impliedly assented to any contract whatever with the plaintiff. On the contrary, the evidence shows that it wanted nothing to do with the arrangement between Denny and plaintiff for obvious reasons, and plaintiff was so notified. Counsel have favored us with many authorities upon the subject of what facts do or do not raise an implied contract. A discussion of these cases would answer no useful purpose. Suffice it to say that, as in the case of other contracts, a contract of sale may or may not be implied from facts and circumstances. Here there are facts which negative any obligation on the part of defendant to pay. The rule is elementary that a person has a right to select and determine with whom he will contract, and he cannot have another thrust upon him without his consent.

Respondent raises the further question that the proceedings brought by plaintiff against the White Pine Products Company constitute an election of remedies which precludes plaintiff from now asserting its claim against defendant. Considering the conclusion we have reached, a discussion and determination of this question becomes unnecessary. It may be said, however, that the circumstance affords strong evidence that plaintiff intended to sell the merchandise to White Pine Products Company and not to the defendant.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

108 Cal. App. 667

HARGROVE et ux. v. HENDERSON et al.
Civ. 4134.

District Court of Appeal, Third District,
California.

Sept. 30, 1930.

1. Appeal and error ⇨927(3).

In considering appeal from judgment of nonsuit, every inference of fact and intentment of law must be liberally construed in favor of plaintiffs.

2. Fraud ⇨50.

Vendor is presumed to know area and boundaries of his own land.

3. Fraud ⇨23.

Purchaser is entitled to rely on representations of vendor as to extent and boundaries of property.

4. Fraud ⇨22(1).

Purchaser relying on vendor's representations as to extent and boundaries of property is not required to investigate public records or make further inquiry.

5. Fraud ⇨27.

Vendors' representation that they owned all land within certain boundaries, whereas railroad had right of way extending entirely through tract, constituted actionable fraud (Civ. Code, §§ 1571-1573).

6. Fraud ⇨27.

Purchaser could maintain action for fraud against vendors for representing that they owned entire tract, whereas railroad had right of way across land; deed being simply grant deed (Civ. Code, §§ 1113, 1571-1573).

7. Fraud ⇨29.

In purchasers' action against vendors for fraud, nonsuit *held* properly granted as to parties having contract to purchase, but not connected with vendors' fraud.

8. Husband and wife ⇨138(2).

Where title stood in wife's name and she joined with husband in conveyance, *prima facie* case of agency *held* shown, as regards wife's liability for husband's misrepresentation.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by A. E. Hargrove and wife against Harry O. Henderson and others. Judgment for defendants, and plaintiffs appeal.

Affirmed in part, and reversed in part.

Ames & McFadden, McFadden, Holden & Friis, George F. Holden, and Leo J. Friis, all of Anaheim, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

LUTTRELL, Justice pro tem.

Plaintiffs and appellants, who are husband and wife, brought this action against defendants and respondents to recover damages for fraudulent representations made as to the quantity and boundary lines of a certain tract of land sold by them to plaintiffs in the county of Orange, state of California.

Plaintiff A. E. Hargrove engaged in the real estate business in said county in the year 1919. On March 1, 1920, he entered into a copartnership with defendants Harry O. Henderson and J. Lloyd Moore and a man by the name of Wagner. This copartnership was formed to conduct a real estate business.

At the time of the formation of such copartnership, the defendants Henderson owned a triangular piece of land in said Orange county, across which the Southern Pacific Company owned a right of way two hundred feet wide. This right of way had come to said company through a grant from the United States in 1872. The right of way divided said triangular parcel of land owned by the Hendersons into two separate parcels. The triangular piece, including the right of way, contained 4.78 acres of land. Excluding the right of way, it contained 3.75 acres, the area of the right of way being 1.03 acres.

Some time prior to the formation of such copartnership, the defendants Henderson had contracted to sell said parcel of land, including the 1.03 acres owned by the railroad company, to the defendant Moore, and the Moores had gone into possession of the land under the contract. The Moores were desirous of disposing of their interest in the land, and it was in the hands of such real estate copartnership for sale. Shortly after plaintiff Hargrove became associated with defendants in such real estate business, his associates Henderson and Moore called his attention to this land with a view of interesting him in its purchase. He made several trips to the land and looked it over. On one occasion, defendant Harry O. Henderson took him to the land and showed him the corners and boundaries thereof. The entire tract, including the 1.03-acre right of way owned by the railroad company, was planted to orange trees, the trees on the said right of way being younger and smaller than those on the parcels on either side thereof, owned by the Hendersons. The said right of way was unfenced and had no ties or railroad track of any description upon it. It had, in fact, nothing upon it to indicate that it was a right of way and looked no different from the adjoining land, except that the growing trees upon it were, as heretofore stated, younger and smaller than those on the adjoining land. On the occasion when defendant Harry O. Henderson took plaintiff A. E. Hargrove to the land and showed him the boundaries they went entirely around the triangular tract, and Henderson informed Hargrove that he owned the entire tract, including the 1.03-acre right of way owned by the railroad company. No mention was made at that time of the right of way, but, upon their return to their office, Hargrove asked Henderson if the railroad company had any right of way across the land, and in reply Henderson told him that the railroad company had no right of way there and had no interest in the land.

Later on, during the month of May, 1920, and before the purchase of the land by plaintiffs, as hereinafter noted, defendant Henderson again told Hargrove that the railroad company had no right of way there; that the company never had owned the land and had not used it for eleven years; that he could not get the railroad company to do anything about it and that he finally tore up the railroad ties and rails and planted the land where they had been to orange trees. He further informed Hargrove on such occasion that the railroad company had had him in court three times over the matter, but that his attorney had each time demurred the company out of court, and that the company was through and had no right there and would not come back again.

On May 28, 1920, the defendants Henderson sold the entire triangular tract, including the 1.03 acre right of way owned by the railroad company, to plaintiffs for the sum of \$24,000. This was the same amount that the defendants Moore had contracted to pay the Hendersons for the land when they entered into the contract to purchase same. At the time of the sale to the Hargroves the Moores had paid the Hendersons on the purchase price of the land the sum of \$11,500 and still owed the sum of \$12,500. The Hargroves paid the purchase price of the land by paying to the Moores the \$11,500, which they had paid to the Hendersons under their contract and by giving to the Hendersons their notes, secured by a mortgage on the land for \$12,500, the balance of the purchase price. Thereupon, and on said May 28, 1920, the Hendersons executed and delivered to the plaintiff a joint-tenancy deed "granting" to them, as joint tenants, the entire triangular tract of land, describing same by metes and bounds, "and containing 4.78 acres."

This deed, after describing the land sought to be conveyed, contained a clause in the following language: "Subject to the conditions, covenants, restrictions and reservations now of record."

Plaintiffs went into possession of the entire 4.78 acres and in due time, paid the notes and mortgage given the Hendersons in the purchase of the land.

In 1924, the Southern Pacific Company brought an action in ejectment against plaintiffs for the 1.03 acres embraced in its right of way and recovered judgment and evicted plaintiffs from said 1.03-acre tract.

Plaintiffs then brought the present action for damages. At the trial of the action plaintiffs proved the facts, as above set forth, and in addition proved that they relied upon the representations of defendant Harry O. Henderson, as to his ownership of the entire tract of land described in their deed, including the 1.03 acres thereof owned at the time by the Southern Pacific Company. They also proved their claimed damage of \$12,000,

being the difference in value between the triangular tract purchased, including the railroad right of way and its value excluding such right of way.

After plaintiffs had rested their case, defendants moved the trial court for a nonsuit, which motion was granted and judgment thereupon made and entered in favor of defendants for their costs of suit. From this judgment this appeal was taken.

During the trial respondents seemed to lay much stress upon the so-called reservation clause contained in the deed, as above mentioned, talking the position that such clause excepted the railroad right of way from the transfer. Apparently this position has been abandoned on this appeal, as no mention is made of the point in respondents' brief. Anyway, we find no merit in such claim.

In our view of the case the appeal presents but two questions for solution: First: Did the defendant Harry O. Henderson, acting in behalf of himself and his wife in selling the land in question, perpetrate a fraud upon the purchasers in representing to them that he owned the entire tract deeded, and that the railroad company did not then, nor had it ever owned any part of such tract, or did he give the purchasers sufficient information regarding any claim which the railroad company might have to put them upon notice and obligate them to search the records, or make further inquiry as to the condition of the title of the lands involved before purchasing same? Secondly: Under the facts disclosed by the record, was an action for damages for fraud and deceit, growing out of the claimed false representations as to title, quantity, and boundaries of the land deeded, available to the plaintiffs, or were they restricted to an action for rescission of the contract, or an action on the covenants in the deed of sale, if any there be? We will consider these two propositions in the order mentioned.

[1] At the outset we are confronted with the well-settled principle of law that in considering an appeal from a judgment of nonsuit every inference of fact and intentment of law must be liberally construed in favor of sustaining the case made by plaintiffs to the end that the cause may be determined upon its merits. *Coakley v. Ajuria* (Cal. Sup.) 290 P. 33.

The California Civil Code defines fraud as being either actual or constructive.

Actual fraud is therein defined to consist, among other things, of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

"1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the

person making it, of that which is not true, though he believes it to be true."

"Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law specially, declares to be fraudulent, without respect to actual fraud." Civ. Code, §§ 1571, 1572, 1573.

Mechem, in his work on Sales, volume 2, at page 730, says: "Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless whether it be true or false. If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

Our Supreme Court, in the early case of *Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274, in discussing the question of fraud, used this language: "It is true that 'an evil act, with an evil intent, is a positive fraud, in the true sense of the term.' 1 Story's Eq. J. § 192. But it is equally true that, 'whether a party thus misrepresenting a material fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial.' If a party asserts that *as true*, which he does not know to be true, it is a false representation. If he intends simply to state his belief upon information, then he should state it in that precise form, so as to apprise the other party of the true grounds upon which his statement is made. A party will always be held to make good his statement *in the form* in which he makes it. If he states a thing as true in general terms without qualification then he is presumed to do so upon his own knowledge, or at his own peril, and must make good his assertion. But there is another kind of actual fraud, when there is no intention to deceive, actually existing in the mind of the party at the time of the transaction, but there is such an amount of gross carelessness as constitutes conclusive *evidence* of such fraudulent intent." The same principle was declared in *Muller v. Palmer*, 144 Cal. 305, 79 P. 954, and in *Blake v. Arp*, 180 Cal. 144, 179 P. 683.

[2-4] It is also well settled that a vendor is presumed to know the area and boundaries of his own land, and a vendee is entitled to rely upon the representations of the vendor as to the extent and boundaries of his property, and, if the vendee suffers damage by reason of such representations, he has a good cause of action against the vendor. *Eichelberger v. Mills Land & Water Co. et al.*, 9 Cal. App. 628, 100 P. 117; *Del Grande v. Castel-*

hun, 56 Cal. App. 366, 205 P. 18; Harder v. Allred, 61 Cal. App. 394, 214 P. 1017. Furthermore, a vendee, under such circumstances, is not required to investigate the public records, or to make further inquiry as to the area or title or boundaries of the vendor's land. *Teague v. Hall*, 171 Cal. 668, 154 P. 851; *People v. Henninger*, 20 Cal. App. 79, 128 P. 352; *Peardon v. Markley*, 50 Cal. App. 257, 195 P. 70; *Loverin v. Kuhne*, 94 Conn. 219, 108 A. 554, 33 A. L. R. 848; *Backer v. Pyne*, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; *R. W. Kevil & Sons v. Wilford, Stunston & Co. (Ky.)* 104 S. W. 348. The principle is aptly stated in *Lynch v. Palmer*, 237 Mass. 150, 129 N. E. 374, 375, 33 A. L. R. 842, as follows: "The defendant's contention that the representation that he was the owner of lot 89 is not a material one and cannot be impeached on the ground of fraud cannot be sustained. While the plaintiff could have ascertained the falsity of the statement by an examination of the title in the registry of deeds, she was not bound as matter of law to make such examination but could rely upon the positive assurances of the defendant that he was the owner of lot 89."

[5] Such being the state of the law, and specially in this case where the appeal is one from a judgment of nonsuit, we are constrained to hold that the positive statements made by defendant Harry O. Henderson to plaintiff A. E. Hargrove, as hereinbefore related, to the effect that he owned all of the land within the boundaries pointed out to said plaintiff, and that the railroad company did not have any right of way across said tract and had never owned any portion of said land, when in truth and in fact such railroad company then and ever since the year 1872 had owned a right of way two hundred feet wide and containing 1.03 acres extending entirely through said tract and severing it into two separate parcels, constituted actionable fraud and was at least sufficient evidence upon this point in the case to put the defendants upon their proof. That plaintiffs were damaged in not getting this 1.03 acres of land and by having the land which they did obtain divided into two separate parcels by reason thereof, to the extent of \$12,000, is an admitted fact, in so far as this appeal is concerned.

[6] Having reached this conclusion in the premises, we come now to a consideration of the remaining question in the case, namely, whether or not, under the facts and circumstances as disclosed by the record, plaintiffs could maintain an action for fraud and deceit. Respondents earnestly contend that such action does not lie in this state, but that a vendee, under such circumstances, must either sue for a rescission of his contract or resort to an action for breach of the warranties in his deed, if such deed contain warranties. In

support of their position in this regard respondents cite and rely upon the decision in the case of *Peabody v. Phelps*, 9 Cal. 213, decided by our Supreme Court in the year 1858. They assert that the instant case is so analogous to the *Peabody v. Phelps* Case that the decision therein is controlling in this case. Appellants seem to agree that the case at bar is analogous to the *Peabody v. Phelps* Case, but they contend that the decision in that case is contrary to reason and sound principles of justice and is against the great weight of authority in this country, and, therefore, should be overruled. We have carefully considered the *Peabody v. Phelps* decision and find that the case before us is clearly distinguishable from that case. In that case the deed of conveyance to the plaintiff contained express covenants of title, as is evidenced by the following language found on page 225 of the opinion: "The conveyance to the plaintiff included a covenant to warrant and defend the grantee, his heirs and assigns, in the title to the premises from the grantor, his heirs and assigns, forever." In the case before us the deed to the plaintiffs contained no express covenants or warranties of title. As heretofore shown, it was simply a "grant" deed.

From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.

2. That such estate is at the time of the execution of such conveyance free from incumbrances done, made, or suffered by the grantor, or any person claiming under him. Civ. Code, § 1113; *Gaffey v. Welk*, 46 Cal. App. 385, 189 P. 300.

The only question upon the point involved in the case of *Peabody v. Phelps* was whether or not an action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate could be maintained by the purchaser who had taken possession of the premises sold, under a conveyance with express covenants, and it was decided that such action would not lie, but that the purchaser must bring his action for breach of the covenants in his deed. It is true that the learned justice who wrote the opinion in that case, after thus concluding that the purchaser was restricted to an action for breach of the express warranties contained in his deed, took occasion to discuss, at considerable length, the question as to the right of a

vendee who had taken a deed without express warranties of title, to maintain an action for fraud and deceit, and concluded that, under such circumstances, such vendee would be without remedy, but, as heretofore noted, such question was not involved in the case, and the discussion of same in the opinion and the conclusion drawn may be regarded as pure dictum. In view of this fact, we do not regard the decision in the *Peabody v. Phelps* Case as in any way controlling, nor even as authority in the case at bar.

In passing, it may not be out of place here, and may serve some useful purpose, to note that the decision in that case is, as claimed by counsel for appellants, out of harmony with the great weight of authority in this country and has met with severe, and what we deem just, criticism, at the hands of our own Supreme Court and also the courts of other jurisdictions, as well as by very eminent text-writers. It came before the Supreme Court of this state for discussion in the case of *Wright v. Carillo*, 22 Cal. 595, and, from the language used in that opinion, we are inclined to believe that, had the question involved been squarely before the court so as to have required a decision upon the point, the *Peabody v. Phelps* Case would have been then and there overruled. Mr. Justice Crocker, in writing the opinion in *Wright v. Carillo*, commented upon the decision in the *Peabody v. Phelps* case as follows: "The appellant contends that this decision, in the case of *Peabody v. Phelps*, is a plain departure from these well-settled principles of law, unjustly affecting the rights of innocent persons, and screening the defrauder and deceiver. There are certainly very strong reasons for contending that a person obtaining money by false and fraudulent representations respecting his title to land should be compelled to repay it, as much so as the seller of a horse or other personal property; and the fact that the vendee has neglected to secure himself by proper covenants of warranty should be no defense. The fraud may have been perpetrated and falsehood employed for the very purpose of inducing the vendee to take the conveyance without any or with insufficient covenants. That fraud has been successful has never been supposed to deprive the party defrauded of all remedy. The power of a Court of Equity, as well as of Law, has heretofore been considered most potent in such cases; but if such be the law, they are powerless in the most aggravated cases of deceit. The ruling upon this point in *Peabody v. Phelps* is clearly in conflict with the decision in *Alvarez v. Brannan*, 7 Cal. 503 [68 Am. Dec. 274], and it should be reinvestigated in some case where it can properly be adjudicated, and upon a full argument of the question." Then follows a statement by the writer of the opinion that, because of the fact that the question was indirectly before the

court, it was unnecessary to determine it. In the comparatively recent case of *Mitchell v. California-Pacific Title Insurance Co.*, 79 Cal. App. 45, 248 P. 1035, 1037, decided in 1926, reference was made to the *Peabody v. Phelps* Case, among others, and, while the point under consideration was not directly before the court for decision, it is interesting to note the comment as contained in the following language: "It is contended by respondents Meyerstein and California-Pacific Title Insurance Company that a sale of the character described is analogous to a judicial sale, to which the rule of caveat emptor applies; and that if a party takes a conveyance without covenants he is without remedy in case of failure of title, and if with covenants his remedy upon such failure is confined to the covenants. Such was the view as to conveyances without covenants in the earlier decisions in California, following the rule at common law, fraud or mistake in the transaction being absent."

Turning to the authorities from other jurisdictions, we find that the question under consideration was ably and very thoroughly considered in the annotations to the case of *Loverin v. Kuhne*, 33 A. L. R. 848. On page 1104 of this volume the conclusion as to the weight of authority upon the question is set forth as follows: "The preponderance of authority is decidedly in favor of the doctrine that the remedy of an action for deceit is available, although the vendor's deed contains a covenant applicable to the subject-matter of his misrepresentation. 'Where the party has been induced, by a fraudulent representation, to pay his money and accept a deed, it is immaterial whether any, or what, covenants are contained in the deed. The purchaser defrauded has a right to treat the deed as a nullity, and may maintain an action on the case for the deceit. The fraud is not merged or extinguished by the covenant, but affords an additional and more complete remedy to the party.' [Citing cases.] There is some judicial support for a contrary doctrine. [Citing *Peabody v. Phelps*, supra.] But the weight of authority is clearly opposed to it. There is seemingly no satisfactory ground upon which it can be contended that, by accepting a deed containing covenants with regard to certain subject-matters, the vendee precludes himself from maintaining an action of tort on the ground of fraudulent representations concerning those matters. The situation may more reasonably be regarded as being simply one in which two independent remedies are open to the deceived party. The right of the vendee to maintain an action in cases where the vendor's deed contains no covenants of any description has been explicitly affirmed. [Citing cases.] In cases of this type, it is immaterial whether the vendor expressly refused to give the covenants, or the omission arose from any other cause. 'If the purchaser consents to waive the usual covenants, he

is none the less entitled to the exercise of good faith and honesty on the part of the vendor.'"

It is interesting to note the criticism of the Peabody Case in the annotations above mentioned. After quoting at length from the Peabody Case the author continues as follows: "The learned judge reviewed the New York decisions, and reached the conclusion that the point under discussion was still unsettled in that state. With all deference, it is submitted that this view was erroneous. That one of the decisions referred to, *Ward v. Wiman* (1837) 17 Wend. (N. Y.) 193, was a distinct authority for the doctrine impugned by Field, J., is shown by the fact that the actual point decided was that the lower court had properly overruled a demurrer to a plea based on the ground that the vendor's deed contained a covenant applicable to the subject-matter of the alleged misrepresentation. Furthermore, a reference to the report of *Whitney v. Allaire* [1 N. Y. 305] will show that he was not warranted in treating the language of *Gardiner, J.*, as being expressive merely of a personal opinion, and that the remarks of *Bronson, J.*, on which he laid great stress, embodied a theory which was not concurred in by any of his colleagues. *Field, J.*, cited the judgment of the supreme court in *Clarke v. Baird* (1849) 7 Barb. (N. Y.) 65, but apparently had no knowledge of the statement made by the court of appeals in that case (see [1853] 9 N. Y. 183), to the effect that it was fully satisfied with the earlier decision in *Whitney v. Allaire*. So far as the present writer has been able to ascertain, *Peabody v. Phelps* (Cal.) *supra*, has never been overruled in California itself. In *Wright v. Carillo* (1863) 22 Cal. 596, the court was asked to review and overrule this decision, as being in conflict with *Alvarez v. Brannan* (1857) 7 Cal. 503, 68 Am. Dec. 274; but refused to do so on the ground that the case at bar did not require a determination of the point. That the court was strongly inclined to regard the decision as erroneous is clear from its language. In *McLeod v. Barnum* (1901) 131 Cal. 608, 63 P. 924, it was cited, strangely enough, as an authority for the rule applicable in cases not involving fraud."

The case of *Whitney v. Allaire*, *supra*, referred to in the *Peabody Case*, is certainly not authority for the conclusion reached in that case. The fact is that the *Whitney Case* is directly opposed to the *Peabody Case*. In the *Whitney Case*, *Gardiner, J.*, in writing the prevailing opinion, said: "For more than thirty years it has been the settled doctrine of the courts of this state, that fraudulent representations in reference to the title of real estate, accompanied with damage, is a good ground of action, and that it is immaterial whether any or what covenants are contained in the deed of conveyance." Seven of

his associates on the bench concurred in this conclusion. Only one of them, *Bronson, J.*, differed with him, and he reached no conclusion on the point. Yet, this decision was apparently largely relied upon in deciding the point in the *Peabody Case*, the quotations in the latter case, however, being largely taken from the opinion of *Bronson, J.*, who, as stated, did not agree with his colleagues in the conclusion reached by them.

In 20 Cyc., at page 89, under the title "Election of Remedies," in discussing the question before us, it is said: "Thus as a general rule an action of deceit may be maintained by a purchaser of real or personal property against his vendor for fraudulent misrepresentations as to title or as to other material facts relating to the property, notwithstanding that the conveyance is by deed or bill of sale containing covenants or warranties which cover the subject matter of the representations." Many cases from various jurisdictions are cited as supporting this statement in the text. The case of *Peabody v. Phelps* is cited as supporting the contrary doctrine.

The question at issue is quite fully considered in 12 R. C. L. pp. 410-411, where the same conclusion is reached as is found in 20 Cyc., *supra*. In the footnotes appended to the decision in the case of *Bostwick v. Lewis*, 2 Am. Dec. 73, the case of *Peabody v. Phelps* is discussed at some length and the following conclusion reached: "Therefore, it is now well settled that actions for fraud in the sale of real estate will lie notwithstanding the conveyance is made with covenants."

In the well-considered case of *Sellards v. Adams*, 190 Ky. 723, 228 S. W. 424, 426, the court, after reviewing numerous authorities, said: "It will be observed that none of the above-cited cases confine a vendee to a reliance alone for recoupment upon the covenants of warranty in his deed when the sale and purchase was the result of fraud practiced by the vendor. Where the purchase of the land is the result of false representations as to the title of the land knowingly made by the vendor with the purpose to deceive and to induce the purchase, and relied upon by the vendee, and the sale is induced thereby, and therefore not constructively, but actually, fraudulent, and the vendee suffers injury therefrom, he may maintain an action against the vendor for the damages suffered on account of the fraud and deceit, or he may maintain an action for a rescission of the contract, if he acts promptly when the fraud is discovered. While the greater number of the decisions of this court in such states of case have dealt with the right to maintain actions for rescission and the incidents of such actions, the right to maintain the action for deceit is nearly universally upheld, although there is some authority to the contrary"—citing many cases.

Thompson on Real Property, 1929 Supplement, at page 1248, announces the same principle as follows: "One induced to purchase land by fraudulent misrepresentations may either bring an action for fraud or for the breach of the covenants of his deed. He has an election."

From the authorities thus reviewed it is apparent that the case of *Peabody v. Phelps*, so much relied upon by respondents in the instant case in justification of the trial court's action in granting a nonsuit, is, as heretofore stated, clearly against the great weight of authority, and, even if same were in point here, could well be disregarded. Indeed, we seriously question whether, in view of the criticism of such case in the *Wright v. Carillo* decision, same can longer be considered as authority in this state, even upon the point therein decided.

Counsel for respondents in the case before us cite, as supporting the *Peabody v. Phelps* decision, the case of *Gaffey v. Welk*, 46 Cal. App. 385, and in their brief quote at length from this decision. The *Gaffey v. Welk* Case, however, is to be distinguished from the *Peabody v. Phelps* Case in that no charge or element of fraud or misrepresentation whatsoever was involved therein, and consequently is not authority supporting the *Peabody* Case. The opinion in the *Gaffey v. Welk* Case contains quite extensive quotations from that in the case of *Bryan v. Swain*, 56 Cal. 616, upon the point, but an examination of this latter case discloses that it, too, was a case in which the element of fraud was entirely absent. Respondents also rely upon the case of *Choate v. Hyde*, 129 Cal. 580, 62 P. 118, as being decisive of the case before us. In this they are in error, for in the *Choate v. Hyde* Case, unlike the instant case, all of the facts pertaining to the title involved were fully disclosed by the seller to the purchaser before the contract was made, and the seller merely expressed his opinion as to the title. Then, too, a nonsuit was not granted in that case, but the judgment of the trial court was rendered after a trial of the case upon the merits.

It has been quite recently held in the case of *Paolini v. Sulprizio*, 201 Cal. 683, 258 P. 380, that three remedies are open to a party defrauded in a contract for the purchase of real estate, one being a rescission with claim

for damages, another an affirmation of the contract, the purchaser retaining what he has received and suing for his damages in an action for deceit, and, thirdly, the setting up of the seller's fraud as a partial defense or counterclaim, without offer of restitution and the recouping of damages in an action brought by the guilty party to the contract. It was also held in this case that a right of action for damages for fraud arises immediately upon the consummation of the fraud, which may arise in a contract executed or executory, and which may be asserted at once upon discovery of the fraud. It would seem that the plaintiffs in the case before us availed themselves, as in our opinion they had a right to do, of the second remedy mentioned in this case.

[7] In conclusion, we do not understand that appellants make any claim in this appeal that they proved any case against the respondents *Moore*, or either of them. At any rate, we find no evidence in the record tending to connect either of these two respondents with any fraud or misrepresentation in the transaction. A judgment of nonsuit as to them was therefore proper.

[8] As to the respondent *Louisa P. Henderson*, the record shows that the title to the land involved, other than the right of way owned by the Southern Pacific Company, stood in her name at the time of the sale, and that she joined with her husband, the respondent *Harry O. Henderson*, in the conveyance of the property to the appellants. We therefore hold that a prima facie case of agency is shown between her and her said husband, and that she is accountable with him for any damage resulting from his representations in the premises. *Quarg v. Scher*, 136 Cal. 406, 69 P. 96.

From the views herein expressed, we conclude that the learned trial judge was in error in granting a nonsuit in the case in so far as the defendants *Harry O. Henderson* and *Louisa P. Henderson* are concerned, and that the action as to these two defendants should be heard and decided upon its merits.

The judgment is therefore affirmed as to the defendants *J. Lloyd Moore* and *Viola Moore*, and is reversed as to the defendants *Harry O. Henderson* and *Louisa P. Henderson*.

108 Cal. App. 714

WEED v. BUTLER.

Civ. 5983.

District Court of Appeal, Second District,
Division 1, California.

Oct. 2, 1930.

Appeal and error ⇐1071(6).

Appellant *held* not prejudiced by court's failure to make direct finding on issue, where finding, if made, would have been adverse.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by M. J. Hogan, for whom Charles J. Weed was substituted, against O. C. Butler. Judgment for plaintiff, and defendant appeals.

Affirmed.

Maurice C. Sparling, of Los Angeles, for appellant.

Knight & Reynolds and Edward S. Shattuck, all of Los Angeles, for respondent.

HOUSER, J.

Defendant appeals from a judgment rendered against him in an action brought on a promissory note. The defenses to the action were that no consideration for the note was received by defendant, and that the certificate of certain shares of stock in a corporation, received by defendant at the time when the said promissory note was executed and for which said promissory note was given by defendant to plaintiff, was illegally issued and consequently was void.

Although somewhat varied as to form of statement, the appeal herein is predicated upon the points that the findings of fact are either contrary to, or not supported by, the evidence; also, that the trial court failed to find upon a material issue of fact.

No new rule or new application of any principle of law is either invoked or involved in this appeal; nor would any useful purpose be served either by a statement of facts or by a review of authorities cited by respective counsel appearing herein.

From an examination of the several specifications of error suggested by appellant, it is more or less apparent that some of them are not without seeming merit; but when the pleadings, the evidence, the findings of fact, and the conclusions of law are considered together, it becomes manifest that the ensuing judgment was fully supported by the precedent proceedings in the action. The several criticized findings may be reconciled one with the other. The failure of the trial court to find upon the issue to which appellant has directed attention is not so apparent; but as-

suming (without conceding) that no direct finding was made by the trial court in that regard, from a consideration of the findings which were made, it is most obvious that had an unexceptionable finding been made on the issue in question it could have been nothing but adverse to the claims of the defendant in the action.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

108 Cal. App. 624

KIPP v. DANIELSON.

Civ. 46.

District Court of Appeal, Fourth District,
California.

Sept. 29, 1930.

1. Taxation ⇐430.

Where two lots were listed separately on assessment roll after name of owner, each lot being given separate valuation, and thereafter valuations were added together and assessment carried out to one total, assessment *held* valid.

2. Taxation ⇐675.

Where property was sold for one cent less than amount assessed as taxes, penalties, and costs, variance *held* immaterial.

3. Taxation ⇐734(7, 9).

Where neither delinquent list nor notice of sale had amount of taxes, penalties, and costs due appearing opposite description of each parcel to be sold, sale *held* void.

Appeal from Superior Court, San Diego County; Douglas L. Edmonds, Judge.

Action by Sylvester Kipp against Laura C. Danielson to quiet title. From the judgment, plaintiff appeals.

Affirmed.

Superseding opinion in 288 P. 882.

Virgil S. Kipp, of San Diego, for appellant.

Lon A. Brooks, of Los Angeles, and Turrentine & Wright, of San Diego, for respondent.

PER CURIAM.

This is an action to quiet title to lots 39 and 40 in block 42 of University Heights, in the city of San Diego, county of San Diego, state of California. The complaint of appellant is in the usual form and alleges title in himself. The answer of respondent denies

title in the appellant and alleges title in herself. Appellant derails his title through an assessment of the property made by the county assessor of the county of San Diego, in the year 1917, and delinquent tax sale of the property under which it was sold to the state on June 25, 1918. It is admitted that the appellant has no title to the property unless he acquired it under the assessment and the following tax sale.

[1] The record before us shows that on the assessment roll the two lots were listed separately after the name of an owner, each lot being given a separate valuation. Thereafter, the valuations were added together and the assessment carried out to one total. This form of assessment has been approved in the case of *Gottstein v. Holmes*, 89 Cal. App. 145, 264 P. 310, which involved a similar assessment in San Diego county for the same year. It further appears from the record that on the delinquent list for the same year this property was assessed to its owner, whose name appears but once on the assessment. In the next two columns of this delinquent list follows the description of the two parcels of property, described separately. Following in the next column is the valuation of each lot, separately stated. Thereafter, the total valuation of the two lots, the total taxes, the total penalties, and the advertising costs are added together and consolidated and carried forward as a single item under each head. The total tax and penalties, for which the two lots were to be sold, appears on this list as the sum of \$5.76.

[2] In the notice of sale of the property each lot is separately described but the taxes, penalties, and costs due do not appear opposite each description, but were consolidated into a single amount, \$5.77, for which sum the property was sold to the state. In an addenda it appears that the property was finally sold to appellant for \$5.76. It would appear that this difference of 1 cent arose from the dropping of fractions of cents in the computation of the penalties. In the case of *Gottstein v. Kelly* (Cal. Sup.) 276 P. 347, 349, it was held that such a variance in the amounts was immaterial and would not defeat the validity of the ensuing tax deed.

[3] However, under authority of the same case, we must hold that the sale is void because neither the delinquent list nor the notice had the amounts of the taxes, penalties, and costs due appearing opposite the description of each parcel of the land to be sold. In this case, it was held as follows:

"One of the reasons assigned for upholding the judgment herein is that the notice of sale to the state of the property affected by the judgment was defective. By the provisions of section 3764 of the Political Code, in force at the time the notice of sale was given (Stats. 1913, p. 556), the tax collector was

required to 'publish the delinquent list, which must contain the names of the persons and a *description* of the property delinquent, and the amount of taxes, penalties, and costs due, *opposite* each name and *description*.' * * *

"At the time the notice of sale herein was published a further requirement of section 3764 of the Political Code, then in force, was that the delinquent list should contain the 'taxes due on personal property, the delinquent state poll, road, and hospital tax, the taxes due each school, road, or other lesser taxation district, added to the taxes on real estate.' * * * It appears that, as affecting the property here involved, a tax of 71 cents on the \$100 of valuation was levied for the school district. With reference to the meaning of the phrase appearing in the statute, 'added to the taxes on real estate,' it was held in *California Loan, etc., Co. v. Weis*, 118 Cal. 489, 496, 50 P. 697, 700, that 'the word "added," as here used, does not contemplate a mathematical computation. It is employed in the sense of subjoined or appended.' * * *

"In the case of *Cordano v. Kelsey*, 28 Cal. App. 9, 19, 151 P. 391, 398, among other things, it is held that, in a notice of sale for delinquent taxes, it is necessary that the amount of penalties and costs be separately stated, and that (citing *Campbell v. Canty*, 12 Cal. App. Dec. 373,¹ and quoting sections 205-207 of *Black on Tax Titles*), 'the giving of notice in the manner and form prescribed by the statute is an essential jurisdictional fact'; also, that 'not only is the giving of notice of the sale essential, but it must be such notice as the statute prescribes.'

"Assuming the correctness of the conclusion hereinbefore stated to the effect that each lot was separately described and assessed, and reasoning from the rule announced in the case of *California Loan, etc., Co. v. Weis*, 118 Cal. 489, 496, 50 P. 697, as well as from the case of *Cordano v. Kelsey*, 28 Cal. App. 9, 19, 151 P. 391, 398, it becomes apparent that the construction which should be placed on the statutory requirement that the amount of 'taxes, penalties, and costs due' should be placed 'opposite each name and description,' is that opposite each *description* all 'taxes, penalties, and costs' applicable thereto should be placed, rather than that where, as in the instant case, there are several pieces of property separately assessed and described, the total amount due thereon on account of the several charges of 'taxes, penalties, and costs' should be added together and stated in one aggregate amount."

As the proceedings leading up to the sale were fatally defective, no title was conveyed to the state of California, and it had no title

¹ For opinion on hearing by Supreme Court, see 162 Cal. 382, 123 P. 266.

to convey to appellant. As his purported title was dependent entirely upon a void tax deed, no title vested in him.

Judgment affirmed.

108 Cal. App. 570

GRAY v. MAGEE et al.

Civ. 445.

District Court of Appeal, Fourth District,
California.

Sept. 26, 1930.

Rehearing Denied Oct. 20, 1930.

Hearing Denied by Supreme Court
Nov. 24, 1930.

1. Judgment ¶256(1).

Waters and water courses ¶152(10).

Conclusions of law and decree in action to establish water rights *held* not contradictory to findings.

The decree provided that, when there was less than 3.50 miner's inches, the deficiency should come from part allotted to plaintiff, whereas the court merely found that defendants had lost right to one-half of miner's inch during summertime and one and one-half during winter, and the amount to which plaintiff could acquire a right was therefore limited to such amount, with the exception of the additional amount which he was able to save by his intake being further up stream.

2. Trial ¶404(1).

Findings must be read together, and reference may be had to context to ascertain doubtful meaning.

3. Waters and water courses ¶152(11).

Under findings, riparian owner was entitled to only that water to which rights of prior users had been lost.

The court found that for more than forty years the prior users had diverted and used all the water in the stream, except that they had lost the right to, and failed to use a specific quantity for the past five years.

4. Highways ¶17.

Evidence *held* sufficient to support finding that there was no public road over grantor's land to grantee's land.

5. Easements ¶36(3).

Evidence *held* insufficient to support finding that grantee's only access to land was over grantor's land, as regards right of way of necessity.

6. Easements ¶18(1).

Right of way of necessity does not arise when only interest of grantor in adjoining

land over which grantee claims right is that of cotenant with other parties interested in estate in process of administration.

7. Estoppel ¶118.

Evidence *held* to show that grantor consented only to grantee's use of road over grantor's land temporarily as regards estoppel by grantee's improvement of road.

8. Executors and administrators ¶114.

Grantor's consent, if any, to grantee's use of road over land of estate of which grantor was executor could not bind estate, as regards claimed estoppel.

9. New trial ¶106.

Refusing new trial for newly discovered evidence, which only added to existing conflict in evidence, *held* not error.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Coleman M. Gray against Hugh Magee and others. From an unsatisfactory decree for plaintiff, plaintiff appeals.

Affirmed.

George H. Stone, of San Diego, for appellant.

Estudillo & Schwinn, of Riverside, and A. M. Thompson, of San Diego, for respondents.

BARNARD, J.

Victoria P. de Magee died intestate in 1886 and left as part of her estate certain lands in San Diego county which lie on the southwesterly slope of the Agua Tibia mountain, in an elevated valley or bench bordered on all sides, except the southwest, by rapidly rising ground. Hugh Magee, as one of the executors of this estate, has been in personal charge of these lands since about 1913. He has also entered under the law of the United States, as cattle raising homesteads, certain other adjoining tracts of land on the east, the north, and the southwest. Portions of these other lands have been patented and other portions merely entered. For many years water had been diverted by the Magee family from Castro creek, a natural stream running through the property, for the purpose of irrigating parts of said land. In 1924 plaintiff Gray established a camp on certain lands belonging to Hugh Magee under some arrangement with him. In 1925 he built thereon a stone lodge and certain other structures, and began to take a portion of the Castro creek water from the Magee ditch for domestic purposes. A little later he installed his own pipe line, taking water directly from this creek, his intake being at a point farther up the stream than the Magee intake. Plaintiff cleared about an acre of land for his house

and garden, and another acre which he set out to orange trees, and continued to use this water both for domestic purposes and for irrigation. All of these improvements were made with the knowledge and consent of said Magee, and it is apparent that at the time the relations between the plaintiff Gray and the defendant Hugh Magee were most friendly. On July 20, 1928, defendants Hugh Magee and Florence M. S. Magee, his wife, conveyed to the plaintiff by deed the tract of land which he had been improving, consisting of about twenty-five acres, together with an easement over certain homestead lands of the grantors, for the purpose of repairing and maintaining a pipe line thereon. Castro creek runs through plaintiff's land, and his whole twenty-five acres are riparian thereto.

This action was begun by the plaintiff for the purpose of establishing his right to take water from Castro creek, and also for the purpose of enjoining the defendants from interfering with the plaintiff's use of a certain road, which, it is claimed, constitutes his only means of access to his property.

In his first cause of action, after alleging his ownership of the property and his improvements thereon, plaintiff alleges that he has used domestic water from Castro creek for three years and irrigation was for one and one-half years, and that he needs for these purposes a total of 24,000 gallons of water per day in the irrigation season; that more than thirty years ago the estate of Victoria P. de Magee attempted to appropriate one hundred miner's inches of water from Castro creek, and during that period of time has maintained a diversion ditch, taking said water over the land now belonging to plaintiff to lands belonging to the estate, which are not riparian to the creek; that for the past five years the said estate has not put said water to beneficial use to its full extent, but has at all times during the past ten years left unused and abandoned and wasted water to the extent of more than 24,000 gallons of water per day; that with the consent of the defendants, plaintiff completed in May, 1927, a dam and pipe line capable of carrying about 24,000 gallons of water per day, and that such water as he does not use is returned to the estate's diversion ditch as it crosses plaintiff's land; that plaintiff has used 24,000 gallons of water per day and is entitled thereto by reason of his riparian rights and his use thereof, and by reason of the nonuse and abandonment of a part of the water of Castro creek by defendants; and that plaintiff has made application to the state division of water rights for the appropriation of that amount of water. Plaintiff asks that the defendants be enjoined from interfering with his right to take said water, and that title thereto be quieted. In their answers defendants allege that for more than fifty years they have diverted and put to ben-

eficial use all of the waters of Castro creek, and deny any nonuser or abandonment of any of said water. Cross-complaints were filed in which the defendants asked that they be declared the owners of and entitled to all of the waters of said creek, and that the plaintiff be enjoined from the use of any of said water.

Among other things, the court found the plaintiff's land was wholly riparian to Castro creek, and that the lands of the defendant estate were not riparian to said stream; that plaintiff acquired title to his property on July 20, 1928, together with the right of ingress and egress over certain property belonging to Hugh Magee and his wife for repairing and maintaining a pipe line thereon, and to take domestic and irrigation water therefrom; that the plaintiff occupied his land prior to the date of his deed as a licensee of the grantors therein, and with their consent established, at some time prior to May 4, 1927, his own diversion system, with an intake above that of defendants; and that such water as is not used by the plaintiff is diverted back into the defendants' diversion system. The court also found that the plaintiff has put to beneficial use not less than the amount of water he claimed in his complaint, namely, 24,000 gallons per day; that the defendant estate more than forty years ago appropriated all of the water of Castro creek, diverting the same at a point on unpatented government land, and for a long time applied all of said water to a beneficial use on the estate land; that for more than five years next before the commencement of this action, the defendants have not put said water to beneficial use to the fullest extent, in that during the past five years they "have failed at all seasons of each year to devote to any beneficial use one-half of one statutory miner's inch of water out of the quantity that under natural conditions flows in said stream at the estate's intake"; that for more than five years, in addition to the one-half inch of water mentioned, they have at all times between the 1st of November of each year and the 1st of May next following, out of the increased flow during that period "wholly failed and neglected to devote to beneficial use a further quantity" of "not less than one statutory miner's inch of water"; and that there was at the time of the commencement of the action an aggregate of not less than one and one-half statutory miner's inch of water between the 1st of November of each year and the 1st of May following, and at all other times of each year there was one-half of a statutory miner's inch of water, which had ceased to have the status of a flow of water appropriated by the defendants. The court further found that, in addition to said one-half inch in the summer and one and one-half inches in the winter that had not been put to beneficial use by the defendants dur-

ing the preceding five years, the plaintiff, by locating his intake farther up stream than the estate intake, had saved further water, not theretofore used, in the amount of one-quarter of a statutory miner's inch between May 1st and November 1st of each year, and had put such saving to beneficial use upon his land. The court also found that in the dry half of each year there is sufficient water in the stream over and above that put to beneficial use by the Magee estate, so that plaintiff may take *not to exceed* three-fourths of a statutory miner's inch of water without infringing on any right of the estate; and, further, that "seldom, if ever, even in the driest season of the year, is the flow at plaintiff's intake less than three and one-half statutory miner's inches." As conclusions of law, the court found that the plaintiff was entitled to take three-fourths of a statutory miner's inch, equal to 12,117.60 gallons of water per day, during the period from May 1st to November 1st of each year; to take double that amount during the remainder of each year; and to a decree quieting his title to said amount of water. The conclusion of law then contains the following: "That plaintiff's right to such water is fixed and determined upon the basis of a flow of said stream at plaintiff's intake at no time less than three and one-half (3.50) miner's inches, and that when, if ever, the flow of the water at that point shall in fact fall below that quantum * * * defendants are entitled to have the amount of water used by the plaintiff from his diversion and not returned into defendants' ditch diminished to the same extent that the flow of said stream at the location of plaintiff's intake shall fall below said minimum of three and one-half (3.50) miner's inches;" and, further, that the plaintiff should be required "at his own expense to install and maintain immediately above his intake proper measuring devices, so as to ascertain whether or not at any particular time the minimum flow of three and one-half (3.50) miner's inches is being maintained."

The decree followed these findings and conclusions of law. The plaintiff has appealed, particularly stating, however, that he takes no appeal as to the quantity of water allotted to him. As to the water issue, he asks that the case be not reversed, but that the conclusions of law and the decree of the court be amended to conform to the findings and be limited to the extent of the facts found.

[1] The gist of appellant's contentions in this regard is that the findings of the court amount to a positive finding that respondents have a prior right to 2.75 inches of water and no more; that this prior right of respondents should not be enlarged, and appellant, as a riparian owner, is entitled to all water that he can put to beneficial use over and above the 2.75 inches to which respondents are found to have priority; and that

those provisions found in the conclusions of law and the decree, which provide that when there is less than 3.50 miner's inches of water in the stream the deficiency shall come from that part allotted to the appellant, are contradictory to the findings that the appellant was entitled to three-fourths of an inch in the summertime, and the respondents to two and three-fourths inches. Appellant argues that the findings that the flow in the summertime was seldom, if ever, below 3.50 inches, and the appellant is entitled to three-fourths of an inch in the summertime and respondents to 2.75 inches, but that, if the flow falls below 3.50 inches, the reduction is taken from the appellant, amount to a positive finding that respondents have a right to 2.75 inches of water and no more. As we understand it, this entire argument is based upon the supposition that the court had positively found that respondents had a prior right to 2.75 inches of water and no more. We are unable to follow appellant in this contention. The court did not affirmatively find that respondents had a prior right to 2.75 inches only, although appellant attempts to arrive at that conclusion by mathematical computation. Instead of finding as to the quantity of water which the estate had used and to which they had priority, the court approached the problem from the other direction, and, after finding that they had theretofore taken all of the water at the point of their intake, the court found that during more than five years they had so far failed to make a beneficial use of all of this water, that they had lost the right to one-half of one statutory miner's inch during the summer and one and one-half inches during the winter. The amount of water to which appellant could acquire a right was therefore limited to this amount, with the exception of the additional amount which he was able to save by reason of his intake being farther upstream.

[2] Furthermore, the court found that, in the dry season of the year, appellant could take "not to exceed three-fourths of one statutory miner's inch of water," without infringing on the rights of the defendant estate. What is here referred to by the words "not to exceed" is explained by another provision wherein it is stated that plaintiff's right to such water is determined upon the basis of a flow at his intake of not less than 3.50 miner's inches, and that in the event the flow at that point should fall below that amount, the reduced amount should be taken from the appellant's allotment. Both the findings and the so-called conclusions of law are all contained in one document which is headed "Findings of Fact and Conclusions of Law." While the statement just referred to appears under a subheading labeled "Conclusions of Law as to Water," it cannot be doubted that it is more in the nature of a finding of fact than a conclusion of law. It relates to and

explains the basis upon which appellant's rights have been determined in the findings, and it explains what was meant by the use of the words "not to exceed" in the finding that the plaintiff could take not to exceed three-fourths of an inch of water, without infringing upon respondents' rights. Nor do we think it can be held to contradict the findings of fact, because this provision happens to have been inserted in that part of the instrument which was headed "Conclusions of Law." It is a general rule of law that all of the findings should be read together, and not taken piecemeal. And that reference may be had to the context to ascertain any doubtful meaning. *Akley v. Bassett*, 68 Cal. App. 270, 228 P. 1057; *J. M. Brown, Inc., v. W. P. Fuller & Co.*, 28 Cal. App. 676, 153 P. 960. If appellant's reasoning that the court had limited respondents' rights to 2.75 inches were adopted, this finding would, on the other hand, contradict the other findings that the defendant estate had for many years made a beneficial use of all of the waters of said Castro creek which reached the estate's intake, and that they had later lost, through nonuse, the right to only one-half inch in summer and one and one-half inches in winter. The evidence shows that there was a greatly increased flow of water in this creek in the winter season, and that the defendant estate had made use of this increased flow by storing it in a reservoir for use in the dry season. To find that the respondents had a prior right to 2.75 inches only, and that any amount in excess thereof could be taken by the plaintiff, would not only contradict the other findings of the court, but would be contrary to all of the evidence introduced. We think it sufficiently appears from the findings of fact and the conclusions of law that the court found, not that the respondents had a prior right only to 2.75 inches of water, but that through the respondents' partial nonuse and the saving effected by appellant there had become available for his appropriation and use, not to exceed three-fourths of a miner's inch in the summer season, and one and one-half inches in the winter season; that this three-fourths inch in the summer season was determined upon the basis of there being at all times 3.50 inches of water in the stream at appellant's point of intake; and that the amount of water, the right to the use of which the defendant estate had not lost, was such that when the flow in the stream was less than 3.50 inches, the deficiency must be taken from the amount otherwise available to appellant. The decree follows the actual findings of the court and the conclusions of law, and the sufficiency of the evidence to sustain the findings has not been attacked.

[3] The only other point in regard to water urged by appellant, is that, as riparian owner, he is entitled to all of the waters of Castro creek that he can put to beneficial use, over

and above the 2.75 inches to which respondents were found by the court to have priority. As we have seen, the court did not find the respondents were entitled only to a priority of 2.75 inches. The court found that for more than forty years respondents had diverted and used all of the water in the stream, except that they had lost the right to and failed to use a specific quantity for the past five years. The respondent estate was entitled to all of the water it had previously used with the exception of the portion as to which its right had been lost. *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 276 P. 1017. Under the findings of the court, only that portion of the water theretofore taken by respondents, to which their right had been lost, was available to appellant.

In his second cause of action the plaintiff alleges that his only means of access to his land is by an existing road over the land of his grantors, Hugh Magee and Florence M. S. Magee, and the lands owned by the defendant estate as described in the complaint; that such road was openly and publicly used for more than forty years as a public highway, with the full knowledge, consent, and acquiescence of the defendants; that during the last two years he improved this road at an expense of \$200, at the request of and with the consent of defendants Florence M. S. Magee and Hugh Magee, individually, and as executor of the estate; and that during said time he has continuously used the road. He alleges that the defendants have threatened to fence off the road and destroy his only means of access to his property, and asks that they be enjoined from so doing. The defendants deny that the road has been openly and publicly used by the public for forty years, or for any other time; that it has ever been used as a public road; and that it is plaintiff's only means of access to his property. The court found that plaintiff's only access to his land is by an existing road over the land belonging to Hugh Magee, Florence M. S. Magee, and the estate of Victoria P. de Magee, deceased; and that this road is substantially in the same location as an old road that formerly ran over a portion of this land to an old house that formerly stood near the center of the land, and an old trail which formerly proceeded from this old house on across the land in question. The court further found that said road was used more than forty years ago as a private driveway by the family, friends, and relatives of the party who formerly owned the old house referred to; that said road has then and since been occasionally passed over by others, but had largely been abandoned for many years prior to September, 1926; that it was never at any time dedicated to public use; that it had not at any time been used under claim of right by the public for any period of five years; and that it never was and is not now

a public road or highway. The court decreed that said road is not a public road and that the plaintiff was not entitled to the use thereof without permission.

Appellant, in insisting that this portion of the decree be reversed, first urges that these findings are not supported by the evidence. It is neither possible nor necessary to review all of the voluminous evidence upon this question shown by the record. It cannot be questioned that there is some evidence showing the existence of an old road going as far as the old house mentioned in the findings, and that at certain points its location coincided with the road opened up and claimed by the appellant. This evidence consists both of testimony as to physical remains of such a road at certain points, and testimony as to travel over the same at various times for a number of purposes. There was also evidence of an old trail extending from that point on over the hills to Agua Tibia. This evidence is not only fragmentary, but its value is greatly reduced by the facts abundantly shown by the record that, at the time the new road was opened up by the appellant, physical evidence of the old road did not exist for all of the distance; that evidence is lacking that the new road followed the line of the alleged old road, except in spots; and that even those permanent marks in certain spots, which are especially relied on by appellant as conclusively showing the existence of an old road, are such as to indicate not only age but long disuse. On the other hand, the record is replete with evidence that the land over which the road is supposed to have gone was farmed and fenced for years. There is also evidence that any road that ever existed there was not a public road. Also that Hugh Magee had given appellant temporary permission to open up and use the road across his land and the land of the estate, upon his agreement to put in a gate.

Even the appellant testified about what he first found there, as follows:

"The Court: Describe just what you saw.

"A. Yes. The road laid midway between these two low hills and then debouched on to open mesa land. After leaving the olive trees, the road at that time was almost impossible to follow. It could have been anywhere—two years previous to my visit another road had been used by the Magees."

He further testified that when he first went over the location of the road there was brush growing upon it, bee sage and deer weed, but that it could be distinguished from the heavy chaparral growing along the sides. He admitted that when he started work in the road there were pieces of fence over the road, although he did not remember whether there were two or three wires thereon. He testified that he had to move three posts off of the road in order, as he says, to make it more

convenient; that these posts did not look like new fence; that he was using the road at the suggestion of Magee, and that he had permission to do so; that for a time he maintained a gate on the road and at Hugh Magee's request kept the same locked; and that both executors of the estate had keys, but no one else except, apparently, himself.

Hugh Magee testified that the fence across this road has been there a good many years; that it was there in 1914 and has been there since; that there was no gate where the claimed road is located, previous to 1927; that in that year he permitted appellant to cut the fence so that he could drive through, and the gate was built to keep the stock from bothering; and that there was no road there from 1913 to the time in 1927 when the appellant fixed one.

Mrs. Florence Magee testified there was no road there when she came there in 1913; that there has been a fence crossing what is now the road, since 1913; that she heard her husband tell appellant in 1927 that he might use this for a road temporarily, and that later, because hunters bothered, her husband told appellant he must maintain a gate and keep it locked. Will Magee testified that there has always been a fence there to separate the agricultural lands from the grazing lands; that he personally saw this fence in 1913 and again in 1923, and that it was there each year thereafter until 1928. Fred Sickler testified that an old road over a portion of the route of the new road had washed out about 1890, and that it had never been repaired or used again, although he had gone over it on horseback while hunting since that time; that from 1890 on a person would never know there had ever been a road there, except that in one place it was evident that there had been one graded down a hillside; and that the fences above referred to had been there a great many years. M. M. Sickler testified there has been no traveled road across this property subsequent to 1914, but that a fence had been built around the property in 1914, which the witness thought was there until 1926. In reference to the supposed road which was testified to by certain witnesses as proceeding from the old house above mentioned on over the hill to Agua Tibia, most of the evidence is to the effect that there had been an old trail there used by the Indians; and while there was some evidence of its occasional use in more recent years, one witness testified that there has never been a traveled or wagon road in that location, and another witness testified that there had never been a usable wagon road there.

[4] The evidence, taken in the light most favorable to appellant, goes no further than to show there was formerly some sort of road which in some places followed the route of the new road to which he lays claim; that

such road as there was was used mostly by the occupants of the lands and their occasional visitors, with a little evidence of occasional use by others, such as Indians and hunters; and that, except for the road to the old house, there had been no real wagon road over any part of the way. On the other hand, there is positive evidence that there had never been a public road there; that such road as there was had been long unused; that the property over which the road is now claimed had for years been fenced and farmed; and that for the last year or two prior to the trial of this action appellant had been using and improving a road across this property with the permission of Hugh Magee, one of the defendants. At best, nothing more than a conflict in the evidence is here presented, and we think there is sufficient evidence to sustain the findings of the trial court that no road over the route now claimed as a road by appellant had at any time been dedicated to public use, nor has such a road at any time for a period of five years been used under hostile claim of right by the appellant, and that the same never was and is not now a public road or highway. See *Clarke v. Clarke*, 133 Cal. 667, 66 P. 10; *Thomas v. England*, 71 Cal. 456, 12 P. 491; *People v. Rindge*, 174 Cal. 743, 164 P. 633.

[5] The appellant next urges that, if not otherwise, he is still entitled to the use of the road in question under the law of way of necessity. The court found that plaintiff's only access to his land is over the road in question. This does not seem to be supported by the evidence, as the appellant went upon the land in 1924 and built a permanent house in 1925, while he himself testified that the first time he went over the road in question was in September, 1926; and, also, that during the earlier years he was there it was his custom to use the longer road around by Hugh Magee's house. Appellant relies upon the rule laid down in *Mesmer v. Uharriet*, 174 Cal. 110, 162 P. 104, 106, as follows: "When a grantor conveys land shut off from access to a road by the grantor's remaining land, or partly by his land and partly by that of a stranger, a way of necessity arises over the adjoining land of the grantor."

[6] Not only does it not sufficiently appear that appellant's land is entirely shut off from access to any road, but it does appear that he is claiming this way of necessity not over lands belonging to his grantor, which adjoin the land conveyed to him, but over the intervening land of the Magee estate, in which appellant's grantor has only a partial interest as one of the heirs, and then over land owned by his grantor. Such a right does not arise when the only interest of the grantor in the adjoining land over which a right of way is claimed is that of a cotenant with other par-

ties interested in the estate, which estate is in the process of administration. *McDonald v. McElroy*, 60 Cal. 484.

[7, 8] Appellant next insists that the respondents should be estopped to deny him the right to use the road in question by reason of their consent and approval of his previous use thereof, and by reason of his improving the road and spending money on the strength of his right to use the same. Not only does the evidence show such consent as was given by respondent Hugh Magee to have been a consent to use of the road temporarily, but the greater part of the road claimed is across the lands belonging to the Magee estate. Not only is the evidence not sufficient to sustain appellant's contention in this regard, but Hugh Magee, as one of the executors of the estate, was without authority to bind the estate in any such manner. See *City of Eureka v. Fay*, 107 Cal. 166, 40 P. 235.

[9] Appellant's final contention is that the court erred in denying his motion for a new trial upon the ground of newly discovered evidence, it being contended that the court is required to review such an order under section 956, Code of Civil Procedure. It is sufficient to say we have read the affidavits setting forth the newly discovered evidence, and the most that can be said for them is that they only add to the already existing conflict in the evidence.

For the reasons given, the judgment is affirmed.

I concur: MARKS, Acting P. J.

CARY, P. J., being absent, takes no part in this decision.

109 Cal. App. 62
INGAMELLS et al. v. GOODFELLOW et al.
Civ. 4136.

District Court of Appeal, Third District,
California.
Oct. 14, 1930.

1. Appeal and error ⇐110.

No appeal lies from order refusing new trial.

2. Physicians and surgeons ⇐14(4).

Physicians and surgeons must possess reasonable learning and skill ordinarily possessed by others in locality, and must use best judgment and reasonable care and diligence in exercising skill and applying learning to accomplish purpose for which employed.

3. Physicians and surgeons ⇐15.

"Negligence" of physician consists of doing something physician should not have

done, or omitting something he should have done.

[Ed. Note.—For other definitions of "Negligence," see Words and Phrases.]

4. Physicians and surgeons ⇨18(8).

What is proper and usual practice and treatment by physician and surgeon is question for experts and cannot be otherwise established.

5. Physicians and surgeons ⇨18(8).

In action against osteopathic surgeon for negligent tonsillotomy, evidence *held* to support verdict for plaintiff.

The alleged negligence consisted in leaving a portion of a tonsil in patient's throat and cutting the pillars of the throat so that they grew together over the piece of tonsil remaining, causing patient to suffer from aseptic absorption of the infected portion of such tonsil and resulting in swollen glands and rheumatism. Further alleged negligence was defendants' subsequent failure to diagnose swelling in neck as being caused by the absorption of poisons from the remaining portion of the tonsil.

6. Physicians and surgeons ⇨18(10).

In action for malpractice, instruction that plaintiffs must prove that defendants knew or ought to have known consequences from allegedly negligent tonsillotomy *held* properly refused.

7. Appeal and error ⇨1056(1).

Where letter was offered to prove admission in certain passage therein, refusing to permit party to explain other passages in letter *held* not prejudicial.

In action for malpractice, while one of defendants was under examination by plaintiff, plaintiff offered a letter for impeachment purposes, but later stated that it was offered for the purpose of showing an admission of an error in technique. Defendant was not permitted to explain statement then, but was permitted, when under examination by own counsel, to explain only the passage containing the alleged admission.

Appeal from Superior Court, Santa Barbara County; J. T. B. Warne, Judge.

Action by Margaret Ingamells and husband against Jack Goodfellow and another. From a judgment in favor of plaintiffs, defendants appeal.

Affirmed.

Griffith Jones, of Los Angeles, for appellants.

Griffith & Thornburgh, of Santa Barbara, for respondents.

LUTTRELL, Justice pro tem.

This is an action for damages for alleged malpractice.

Plaintiffs are husband and wife, residing at Santa Maria, in Santa Barbara county, Cal. Defendants are duly licensed osteopathic physicians and surgeons practicing their profession together, as copartners, at said place. On May 1, 1926, plaintiff Margaret Ingamells consulted defendants professionally and was advised by them to have her tonsils removed. On June 10th of that year such operation was performed upon her by defendants, Dr. Goodfellow doing the actual operating and Dr. Bell administering the anæsthetic. For a time after the operation Mrs. Ingamells ran a temperature and her throat did not heal as it ought, and defendant Dr. Bell prescribed a gargle for the trouble. In about three months she began to suffer from rheumatism and neuritis in her arms, legs, and back. She consulted the defendants regarding same and they advised an X-ray of her teeth. They X-rayed one of her teeth, and her dentist, Dr. Dart, X-rayed some of them. Defendants advised the extraction of one of her teeth and she had this done, but her condition did not improve. In about six months' time after the tonsil operation a large swelling appeared on the right side of her neck, and defendant Dr. Bell, being called and after examining her throat, prescribed a gargle. On this occasion he advised her that a certain tooth was causing this swelling and the rheumatism and advised her to have this tooth extracted. Defendant Dr. Goodfellow also looked at her throat about this time and prescribed hot applications. Her dentist, Dr. Dart, examined the tooth in question and pronounced it a good tooth, but under the advice of defendants same was, on January 4, 1927, extracted and found to be a good, live tooth. The hot applications gave temporary relief, but in about three weeks' time the swelling on her neck grew worse and Mrs. Ingamells consulted a Dr. Coblenz, who advised that the right tonsil was bad and should be removed immediately. Plaintiffs then went to San Luis and consulted Dr. Proudfoot, a specialist. On the following day they again called upon defendant Dr. Goodfellow, who, at their request, examined Mrs. Ingamells' throat and offered to operate again, if plaintiffs desired him to do so, and upon their refusal to have him operate again, he offered to pay their expenses to Los Angeles to have his brother, a specialist, operate, provided he should find that his said brother was not coming to Santa Maria. After waiting several days and learning that Dr. Goodfellow's brother could not come from Los Angeles for at least two weeks' time, plaintiffs again consulted Drs. Coblenz and

Proudfoot, who advised an immediate operation. After waiting for about two weeks, and Dr. Goodfellow's brother not having come to Santa Maria, plaintiffs went to Santa Barbara and consulted one Dr. Wells, an ear, nose, and throat specialist. He examined Mrs. Ingamells' throat and neck and found pieces of tonsil on either side of her throat. The piece on the right side contained pus and was bound in by adhesions from a partially removed tonsil. The pillars of the tonsil had been cut and segregated and were partially covered over. He also found an enlarged lymphatic gland on the right side of the neck. He diagnosed her rheumatism and the swollen condition of the neck as being caused by absorption from this remnant of tonsil, and advised an operation at once. The following day, February 12, 1927, at St. Francis Hospital, he operated and removed the remnant of the right tonsil. About two days after this operation the temperature which the patient had been running since the swelling in her neck had first appeared, subsided. Dr. Wells treated the swollen neck for a time, and on March 14, 1927, operated on same by lancing it. This operation left a permanent scar on the neck. Shortly after the operation on the neck the swelling began to go down, the rheumatism to disappear, and the patient began to recover her health. Mrs. Ingamells was confined to her bed a considerable portion of the time between the operation performed by the defendants and the ones performed by Dr. Wells. She suffered much pain, and was unable to perform her usual household duties.

[1] On June 9, 1927, the present action was instituted, the basis of plaintiffs' claim being alleged negligence of defendants in the operation performed, and in the treatment following same. Defendants denied any negligence upon their part. The cause went to trial before the court sitting with a jury and a verdict was rendered awarding damages in the sum of \$2,304. Judgment was thereupon entered in plaintiffs' favor for this amount, with costs. A motion for a new trial was made and denied, and this appeal was then taken, in the alternative method, from such order denying a new trial and from the judgment. Inasmuch as no appeal lies from an order refusing a new trial, we will proceed to consider the appeal as being from the judgment only.

Appellants rely for a reversal of the judgment upon the refusal of the trial court to give a certain requested instruction, herein-after noted; error of the court in the rejection of evidence, and also upon the claim that the verdict was contrary to the evidence and against law.

The history of the case, as hereinabove narrated, is in accordance with the facts as given by the witnesses called by the respective parties. In fact, there is not much dispute between the parties as to the facts of the case.

Appellants, in effect, admit that in operating they left a portion of the right tonsil in Mrs. Ingamells' throat, but take the position that this does not constitute negligence, as they claim that it is a thing that frequently happens with physicians and surgeons engaged in general practice, in tonsil operations, and even with throat specialists, and further that in the removal of diseased tonsils the supporting walls of the throat are often unavoidably injured. In addition to this defense they assert, and at the trial attempted to prove, that Mrs. Ingamells' condition was caused by poison from diseased teeth, rather than from the portion of the diseased tonsil which they left in her throat.

[2-4] The law pertaining to the care and skill required of physicians and surgeons in operating upon and treating patients is well settled. In the case of *Pike v. Honsinger*, 155 N. Y. 209, 49 N. E. 760, 762, 63 Am. St. Rep. 655, cited with approval by our own Supreme Court in the case of *Hesler v. California Hospital Co. et al.*, 178 Cal. 764, 174 P. 654, the law was stated in the following language: "A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge." Numerous other authorities might be cited in support of this proposition. Negligence on the part of a physician has been defined as consisting of his doing something which he should not have done, or in omitting to do something which he should have done. *Perkins v. Trueblood*, 180 Cal. 437, 181 P. 642; *Houghton v. Dickson*, 29 Cal. App. 321, 155 P. 128; *McGraw v. Kerr*, 23 Colo. App. 163, 128 P. 870. As to what is or is not proper practice by a physician and surgeon in the examination and treatment of a patient, or what is or is not the usual practice and treatment, is a question for experts and can be established only by their testimony. *Houghton v. Dickson*, *McGraw v. Kerr* and *Perkins v. Trueblood*, supra.

[5] Applying these rules of law to the case before us, the question presents itself as to whether or not the defendants possessed that degree of learning and skill ordinarily possessed by physicians and surgeons practicing in the locality where this operation and sub-

sequent treatment occurred, and whether or not they exercised such required reasonable and ordinary care and diligence in operating upon and subsequently treating the plaintiff Mrs. Ingamells. Did these physicians and surgeons do something which they should not have done or omit to do something which they should have done? The record shows that in addition to presenting to the court and jury their own testimony in support of their complaint, plaintiffs called as witnesses in the case Dr. Charles S. Stevens, a duly licensed physician and surgeon, of Santa Barbara, who had at that time been practicing his profession there for fourteen years, and also Dr. George S. Wells, the specialist of Santa Barbara, who performed the last operation upon Mrs. Ingamells' right tonsil and also operated upon her neck, as hereinbefore noted. They also called Dr. E. K. Dart, the dentist who X-rayed and extracted two of her teeth. Dr. Stevens testified that he was a graduate of the medical department of the University of Minnesota and in his practice had removed tonsils and knew the technique involved therein, and that he also knew the standard set by physicians and surgeons in the community where the operation in question was performed. He further testified that a physician and surgeon, in the exercise of ordinary care and skill, at the time and place when and where the defendants operated upon Mrs. Ingamells' throat, should remove tonsils cleanly and without damage to the neighboring tissues. In other words, that the leaving of a portion of a tonsil in the throat and the cutting of the pillars of the throat in operating was not the exercise of that degree of skill and learning ordinarily possessed by physicians and surgeons in that locality. He also stated that the leaving of a portion of a tonsil in the throat and the cutting and lacerating of the pillars of the throat, so that they would grow together over the piece of tonsil left in, would cause the patient to suffer from aseptic absorption of the infected portion of such tonsil left in and might result in swollen glands, rheumatism, and heart trouble. He further testified that a physician, who has performed an operation for the removal of tonsils and has left a portion of a tonsil in the throat, would be able, either in a week, in three months, or in six months after such operation to determine whether or not, in operating, he had failed to remove all of the tonsil, and further that such physician would not, in the exercise of ordinary care and skill, diagnose a swelling occurring in the neck of the patient subsequent to such operation, on the same side thereof as that in which the portion of the tonsil was left, as being caused by a bad tooth, but that in the exercise of ordinary care and skill he would diagnose the swollen neck as being caused by the absorption of poison from the portion of the tonsil remaining in the throat. Dr. Wells, the ear, nose, and throat specialist, who was a graduate of Cincinnati Medical College, and who

had been practicing in Santa Barbara since 1911, and who, as heretofore stated, performed the last operation upon Mrs. Ingamells' tonsil and lanced her neck, testified to the same effect in these regards as did Dr. Stevens. He was positive that her trouble and suffering had been caused by poison from the portion of the infected right tonsil which had been left in by defendants when they operated, and not by any bad teeth. Dr. Dart, the dentist, testified that neither of the two teeth which he extracted, under defendants' direction, contained pus sacs. The defendants, in attempting to justify their acts in leaving a portion of the tonsil in Mrs. Ingamells' throat, called Dr. Louis C. Chandler, who is a graduate in medicine and osteopathy of the University of California and who had been for fourteen years connected with the public school clinic of Los Angeles. Dr. Chandler testified that in from 15 to 25 per cent. of the cases in which tonsils have been removed by general practitioners, portions of the tonsils are left in the throat and are visible after the operation. He further testified that teeth with pus sacs at their roots frequently cause rheumatism and neuritis, and that it is not possible to tell whether rheumatism is caused by ulcerated teeth or bad tonsils when one has both such teeth and tonsils. He also stated that glandular infection can be caused by infected teeth. This witness admitted that he had not operated upon any one's tonsils for fourteen years, or since he was a student.

From this review of the principal evidence given at the trial we think that it is demonstrated that the jury's verdict in plaintiffs' favor was justified by the evidence and is not contrary to the law.

[6] We will now consider the claimed errors of the court in the refusal of an offered instruction and in the rejection of evidence. Defendants offered and the court refused to give the following instruction: "You are instructed that unless the plaintiff proves by a preponderance of the evidence that the defendants knew, or ought to have known, that the consequences complained of would result from their acts or treatment, you must find for the defendants." In contending in their brief that the court erred in refusing this instruction, counsel for appellants content themselves with a mere citation of two California cases and a citation from California Jurisprudence, together with a brief quotation from one of the cases cited. The cases cited are: Perkins v. Trueblood, 180 Cal. 437, 181 P. 642, and Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128, and the citation from California Jurisprudence is found in volume 20 of that work on pages 1074 and 1075. No argument is made by them upon the point, and no effort whatever has been made to show wherein the error, if error it be, was prejudicial to appellants. Under these circumstances we perhaps could with propriety

disregard the point; however, we have given same due consideration and have concluded that the court was right in rejecting the instruction. Neither of the cases cited as supporting this instruction can be fairly construed as sustaining any such proposition as is therein contained. Had the court given the proffered instruction, it would have been tantamount to the court saying to the jury that a verdict should be returned in favor of the defendants, unless the plaintiffs had proven by a preponderance of the evidence that defendants knew, or ought to have known, when they performed the operation and left a portion of a tonsil in the throat and cut some of the pillars of the throat, or when they failed to discover what they had done in this regard after the operation, or failed to properly diagnose and treat the ailments of their patient following the operation, that, for example, the patient would subsequently have to submit to another operation which would leave a permanent scar upon her neck or would have to subsequently lose two good teeth. Had the infection from the part of the diseased tonsil left in by reason of the negligence of defendants caused the loss of an eye or a foot, we will say, instead of a scar upon the neck, is it possible that the law is such that no recovery could have been had unless the proof on plaintiffs' part showed that defendants, at the time of the negligent acts and treatment complained of, knew, or ought to have known, that such dire consequences would be the result of such acts and treatment? If such should be held to be the law, then in many cases such an instruction would, in effect, be an instruction for a directed verdict. It is true that the text in volume of California Jurisprudence cited supports the instruction in question. The learned writer of this text has cited several California cases as supporting the proposition of law set forth in the text. A careful reading of these cases, however, shows that this proposition of law, as stated in this text, finds no support in any of such cases. Nor have we found any authority, in this or any other jurisdiction, in accord with the doctrine set forth in California Jurisprudence and contended for by appellants. We therefore conclude that such contention is against reason and is not the law. In passing, we might say that had such offered instruction been modified to the extent of only requiring plaintiffs to prove that the defendants knew, or ought to have known, that serious consequences would result from their acts or treatment, instead of "the consequences complained of," same would then have been a proper instruction. At any rate, we find from an examination of the instructions given by the court that the jury was fully and fairly instructed in the law governing a case of this character.

[7] As to the only remaining point involved in this appeal, we feel that same hardly merits consideration. Counsel for plaintiffs introduced, without objection, a letter written to them by defendants under date of May 21, 1927. In this letter the following statement, among others, appears: "Also we offered to correct free of charge any error of technique in the removal of Mrs. Ingamells' tonsils, even offering also free of charge, the services of a Los Angeles specialist who Mr. and Mrs. Ingamells' desire to do the work." The letter was identified and put in evidence while the defendant Dr. Goodfellow was on the witness stand and under examination by plaintiffs' counsel, who first stated when offering the letter that same was offered for impeachment purposes, but later in the discussion which followed stated that same was offered for the purpose of showing an admission of an error in technique. Upon taking the witness for examination, counsel for appellants then sought to have him explain the various statements contained in the letter, claiming that he had the right to have each and every word and line contained therein explained and interpreted by the writer of the letter. The court, under objection by counsel for plaintiffs, refused to allow this to be done, and properly so. However, we find that later on when Dr. Goodfellow was upon the witness stand in behalf of the defendants, and under examination by his own counsel, he did, without objection, explain what he meant by writing the above-mentioned passage. We are satisfied that no prejudice resulted from his not having been given the opportunity to explain the other passages contained in the letter.

The judgment is affirmed.

All concur.

108 Cal. App. 713

DALY v. CRUSE.

Civ. 6127.

District Court of Appeal, Second District Division 1, California.

Oct. 2, 1930.

Appeal and error ⇨882(3).

Plaintiff suing on notes cannot complain on appeal of insufficiency of answer to raise failure of consideration, where case was tried on that issue.

Plaintiff for first time on appeal contended that answer did not raise issue of failure of consideration for notes sued on. Record disclosed that parties as well as judge of trial court understood allegations of answer were sufficient to raise defense of failure of consideration, and

case was tried on issue of fact thereby presented.

108 Cal. App. 697

In re ESCOVER'S ESTATE.

Civ. 7514.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

District Court of Appeal, First District,
Division 2, California.

Oct. 1, 1930.

Action by Mary L. Daly against Rex Reginald Cruse, also known as Reginald Rex Cruse. Judgment for defendant, and plaintiff appeals.

Affirmed.

Leo M. Daly and Earl L. Wisdom, both of Los Angeles, for appellant.

J. Russell Morton, of Pasadena, for respondent.

HOUSER, J.

The action upon which this appeal is predicated was brought by plaintiff against defendant on two promissory notes. The defense as to each of such notes was that "said note was given to plaintiff's assignor upon the express condition that plaintiff's assignor should pay to defendant, or for his account, the full face value thereof, to-wit, the sum of \$600 (\$1,000); that plaintiff's assignor then and there agreed to pay to defendant, or for his account, said sum of \$600 (\$1,000), and that plaintiff's assignor failed, and has ever since failed, to pay to defendant, or for his account, said sum of \$600 (\$1,000), or any part thereof, and that the consideration for said note has completely and totally failed." Judgment was rendered in favor of defendant, and plaintiff appeals therefrom.

It is first urged by appellant that the answer interposed by defendant "did not raise an issue of failure of consideration." But whatever objection may be made regarding the form of the answer presented by defendant, its obvious meaning is that, although admitting the execution of the note in question, defendant never received any consideration whatsoever therefor. In any event, the record discloses that the parties to the litigation, as well as the judge of the trial court, so understood the allegation of defendant, and the case was tried on the issue of fact presented thereby. In such circumstances plaintiff is in no position to now complain for the first time.

Appellant's further complaint, to the effect that the evidence was insufficient to support the finding and ensuing judgment of the trial court, is likewise unavailing. Although the testimony given by the several witnesses regarding what consideration, if any, was received by defendant for the notes upon which the action was based, was somewhat conflicting one with the other, the record discloses ample evidence to support the conclusion reached by the trial court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

1. Wills ⇐316(1).

Where will was probated after contest, jury trial of petition to revoke probate *held* properly denied under statute (Code Civ. Proc. § 1330; Const. art. 1, § 7).

Code Civ. Proc. § 1330 provides that, where original probate was granted without contest, trial by jury must be had in case of petition to revoke probate. Const. art. 1, § 7, secures right of jury trial in civil actions.

2. Jury ⇐19(7½).

Constitutional right to jury trial in "civil actions" applies only where such right existed at common law; hence inapplicable to probate matters (Const. art. 1, § 7).

[Ed. Note.—For other definitions of "Civil Action—Case—Suit—etc.," see Words and Phrases.]

3. Wills ⇐316(3).

Issue of undue influence is addressed primarily to equity side, and when subsequently arising in probate court, after previous determination, jury trial may be denied (Code Civ. Proc. § 1330; Const. art. 1, § 7).

4. Wills ⇐166(1).

In proceeding to revoke probate, evidence testator's brother was dissatisfied with will, whereupon testator executed more favorable will, showed no undue influence (Code Civ. Proc. § 1330; Const. art. 1, § 7).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Petition by certain heirs to revoke probate of the will of John P. Escover, deceased. From a judgment of nonsuit, petitioners appeal.

Affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellant.

Bohnett, Hill & Campbell, of San Jose, for respondents American Trust Co., Joe G. Perry, Manuel P. Escover, and George I. Rhoda.

David M. Burnett and John Burnett, both of San Jose, for proponent Joseph R. Crowley.

NOURSE, P. J.

John P. Escover died testate December 27, 1927. His will was offered for probate Decem-

ber 31 of the same year. Certain heirs filed a written opposition to probate on grounds of undue influence and lack of testamentary capacity. This contest was tried before the court without a jury and judgment was entered against contestants. The will was thereafter admitted to probate, and on April 15, 1929, three heirs filed a petition to revoke probate on the same grounds. This was heard before the court without a jury, and at the close of petitioners' case the court granted proponents a nonsuit. The appeal is from the judgment following the nonsuit and is taken on typewritten transcripts.

[1,2] Two points are raised by appellants: First, that the probate court erred in denying their motion for a trial by jury. The denial was based upon the express provisions of section 1330, Code of Civil Procedure, which reads in part: "In all cases of petitions to revoke the probate of a will wherein the original probate was granted without a contest, * * * a trial by jury must be had." As the original probate was granted after a contest wherein the contestants might have had the issues tried by a jury if they had so demanded, it is evident that, so far as our statutory law is concerned, they did not have that right on the second trial. Hence, the only question remaining is whether our statutory law is valid in view of section 7 of article 1 of the Constitution, which secures the right of trial by jury "in civil actions." This was determined adversely to appellants in *Estate of Dolbeer*, 153 Cal. 652, 657, 96 P. 266, 15 Ann. Cas. 207. This "right" was secured only in those cases where it existed in the common law. It was not recognized as a right in probate matters in the common law because such matters belonged to the ecclesiastical jurisdiction, where trial by jury was not a right.

[3] If the point be put on the question of discretion, the appellants likewise fail to show error. The issue of undue influence is one which is primarily addressed to the equity side of the court, and when it arises in a probate court, after having previously been fully heard and determined, we see no error in a denial of a demand for a jury, with its consequent delays and expense. *Estate of Dorn*, 69 Cal. App. 413, 415, 231 P. 346.

[4] Second, that the probate court erred in granting a nonsuit. On the issue of lack of testamentary capacity there was no evidence except the evidence that the testator was of sound mind. On the issue of undue influence the evidence showed nothing more than that testator's brother complained that he had not been given a greater portion of the estate in a former will, and that the testator then called in an attorney who prepared the will under attack which gave the brother a larger share. There is no evidence tending to show that any pressure was brought to bear directly upon

the testamentary act. From appellants' own case it is shown that the will was not made in the presence of or at the connivance of any person benefited by it, but that it was the free and voluntary act of the testator. *Estate of Presho*, 196 Cal. 639, 651, 238 P. 944, and cases there cited. Upon contestants' whole case there is no evidence that would have justified a judgment in their favor, and hence the trial court did not err in granting the nonsuit.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

108 Cal. App. 559

FALLIS et al. v. JULIAN PETROLEUM CORPORATION et al.

Civ. 6272.

District Court of Appeal, Second District, Division 2, California.

Sept. 26, 1930.

Mines and minerals 78(7).

Difficulty of measuring damage for non-completion of oil well, causing property to be drained by surrounding wells, did not warrant sustaining demurrer to complaint, without leave to amend.

Complaint alleged, especially with reference to one cause of action, that leased property was in proved oil territory; that drilling of well to depth of 5,200 feet, as contemplated by lease, would have resulted in oil and gas in large quantities; that negligent failure to drill to depth mentioned caused property to be drained of oil, and gas pressure reduced by wells on adjacent property; and that, by reason thereof, lessors were damaged in sum of \$67,500. It was also alleged that lessee knew that prolific oil and gas producing sands underlay leased property.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Garland P. Fallis and another, against the Julian Petroleum Corporation and another. A demurrer to the complaint was sustained without leave to amend as to defendant named, and plaintiffs appeal.

Reversed.

Superseding former opinion in 285 P. 1077.

Harold C. Morton and Fredericks, Hanna & Morton, all of Los Angeles, for appellants.

Anderson & Anderson and A. G. Ritter, all of Los Angeles, for respondent.

CRAIG, J.

By a contract dated February 26, 1925, the appellants leased to the defendant Courtney Petroleum Company for a period of five years certain real property upon which the latter agreed to drill to a depth of 5,200 feet for oil, gas, and other allied products, and to pay as rental \$2,500 from the first production and one-sixth of all other production. The lessee drilled to a depth of 4,158 feet, whereupon by written assignment and a collateral contract, it delivered possession to respondent Julian Petroleum Corporation. The lessors do not appear to have consented to the assignment. On December 20, 1926, the lessors commenced this action against their original lessee and its assignee by a complaint consisting of three causes of action, embracing said lease and contemporaneous agreements, alleging that the Julian Corporation had not drilled to a depth exceeding 4,162 feet, that both companies had ceased operations, and that through their negligent and unworkmanlike conduct of the project production had failed. The original lease provided that "the terms and conditions hereof shall be binding upon, and accrue to the benefit of the heirs, executors, successors and assigns of the respective parties hereto, and an acceptance of an assignment hereof, by any person, shall be construed as a promise on his part to be bound by and perform all of the lessee's covenants herein contained. Time is of the essence of this lease." By the assignment it was agreed that the Courtney Company sold and conveyed to the Julian Corporation "all of the right, title and interest of the original lessee and present owner in and to said lease and all rights thereunder." The collateral agreement recited that said assignment was made upon conditions and covenants not contained therein, but which were contained in the collateral contract; that, if the well be put on production at a depth less than 4,600 feet, but should make less than 350 barrels, it should be deepened to a specified horizon located approximately 5,000 feet to 5,100 feet; that the assignee "does not undertake to complete said well as a producing oil well at said depth, but does agree to properly drill the same to said depth and there endeavor in the usual and customary manner to place the same on production." By the terms of the original lease, it was recited that it was impossible to determine from current developments as to the necessary depth of the well, but that at a later date the parties would confer regarding the progress of other wells in that vicinity, and "determine what is the best to do for their mutual interests," and the lessors reserved the right to determine the lease for failure to perform any of its terms or conditions upon ten days' notice of election so to do. Neither of these two provisions appears to have been observed by the parties. The plaintiffs alleged that, "had a well been

drilled on said leased property as so required by said lease to a depth of fifty-two hundred (5,200) feet, or production at a lesser depth, a well producing oil and gas in large and commercial quantities would have resulted"; that one-sixth of the production would have been worth \$65,000; that the Julian Corporation failed to continue drilling to a depth of 5,200 feet, or to a lesser depth at which mineral in paying quantities might be found; and that it had not paid the \$2,500 nor placed the well on production by diligent or continuous operation in good faith.

The respondent Julian Corporation interposed a demurrer to the complaint, upon general grounds, and specifically urging that it failed to allege any obligation of said corporation to drill to a depth of 5,200 feet, what, if any, would have been the initial production, how long the well would have produced, or at what rate, or the price of oil over any period of production, or upon what basis the plaintiffs computed the amount of \$67,500 for which they prayed judgment. The demurrer was sustained without leave to amend as to the Julian Corporation, and the plaintiffs appealed.

The first point advanced by appellants is well taken. While the respondent, by accepting an assignment of the lease, became liable only to the lessee, its entry into possession created the relation of landlord and tenant between the original lessor and the assignee, and its holding created a privity of estate. *Bonetti v. Treat*, 91 Cal. 223, 27 P. 612, 14 L. R. A. 151; *Webb v. Jones*, 88 Cal. App. 20, 263 P. 538.

It is observed that the sublessee did not agree with the lessee to drill below 5,100 feet, nor to complete a producing well, and that the original parties did not confer regarding surrounding developments as to means or methods contributing to their mutual benefit. However, regardless of these omissions, without some knowledge as to the necessary depth, the probable regularity or volume of flow, if any, or the market price of such production, the amount of damages or rentals is wholly unascertainable. While, as argued by appellants, a demurrer admits the pleaded facts, the allegations and constituent contracts concede that respondent's sole neglect or evasion consisted of a failure to drill to a depth of 5,200 feet, that it agreed to pay no rental except from production, and that it did not contract to furnish a producing well. Respondent agreed to drill but 5,100 feet, and its experienced drillers may have determined at a depth of 4,162 feet that further expenditures for that purpose would be futile. Damages for the breach of covenants, such as are here presented, may be agreed upon in advance, and an amount so fixed will be presumed as adequate compensation for losses incurred by a lessor through failure of per-

formance by the lessee. Civ. Code, §§ 1670, 1671. When profits are wholly prospective and speculative or conjectural, and the success or failure of such an experiment is of mutual interest, neither party is the arbiter of the extent to which or the diligence with which operations shall proceed. *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 72 C. C. A. 213. Hence, if the compensation or penalty be not specified by the parties, or if it be impracticable or extremely difficult of estimation, they are relegated to proper proceedings in equity for relief. *Hanlon Drydock, etc., Co. v. McNear*, 70 Cal. App. 204, 232 P. 1002; *Brewster v. Lanyon Zinc Co.*, supra; *Craig v. Wade*, 159 Cal. 172, 112 P. 891. "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Civ. Code, § 3301.

In the instant case even the initial payment of \$2,500 is dependent only upon a mere venture, and is wholly contingent upon uncertainties, the extent of which cannot be estimated or determined judicially in dollars and cents. It is a matter of common knowledge that the success or failure of such enterprises, and the casualties and incidental effort and expense of production, if any result, are matters ever held in suspense until mineral is found or the project is abandoned. By the most favorable reading of the complaint and the contract of the parties, this fact appears to have been recognized. It was expressly stated that "the lessee agrees as a further consideration to pay the lessor one-fourth ($\frac{1}{4}$) of the entire production from the lease, of all oils or other hydro-carbons"; "said twenty-five hundred dollars (\$2,500) oil bonus to be paid out of twenty-five per cent. (25%) of the gross production of oil, gas and other hydro-carbons;" "a one-sixth royalty and the twenty-five hundred dollars (\$2,500) provided for in said lease to be paid out of twenty-five per cent. (25%) of the first oil."

The principles above announced were aptly applied in the case last cited (*Craig v. Wade*, supra), wherein the plaintiff sought to recover upon alleged misrepresentations as to the value of certain oil properties. Our Supreme Court there said: "Twenty thousand dollars may have been expended in sinking a well which has not yet reached oil sands, and which may never reach them. To a sanguine man in the expectation of soon striking oil, the well may have a value of many hundreds of thousands of dollars. To the pessimistic man, who believes oil will never be struck, the \$20,000 expended is money lost, and the well is valueless. So, too, if oil be in fact found, the duration of its flow is entirely uncertain, and the flow itself may increase or decrease without apparent reason. If the well yields 100 barrels of oil today, it may yield 1,000 barrels, or none at all, tomorrow. To place a value in terms of money upon such a flowing well must therefore itself of necessity

be a matter of opinion merely, since it is not within human knowledge to foresee the contingencies which may result in greatly enhancing or utterly destroying its output."

There are other decisions in this state of like import. *Escondido Oil Co. v. Glaser*, 144 Cal. 494, 77 P. 1040; *Burrows v. Petroleum Dev. Co.*, 181 Cal. 253, 184 P. 5; *Sledge v. Stolz*, 41 Cal. App. 209, 182 P. 340.

Numerous decisions from other jurisdictions expressly detail evidence of proximate locality of adjacent wells, and the quantity of their production, as a basis for calculating damages, from which it may be inferred that the pleadings were so framed as to permit of its introduction. Likewise, in *Julian Petroleum Corp. v. Courtney Petroleum Co. (C. C. A.)* 22 F.(2d) 360, 362, wherein the same lease here in controversy was involved, it is recited that witnesses testified "that they were familiar with the Athens field, and the location and the production of other wells in that field; that the well in question was favorably located; that, if drilled to the Miley sand, the well would, in their opinion, have produced oil; that the estimated cost of drilling the well to the Miley sand would be a certain amount; that the production of oil would be a certain quantity; that the cost of operation would be a certain amount; and that the oil would sell for a certain price." However, we are of opinion that it was error to sustain the demurrer without leave to amend. The plaintiffs should be permitted to proceed further in the premises as they may be advised.

Authorities upon which the appellants rely in support of their theory of recovery are not persuasive, since they either sound in tort or arise from facts furnishing fixed bases for the estimation of damages, such as the known production of other wells in the immediate locality, as was the case in *Wheeland v. Fredonia Gas Co.*, 92 Kan. 50, 139 P. 1010. We think the rules applicable to the instant case are so well established that to confuse them with distinctions would serve no good purpose.

The judgment is reversed.

IRA F. THOMPSON, J. (concurring).

I concur in the judgment, but deem it proper to set forth my views therefor.

The third cause of action in particular alleges that the leased premises were in proven oil territory; that the drilling of a well to the required depth of 5,200 feet in a workmanlike and careful manner and with due diligence would have resulted in the production of oil and gas in large quantities; that, by reason of the negligent failure to drill to the depth mentioned, the property was drained of its oil, and its gas pressure reduced by wells on adjacent and surrounding property; that, by reason thereof, plaintiffs have been damaged

in the sum of \$67,500. There is also an allegation that the defendants well knew that "highly prolific oil and gas producing sands underlay said property" at the time of the execution of the lease and prior to the assignment to the defendant. The last averment is tantamount to an allegation that the parties had in contemplation the possibility of the property being drained of its mineral substance by the surrounding wells, or at least it is readily amendable to state that ultimate fact. I do not find the California authorities relied upon by respondents to be in point. Concededly they establish the rule of law that in similar instances liquidated damages are permissible on account of the extreme difficulty of fixing damages arising from the breach of such a contract.

The language of *Parkinson v. Langdon*, 36 Cal. App. 80, 171 P. 710, 712, indicates, however, that the difficulty of measuring the damage does not of necessity mean that he who is wronged by the breach of a solemn obligation shall be remediless. It is there said: "The line of distinction between profits which are remote, consequential, or not within the contemplation of the parties, and those which are proximate and absolute and certain, and within the contemplation of the parties, 'seems to rest in the question whether they are to arise directly out of the contract in question or its subject-matter, and to constitute the immediate fruits of the contract, or whether they are to result from collateral engagements or enterprises. Where the profit to be made was the inducement to the contract, such profit is the measure of damages. So a recovery may be had for the loss of profits which are the direct and immediate fruits of the contract itself. Such profits are not to be regarded as consequential, remote, or speculative in character, but are regarded as part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' *Id.* The foregoing is about as satisfactory an explanation of the philosophy of the rule as we can find in the books, and, it seems to us, furnishes a safe guide to a solution of the question here. The contract plainly shows that the land was to be planted to a specific crop, and none other. Both parties understood this and contracted with reference to that understanding. Plaintiff's compensation was to be measured by an agreed percentum of this specific crop, and not otherwise. Given, land suitable for growing beans; condition of soil, climate, moisture, etc., favorable to the production of a profitable crop, and nothing supervening to prevent such result except the failure of the contracting party to do what his contract required of him, it seems to us we have a clear case where the loss to the lessor 'is such as might naturally be expected to follow from the breach,' and that he would

be entitled to the 'profits which would ordinarily and naturally, and in the usual course of things, have been derived from performance,' and furnishes an instance where 'the loss flows directly and naturally from the breach of the contract itself,' and is recoverable, since the loss is 'naturally incident to the contract, and may be fairly supposed to have been within the contemplation of the parties when it was made.'" To the same general effect reference may be had to *Sanford v. East Riverside Irr. Dist.*, 101 Cal. 275, 35 P. 865, and *Meer v. Cerati*, 53 Cal. App. 497, 200 P. 501.

I am convinced that the court should have permitted the plaintiffs to make proof, if such they could, of the allegation that they had been damaged by the draining of their property by surrounding wells. A few quotations from persuasive authorities in other jurisdictions will indicate the reasons I entertain for such opinion. In *Blair v. Creek Oil & Gas Co.*, 148 Ark. 301, 230 S. W. 286, 288, 19 A. L. R. 430, we find two pertinent expressions of the court as follows:

"The record shows that drilling wells is very expensive and is only undertaken where the lessee has a large area of acreage in a block. It is a matter of common knowledge that the landowner is not equipped with machinery for drilling and could not purchase such machinery on short notice, if able to do so. Hence, when he leases his land to another with the exclusive right to drill for oil and gas on it for a stipulated period of time, there is an implied covenant on the part of the lessee to protect the land at least from wells drilled by him on adjoining property which will necessarily draw the gas from the lessor's land. If there had been no lease on his land, the lessor could have had all the time during which the wells were drilled on adjoining land to have arranged for the drilling of an offset well on his land and in case a producing well was brought in on the adjoining land which would draw the gas off his own land. Of course, if he failed to make such an arrangement, the loss would fall upon himself. In case, however, he has leased his land to another and has given the lessee the exclusive right to drill on his land for gas, it is obvious that the mere right of forfeiture in case the lessee would not drill a protection well would not afford him adequate relief. * * *

"It appears from the record that expert witnesses acquainted with the gas field may testify with reasonable accuracy as to the number of wells which should have been drilled on the leased land for protection from drainage. Such witnesses might also testify with reasonable accuracy as to the quantity of gas obtained from the wells. They did say that the sand in which the gas was found was sufficiently porous that a well would draw from underneath the ground gas for a distance of a quarter of a mile in all directions. The record in the case also shows that the three wells

operated by appellee on the adjacent tract will in due course of time draw all the gas from underneath the land of appellants. The lessee under the facts disclosed by the record is liable to the lessors for their proportionate share of the gas taken by the wells drilled so near their boundary lines as to draw off the gas underneath their land. There is no reason why it cannot be ascertained with reasonable certainty what quantity and quality of gas has been and will be taken from appellants' land through the wells drilled and operated by appellee on the adjoining land. *Culbertson v. Iola Portland Cement Co.*, 87 Kan. 529, 125 P. 81, Ann. Cas. 1914A, 610."

And on rehearing it was also said: "From the evidence already taken it would seem that the gas-producing on the leased premises and the land adjacent thereto is of uniform character, and that expert witnesses can with a reasonable amount of certainty tell the amount of gas that will be drawn from the leased premises by the wells dug near the boundary line by the lessee on the adjacent premises. When the amount of gas that will be drawn from the leased premises is ascertained, the amount of damages to be recovered can be readily fixed by the royalty that the lessor was to receive."

In *Daughetee v. Ohio Oil Co.*, 263 Ill. 518, 105 N. E. 308, 310, in which case the plaintiff sought to recover damages for the breach of a covenant requiring the lessee to drill additional wells after the first one had proved the territory, the opinion reads in part as follows: "Plaintiff in error contends that, even if a right of action exists, no recovery can be had because the damages are uncertain, remote, and speculative. This point is preserved by an exception to the refusal of the trial court to hold as law a proposition embodying plaintiff in error's view upon this point. It is undoubtedly the law that, where speculation or conjecture must be resorted to for the purpose of determining whether the injury results from the wrongful act charged or from some other cause, then the law denies the injured party his action for damages. This is only another way of stating the familiar rule that damages must be the proximate result of the injury complained of. This rule was announced by this court in *Indianapolis, Bloomington & Western Ry. Co. v. Birney*, 71 Ill. 391, which is relied on by plaintiff in error in support of this contention. The right of recovery being assumed, plaintiff in error cannot escape liability because the damages are difficult of exact ascertainment. The nature of the inquiry here is such that it is practically impossible to ascertain with mathematical certainty the exact amount of defendant in error's damages. This, however, affords no answer to a cause of action resulting from the breach of contract or a duty imposed by law. The unliquidated damages growing either out of breach of contract or the commission of a tort are seldom susceptible of exact

measurement. If such exactness were required, the law of damages would be of little practical value. The rule is that, while the law will not permit witnesses to speculate or conjecture as to possible or probable damages, still the best evidence of which the subject will admit is receivable, and this is often nothing better than the opinion of well-informed persons upon the subject under investigation. *Chamberlayne on Evidence*, § 2332. Plaintiff in error does not contend that the court allowed improper and irrelevant evidence to be introduced in regard to the damages."

In *Culbertson v. Iola Portland Cement Co.*, 87 Kan. 529, 125 P. 81, 83, Ann. Cas. 1914A, 610, we read: "Since the number of wells to be drilled on the land was not specified, there was an implied obligation on appellants to fully develop the land and put down as many wells as were necessary to secure to appellee his proportionate share of the pool of gas. *Kleppner v. Lemon*, 176 Pa. 502, 35 A. 109; *Thornton on Oil and Gas*, § 91. According to the findings, appellants failed to develop the land in such a way as to give appellee his proportionate share of the gas produced from the pool, and that to have done so would have required the sinking of at least another well. Having failed in this respect, the appellee is entitled to recover his share of the gas actually taken from his land, without regard to which side of the line the wells through which it was taken were sunk. The quantity so taken appears to have been fairly well established by the evidence. In *Howerton v. Gas Co.*, 82 Kan. 367, 369, 108 P. 813, 814, 34 L. R. A. (N. S.) 46, it was said that: 'No reason is seen why witnesses of experience, acquainted with the gas field, may not testify with reasonable accuracy as to the number of wells which should have been drilled on the leased land, both for protection from drainage by neighboring leaseholds and to obtain the gas underneath the land.'"

And lastly, I quote from *Wheeland et al. v. Fredonia Gas Co.*, 92 Kan. 50, 139 P. 1010, as follows:

"This action was brought for failure to develop the land, a trial was had, and evidence was produced. Under these conditions, it was impossible for the appellees, there being no further development of the land, to prove the actual amount of damages they had suffered. The nature of the case is such that it is impossible to tell what a well will develop until it is sunk, and yet experts in oil territory are able to furnish reasonably accurate estimates of what a certain territory will produce, estimating from producing wells in the locality. This the appellants did in this case. The appellee demurred to their evidence, and the court sustained the demurrer. There was evidence tending to show that the one well was not sufficient development to protect the land from the gas being drawn from it by wells on adjacent lands. * * *

"The plaintiff in this action followed the procedure indicated by these decisions and offered the only evidence possible to establish a claim for damages, to wit, the opinions of experts. To say that the evidence in this case did not furnish a reasonable basis for estimating damages is to override the reasoning of all these cases. All the business of leasing lands for development is based upon the opinions of men engaged in the business as to the value of the tracts leased for that purpose, and it is competent evidence; although it is impossible thereby in a particular case to show the exact amount of damage which has been suffered, it is sufficient to enable a jury to estimate the damages and to find accordingly."

Likewise the case of Julian Petroleum Corp. v. Courtney Petroleum Co. (C. C. A.) 22 F.(2d) 360, supports the view I entertain.

I concur: WORKS, P. J.

108 Cal. App. 688

**SCHMITT v. NORTHERN COUNTIES LAND
& CATTLE CO. et al.**
Civ. 7403.

District Court of Appeal, First District,
Division 2, California.
Sept. 30, 1930.

1. Appeal and error ⇨1001(1).

Finding of jury supported by competent evidence is conclusive on appeal.

2. Appeal and error ⇨1002.

Finding, in action for commission for purchase of cattle, that there was no secret agreement between broker and purchaser's foreman, *held* conclusive where evidence was conflicting.

3. Corporations ⇨1.

Rule justifying court in disregarding separate corporate entity, stated.

To justify court in treating a corporation and the individual owning all of its stock as a single legal entity, it must not only appear that there is such a unity of interest that the individuality of the corporation is merged in that of the individual, but also that the facts are such that an adherence to the fiction of the separate existence of the corporation, would under the particular circumstances, sanction a fraud or promote injustice.

4. Corporations ⇨522.

That two separate corporations, purchasing separate lots of cattle under agree-

ment of their agent to pay 50 cents per head to broker, were entirely owned by one individual, did not justify court in rendering joint judgment against corporations.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by H. H. Schmitt against the Northern Counties Land & Cattle Company and others. Judgment for plaintiff, and defendants appeal.

Reversed and remanded, with directions.

Charles Josef Carey and William Clark Crittenden, both of San Francisco, for appellants.

George A. Clough, of San Francisco, for respondent.

DOOLING, Justice pro tem.

In this action plaintiff and respondent Schmitt sued to recover commissions aggregating \$2,608.50 for the purchase of cattle at 50 cents per head. He joined as defendants Northern Counties Land & Cattle Company and William Clark Crittenden, Inc., both corporations, which are the appellants herein, and William Clark Crittenden and Richard Meyer, individuals. At the close of plaintiff's case a nonsuit was granted as to William Clark Crittenden and plaintiff voluntarily dismissed Meyer. The jury brought in a verdict against the two appellants jointly for \$2,636.50. The appeal is from the judgment entered pursuant to this verdict.

The evidence showed without contradiction that Richard Meyer was employed under contract by appellant Northern Counties Land & Cattle Company as ranch foreman and that he also performed services at various times when called upon by appellant William Clark Crittenden, Inc., and other corporations owned and controlled by William Clark Crittenden. The cattle here in question were purchased by Meyer through arrangements with respondent Schmitt, and were delivered partly to one appellant and partly to the other. It is not disputed that Meyer agreed to pay Schmitt 50 cents per head for his services, nor is it questioned that Meyer had authority to bind either appellant by such agreement.

[1, 2] It was claimed by appellants on the trial that respondent could not recover these commissions because of a secret agreement with Meyer to split the commissions with him. This issue was presented to the jury under instructions offered by appellants and given by the court, and the jury must have found that no such agreement existed. If there is any competent evidence to support this finding, the question is not open to appellants here. Appellants introduced in evidence a letter from Schmitt to Meyer written some time be-

fore the transactions here in question which read in part:

"So I have this offer to make on the stock I help get for you I will expect you to pay me a \$1.00 * * * and I would want you to know that you get the cattle cheap enough so you could well afford to pay the commission on your own cattle but I always would try to make the other fellow pay $\frac{1}{2}$ of the commission after I get him cut down if I could.

"And on all cattle you could send me buyers for I will get my dollar some way and I would split it in $\frac{1}{2}$ with you and glad to do so."

As to this letter, Schmitt testified that at the time it was written he believed Crittenden and Meyer were partners, and in the first sentence above quoted he was referring to cattle bought by Meyer and Crittenden and expected to receive and retain the full commission; and that the agreement to split commissions with Meyer referred to certain "outside" buyers that Meyer had informed Schmitt he might secure to buy cattle through him. The language on its face would seem to support this construction. The first sentence refers to "the stock I help get for you I will expect you to pay me a \$1.00," etc. The second sentence, on the other hand, refers to "cattle you could send me buyers for." At the very least the language was ambiguous and so would admit of oral testimony to explain its meaning. This and other testimony, not necessary to recite, did no more than create a conflict which was resolved in favor of respondent by the jury.

[3, 4] Appellants further contend that the evidence disclosed a several liability upon each defendant and did not warrant a joint judgment against both for the full amount. Meyer's dealings with respondent were chiefly oral. He testified that in buying the cattle he was acting for Crittenden and both corporations appellants. But the evidence showed a sale of 1,433 cattle by one Anderson under a written contract to William Clark Crittenden, Inc., and a sale of about 4,000 cattle (the number was not definitely established) by Reid-Cashion Land & Cattle Company to Northern Counties Land & Cattle Company under a written contract. It also showed delivery of another lot of 184 cattle to one Beckley through Crittenden personally.

Respondent seeks to justify the joint verdict for the full amount on the theory that both corporations are entirely owned and controlled by William Clark Crittenden and are, therefore, "one-man corporations." However, the rule was recently reiterated in *Continental Securities, etc., Co. v. Rawson*, 208 Cal. 228, 238, 230 P. 954, 958, and is thoroughly settled, that in order to justify a court in treating a corporation and the individual owning all of its stock as a single legal entity, it must not only appear that there is such a unity of interest that the individuality of the corporation is merged in that of the individual, but also "that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice." Respondent has not attempted to point out nor can we discover in this case any facts which would justify us in holding that to recognize the separate entities of the two corporations appealing herein would sanction any fraud or in any wise promote injustice.

Here we have simply the case of two separate corporations purchasing separate lots of cattle under the agreement of their agent to pay 50 cents per head to respondent. We can find no legal justification for requiring either corporation to pay the commission on the cattle purchased by the other. In our opinion the joint judgment against both cannot stand. It will only be necessary on a new trial, however, to try the single question of the amount of liability of each defendant, since the jury in the former trial has found against the defense of a secret agreement to share commissions with appellants' agent and the authority of the agent to bind the appellants to pay the commissions is not disputed. *Morris v. Standard Oil Co.*, 188 Cal. 468, 473, 474, 205 P. 1073.

The judgment is reversed, and the cause remanded for a new trial solely upon the issue of the several amounts which plaintiff is entitled to recover from each defendant, with directions to the trial court, upon the settlement of such amounts, to render judgment for plaintiff and against each defendant respectively for the amounts so found.

We concur: NOURSE, P. J.; STURTEVANT, J.

108 Cal. App. 419

SHEEHAN et al. v. VEDDER et al.
Civ. 222.District Court of Appeal, Fourth District,
California.

Sept. 23, 1930.

Hearing Denied by Supreme Court
Nov. 20, 1930.**1. Evidence ⇨48.**

Appellate court took judicial notice of terms of prospecting permit by General Land Office of United States Department of Interior, extension thereof, and letter by commissioner to permittee (Code Civ. Proc. § 1875).

2. Pleading ⇨350(3).

Allegations in pleading contrary to facts of which judicial notice is taken are not considered as true in determining sufficiency of pleading.

3. Mines and minerals ⇨78(2).

Where defendant defaulted on contract granting right to prospect for, drill, and develop oil, quieting title in plaintiffs *held* not inequitable.

In his contract, defendant had agreed to install on the lands a substantial and adequate drilling outfit and commence actual drilling operations at least 60 days prior to the time when required by the terms of a prospecting permit issued by the Land Office of the Department of the Interior of the United States to plaintiff. This defendant failed to do, and plaintiff might have forfeited his rights under the prospecting permit had he not entered into a similar contract with coplaintiff, who began operations three days before the permit, as extended in time, would have expired.

4. Quieting title ⇨15.

Contract not specifically enforceable is no defense in quiet title action (Civ. Code, §§ 3386, 3390).

5. Specific performance ⇨6.

Contract is not specifically enforceable unless remedy is mutual to both parties.

6. Specific performance ⇨73.

Contract involving performance of number of successive acts or personal services will not be specifically enforced (Civ. Code, § 3390).

7. Specific performance ⇨32(3).

Contract granting right to prospect for, drill, and develop oil and gas, giving prospective driller right to quitclaim, *held* not mutual and not specifically enforceable.

8. Mines and minerals ⇨78(7).

Contract granting right to prospect for, drill, and develop oil and gas *held* not suffi-

cient defense in quiet title action, because not specifically enforceable.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Harry Sheehan, sometimes known as Harry F. Sheehan, and another, against Dwight G. Vedder, sometimes known as D. G. Vedder, and others. From a judgment for plaintiffs on the pleadings, defendants appeal.

Affirmed.

Superseding opinion in 285 P. 724.

Robert M. Pease and Roy P. Dolley, all of Los Angeles, for appellants.

Emmons & Aldrich, of Bakersfield, for respondents.

MARKS, J.

This appeal comes before us for the second time after a rehearing granted by this court from its decision rendered on February 19, 1930.

In the original opinion (285 P. 724), written by the late Mr. Presiding Justice Sloane, there is a clear and distinct statement of the facts as they then appeared from the record before this court. The portions of such statement material to this appeal are as follows:

"This action was brought by the plaintiffs, Harry Sheehan and Elbe Oil Land Development Company, a corporation, to quiet title to a tract of land in the county of Kern, described as the S. W. ¼ of section 18, township 28 S., R. 29 E., M. D. B. & M.

"It is alleged in the complaint as the basis of plaintiffs' right of action: That plaintiffs have, and are entitled to have, the exclusive right to prospect for oil or gas, and to drill for oil or gas in and upon said premises.

"Dwight G. Vedder, sometimes known as D. G. Vedder, R. D. Vedder, and Vedder Brothers, Inc., a corporation, hereinafter referred to as defendant Vedder, answered to the complaint by setting up and alleging an adverse interest in this property under a drilling contract entered into by and between the plaintiff Harry Sheehan, as party of the first part and the defendant Vedder as party of the second part, on the 3d day of June, 1926, about a year prior to the beginning of this action, the terms of which contract will be later considered.

"The exclusive right to prospect for, drill, and develop oil on this land claimed by plaintiffs was acquired by the plaintiff Sheehan under United States prospecting permit serial No. 010684 in the United States Land Office at Visalia, California, under and pursuant to the Act of Congress approved February 25, 1920, * * * and it is undisputed

that this permit was in full force and effect on June 3d, 1926, and that Sheehan was empowered thereunder to enter into the agreement of that date, with defendant Vedder. The substance of such agreement is as follows:

"Said party of the first part does hereby grant and give unto said party of the second part the right to drill and prospect for oil and gas upon some portion of the land embraced in said permit, as above described, and said party of the second part does hereby covenant and agree that he will commence the actual drilling of a well thereon, on or before six months after oil has been discovered in paying quantities in a well which is to be drilled by said party of the second part on either section in the above township and range they may elect. Said party of the second part is to commence operations for the drilling of said well on or before three years and the drilling thereof is to be conducted with diligence until oil or gas is encountered in commercial quantities on said land or until such time as said party of the second part is satisfied that no oil or gas exists under said land. * * *

"Said party of the second part, in addition to the foregoing, agrees to comply with all the drilling requirements of said Permit and the drilling requirements of any and all leases which may hereafter be granted for said land by the United States, at least sixty days prior to the time when such drilling is required by the terms of said Permit and leases.

"Said party of the first part agrees, in the event the Secretary of the Interior so requires, to assign to the party of the second part, the area covered by this contract; said assignment, if made, shall not change or alter the royalties to be paid said party of the first part as hereinafter set forth.

"After the discovery of oil on said land in paying quantities the parties of the first part agree to make application for a lease thereof to the United States, and thereafter, and subject to the approval of the Secretary of the Interior, to sublet to the party of the second part or his successors in interest, the portion of the Permit area covered by this contract. * * *

"After the discovery of oil in paying quantities, the party of the second part, in addition to satisfying the requirements as to royalties due the United States, agrees to pay to the parties of the first part the equivalent of five per cent. (5%) of all oil and gas marketed from that portion of the said land upon which the royalty due the Government is five per cent. (5%), in cash at the prevailing market price. * * *

"Time is hereby declared to be the essence of this contract, and in the event the party of the second part for any reason fails

to comply with the terms hereof, or with any extension hereof in writing, signed by the parties hereto, this contract may be at the option of the party of the first part, terminated and forfeited by giving the party of the second part thirty days' (30) written notice thereof by registered mail at his address at 551 Chamber of Commerce Building, Los Angeles, California, and said party of the second part covenants, promises and agrees that should such notice of forfeiture be given, he will, if the Permit issued to said Harry F. Sheehan has been assigned to him, reassign the same to the said party of the first part within ten days after receiving such notice. * * *

"The party of the second part at any time before or after the discovery of oil on said premises may quitclaim said property or any part thereof to the parties of the first part, their successors or assigns, and thereupon all rights and obligations of the parties hereto, one to the other, shall thereupon cease and determine as to the premises quitclaimed.

"This contract shall inure to the benefit of, and be binding upon the heirs, assigns and successors in interest of the respective parties hereto.

"In witness whereof, the parties hereto have set their hands the day and year hereinabove first written.

"Harry F. Sheehan,

"Justine Sheehan,

"Parties of the First Part.

"D. G. Vedder,

"Party of the Second Part."

"Defendant Vedder, by amended answer, after setting up this contract, alleges that on or about June 5, 1927, he, in writing, notified the plaintiffs that he then was ready, able, and willing to perform said contract and to commence and prosecute the work of prospecting and drilling for oil and gas, as provided in the contract, but that plaintiffs failed and refused, and have ever since failed and refused, to give defendant possession for said purposes, and then and ever since, have denied the validity and effect of said contract although defendant at all times was and still is ready, able, and willing to perform on his part.

"The amended answer further alleges that the only claim of right or interest in said premises of the plaintiff Elbe Oil Land Development Company, is by virtue of a contract practically identical in its terms with the Vedder contract entered into between the plaintiff Sheehan and one L. S. Barnes, of date April 7, 1927. That Barnes was, at the date of said contract, and ever since has been, the Secretary and a member of the board of directors of the plaintiff Elbe Oil Land Development Company, and that the said Barnes took and received said contract

as the agent of, and for the benefit of said corporation, and has transferred and assigned said contract to said corporation.

"That although said contract is dated April 7, 1927, it was not executed until long after that date, namely on or about June 1, 1927. And that said Barnes and said Elbe Corporation, at the time of execution of the latter contract, were informed and knew of the contract of defendant Vedder.

"On this alleged state of facts plaintiffs demanded judgment on the pleadings, which was granted, and it is from such judgment that this appeal is taken."

On the petition for rehearing the following facts were presented to this court, which we deemed sufficient foundation for the order granting a rehearing in this case:

A copy of the oil and gas prospecting permit of the United States of America, Department of the Interior, General Land Office, serial 010684, whereby Harry Sheehan was granted the exclusive right to prospect for oil and gas upon the property in question for a period of two years from and after the 31st day of October, 1924, was for the first time presented to us. By the terms of this permit it was provided that Sheehan must, within six months from the last-mentioned date, install upon some portion of said lands a substantial and adequate drilling outfit, and to commence actual drilling operations thereon; that within one year from such date he was required to drill one or more wells thereon, not less than six inches in diameter, to a depth of at least five hundred feet; and within two years to drill one or more wells to a depth of at least two thousand feet, unless in each instance valuable deposits of oil or gas should be discovered at a lesser depth. The right to cancel such permit for a failure to comply with any of such conditions was reserved to the Secretary of the Interior. On December 22, 1925, an extension of time of such permit was granted to Sheehan until June 30, 1926, and on July 27, 1926, a further extension was granted him until April 30, 1927, within which time he was required to install the drilling outfit upon some portion of the property and commence actual drilling operations thereon. Copies of these extensions were also furnished us. The last paragraph of the last extension was as follows: "You will notify the parties in interest hereof and advise them also that during the time as extended, it is expected that substantial progress will be made toward development and that unless diligence is shown in that respect, this office will not feel justified in sanctioning any further extension of time." Under date of May 12, 1927, Sheehan was advised by the Commissioner of the General Land Office, in part, as follows: "There has been received in this office application for further

extension of time. Filed with the record is an affidavit by L. S. Barnes showing that drilling was commenced on this permit prior to April 27, 1927. As compliance with Paragraph 2 of the permit has been made, the permittee has until October 31, 1927, in which to drill to a depth of five hundred feet, and a further extension of time is not necessary." Certified copies of the original permit, the extensions, and the letter of May 12, 1927, are now before this court.

[1,2] Section 1875 of the Code of Civil Procedure provides, in part, as follows: "Courts take judicial notice of the following facts: * * * Public and private official acts of the legislative, executive and judicial departments of this state and of the United States. * * * In all these cases the court may resort for its aid to appropriate books or documents of reference." This section has been construed to permit a court to take judicial notice of a letter from the Commissioner of the General Land Office of the United States (*Southern Pacific Co. v. Lipman*, 148 Cal. 480, 83 P. 445; *Southern Pacific Land Co. v. Meserve*, 186 Cal. 157, 198 P. 1055); of the withdrawal of indemnity lands by the Secretary of the Interior (*Southern Pacific Railroad Co. v. Wood*, 124 Cal. 475, 57 P. 388); of the regulations of the Department of the Interior requiring the issuance of a receiver's receipt and entry of homestead location (*Whittaker v. Pendola*, 78 Cal. 296, 20 P. 680); and of government surveys (*Rogers v. Cady*, 104 Cal. 288, 38 P. 81, 43 Am. St. Rep. 100). In the case of *French v. Senate of California*, 146 Cal. 604, 80 P. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756, it was held that this judicial notice comes to the aid of the sufficiency of a pleading where necessary. *Ohm v. City and County of San Francisco*, 92 Cal. 437, 28 P. 580; *Mullan v. State*, 114 Cal. 578, 46 P. 670, 34 L. R. A. 262; *Fey v. Rossi Improvement Co.*, 23 Cal. App. 766, 139 P. 908. With these authorities before us, we are of the opinion that we should take judicial notice of the records and documents of the Land Office relating to the issues on this appeal. Allegations in a pleading of a fact contrary to facts of which judicial notice is taken are not considered as true. 21 R. C. L. 506-509; 21 Cal. Jur. 96-97; *Fey v. Rossi Improvement Co.*, supra; *French v. Senate of California*, supra.

[3] We therefore have before us the following important facts which were not considered on the original decision of this case: That the original oil and gas prospecting permit under which all of the parties derive their rights, expired by the terms of its last extension, on April 30, 1927; that appellant Vedder agreed to move onto "the lands a substantial and adequate drilling outfit and to commence actual drilling operations" at

least sixty days prior to April 30, 1927; that he did not do this and did not offer to perform this obligation of his contract until on or about June 5, 1927; that L. S. Barnes, the predecessor in interest of the Elbe Oil Land Development Company, commenced actual drilling operations upon the property on or prior to April 27, 1927, and thereby prevented the forfeiture of the rights of all parties under the terms of the oil and gas prospecting permit and its extensions.

The former decision of the court was largely based upon the familiar doctrine of equity that he who asks equity must do equity. The members of this court were of the opinion at that time that respondents should show to the court below that their hands were clean before they be given the relief they asked. It now appears that although Sheehan had not notified Vedder in writing of his failure to perform the obligations of his contract, Vedder was in actual default at the time Barnes started his drilling operations, and that if these operations had not been so started all rights under the drilling permit might have been forfeited to the government. Vedder had been in actual default in the performance of his contract for more than three months when he offered to perform. Except for Barnes' performance of the drilling requirements of the permit, Vedder's offer to perform on June 5, 1927, might have been worse than an idle gesture, as there then might have been no land upon which he could have drilled and no contract which he might have performed. His contract with Sheehan would have ended with the termination of the drilling permit by the government. We think these facts sufficient to change the equities of the case.

[4] It is well-settled law in California that a contract which cannot be specifically enforced is not a defense in an action to quiet title. Hedden v. Waldeck, 89 Cal. App. 494, 265 P. 344; Jolliffe v. Steele, 9 Cal. App. 212, 98 P. 544; Crane v. Roach, 29 Cal. App. 584, 156 P. 375; Archer v. Miller, 73 Cal. App. 678, 239 P. 92.

[5] In order to enable the courts to specifically enforce a contract, the remedy must be mutual to both its parties. As was said in the case of O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861, 865:

"In the present situation of the parties a remedy by way of specific performance is not available to the defendant, for the reason that such a remedy would not be mutual, in that the defendant could not be compelled specifically to perform his part of the contract, to wit, to assist in the care and management of the plaintiff's property, a purely personal service. Equity will not require the specific performance of a contract, where the party seeking its enforcement cannot, from the nature of the contract, be compelled spe-

cifically to perform on his part. Civ. Code, §§ 3386, 3390; Cooper v. Pena, 21 Cal. 403; O'Brien v. Perry, 130 Cal. 526, 62 P. 927; Berry v. Moulie, 180 Cal. 137, 179 P. 686; Poultry Producers, etc., v. Barlow, 189 Cal. 278, 208 P. 93."

[6] Nor will the courts of equity decree the specific performance of a number of successive acts and one involving the performance of personal services. Poultry Producers Association v. Barlow, supra; Crane v. Roach, supra; Archer v. Miller, supra. The mere reading of the drilling permit and the Sheehan-Vedder contract shows that the performance of the obligations of these instruments involve both the performance of personal services and the performance of successive acts extending over a number of years, for if oil were found in paying quantities, the contract provided that one well must be drilled on each ten acres of the land. Even if oil were not found, the drilling of a test well usually takes many months and sometimes years of time.

[7] It has been held that an oil-drilling contract which gives to the prospective driller the right to quitclaim the property to his lessor before the discovery of oil, and thereby relieve himself from the obligations of his contract (which proviso appears in the Sheehan-Vedder contract), is not mutual and therefore cannot be specifically enforced. In the case of Dabney v. Key, 57 Cal. App. 762, 207 P. 921, 922, it was held as follows:

"In the case of Sturgis v. Galindo, 59 Cal. 28, 43 Am. Rep. 239, the Supreme Court was considering a case in specific performance. The instrument before the court purported to be a contract of sale of lands supposed to be valuable as a coal mine. The purported contract contained a surrender clause as follows: If defendant's assignors 'should at any time before the expiration of the time hereinbefore fixed for the completion of this contract, to wit, the 14th day of December, A. D. 1867, becomes satisfied that it was useless to further prospect said lands agreed to be conveyed for coal, then upon giving thirty days' notice to said party of the first part, in writing, of their intention to abandon said contract, then and thereafter this agreement shall be void, and of no binding force or effect between the said parties or either of them.' The trial court had entered a judgment specifically enforcing the contract. The Supreme Court reversed that judgment and in doing so said: 'It is, moreover, perfectly clear that a specific performance of the contract could not have been performed at the suit of Pacheco; for besides the difficulty of enforcing the performance of personal services, the agreement contained the express stipulation that if, at any time prior to the period fixed for the completion of the contract, Bromley and Jones should become

satisfied that it was useless further to prospect the land, they should have the right, upon giving thirty days' notice to Pacheco of their intention so to do, to abandon the contract. "It is a general principle," says Mr. Fry at section 286 of his work on Specific Performance, "that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might, in itself, be free from difficulty attending its execution in the former." "

[8] As the Sheehan-Vedder contract cannot be specifically enforced, it can furnish no defense to an action to quiet title, and the judgment of the lower court cannot be disturbed.

Judgment affirmed.

I concur: BARNARD, J.

Mr. Presiding Justice CARY, being absent, did not participate herein.

109 Cal. App. 38

CHASE et al. v. VAN CAMP SEA FOOD
CO., Inc.
Civ. 138.

District Court of Appeal, Fourth District,
California.

Oct. 10, 1930.

Rehearing Denied Nov. 5, 1930.

Hearing Denied by Supreme Court Dec. 9, 1930.

1. Evidence ⇨265(8).

Evidence may not be received to contradict admissions on pleadings.

2. Pleading ⇨36(1).

In action on contract for fishing and cleaning fish, pleadings *held* not to admit such contract as would exclude proof of actual agreement.

The answer, instead of admitting the allegations of the complaint that plaintiffs were to be paid \$1.50 per ton for any and all fish cleaned by them, purported to admit an agreement, not alleged in the complaint, to pay \$1.50 per ton for hauling any fish cleaned. The allegations in complaint as to a bonus and as to the price agreed on for fish delivered by plaintiff to defendant were denied by the answer.

3. Parties ⇨7(2).

Where contract for fishing and cleaning fish was in father's name, father could main-

tain action alone under statute, even if son was to have 50 per cent. of earnings (Code Civ. Proc. § 369).

4. Judgment ⇨570(16).

Where, in action by father and son on fishing contract in father's name, case was dismissed as to son on his counsel's motion, dismissal was "retraxit," estopping son from commencing action against defendant anew.

A "retraxit" occurred at common law when plaintiff came into court in person and voluntarily renounced his suit or cause of action; and when this was done and a judgment was entered, in favor of defendant, plaintiff's cause of action was forever gone.

5. Attorney and client ⇨89.

Attorney of record may make retraxit.

6. Appeal and error ⇨1170(3).

That allegation that employment contract was with both plaintiffs was not amended after dismissal of one plaintiff *held* not to require reversal (Const. art. 6, § 4½).

It appeared that the dismissal of the one plaintiff was treated by both counsel for plaintiff and by trial court as substantially amounting to an amendment of pleading so as to allege that employment arrangements were made with the remaining plaintiff only, and the trial proceeded on that basis.

7. Evidence ⇨242(5).

In action on contract for cleaning fish, admitting quantity statements of discharged employees on theory that they were authorized to compile them and furnish them to plaintiff *held* not error under evidence.

8. Contracts ⇨234.

In action on contract for cleaning fish, court's failure to make deductions for fish cooked whole was not error under circumstances.

The circumstances disclosed that plaintiff was ready as contemplated by contract to split all the fish and gained nothing from the circumstances that some were not split. The plaintiff was told that no deductions would be made from compensation because of the fact that for reasons of its own defendant saw fit to cook some of the fish without having them cleaned.

9. Appeal and error ⇨907(4).

Where plaintiff's book offered to show quantity of fish delivered was not in record, appellate court presumed that it supported finding for plaintiff.

10. Sales ~~359~~(2).

In action for fish delivered to defendant, finding as to aggregate price of fish delivered held supported by evidence.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by W. O. Chase and O. W. Chase against the Van Camp Sea Food Company, Incorporated. Plaintiffs' counsel, with leave of court, dismissed as to O. W. Chase. Judgment for plaintiff, and the defendant appeals.

Modified and, as so modified, affirmed.

William H. Wylie and E. P. Sample, both of San Diego, for appellant.

J. J. Brennan, of San Diego, and W. J. Collard, for respondent.

HAINES, Justice pro tem.

The complaint in this cause alleges that on or about June 10, 1927, appellant Van Camp Sea Food Company, Inc., entered into an agreement with respondent W. O. Chase and one O. W. Chase, both of whom were originally plaintiffs, whereby they were to work for appellant in fishing and cleaning fish; that between June 10, 1927, and November 1, 1927, the said W. O. Chase and O. W. Chase did work for appellant in fishing and cleaning fish for it; that, as consideration for such work to be performed by the Chases, appellant agreed to pay them \$1.50 per ton for all fish which they should clean for it and "an additional 10% on all fish caught and delivered to defendant (appellant) company from July 15, 1927, to October 27, 1927, amounting to One Thousand Six Hundred Seventy Two Dollars and Seventy Cents (\$1672.70)." This latter allegation is, in itself, unintelligible, but other averments follow which, construed in the light of the evidence, seem to show its meaning to have been that appellant agreed to pay the Chases for such fish as they should catch and deliver to it, at the same rates at which packers in the region should from time to time be buying fish from other fishermen, and, in addition thereto, a bonus of 10 per cent, computed thereon, and that on that basis the aggregate price of the fish which the Chases caught and delivered to appellant in pursuance of the agreement, figured without the bonus, came to \$1,672.70, and therefore that, in addition to that sum, the Chases became, under the arrangement, entitled to a bonus of \$167.27. There is no allegation in terms either of the quantity of fish delivered under the agreement or of the price per ton to be paid for all or any of it nor of the quantity of fish cleaned by the Chases or either of them. Performance of the agreement by the Chases is alleged, and part payment of the agreed compensation, but a balance, inclusive of the

\$167.25 bonus, aggregating \$2,469.54 of money earned under the contract is claimed as still due, owing, and unpaid from appellant to respondent W. O. Chase and the said O. W. Chase.

The answer admits an agreement entered into on or about June 10, 1927, between appellant and the two Chases whereby the Chases were to work for appellant in fishing and cleaning fish, states that the period of employment was to be from July 10, 1927, to November 1, 1927, and admits appellant's agreement to pay \$1.50 per ton "for hauling any fish cleaned" by the Chases (it being claimed in appellant's closing brief that the use of the word "hauling" is a typographical error, the intention having been to admit the agreement to pay at said rate "for all or any fish" so cleaned). The answer, however, denies the bonus arrangement and denies any indebtedness to the Chases, by which it is apparent that the intention is to deny that anything payable to them under the terms of the contract remains unpaid, and denies all other allegations of the complaint not specifically admitted.

On the trial it appeared from the testimony of respondent W. O. Chase, who is the father of the said O. W. Chase, that a contract which was placed in evidence, consisting of a written offer by W. O. Chase, accepted in writing by appellant, was made on April 1, 1926, whereby the elder Chase agreed to fish for appellant exclusively for five years beginning June 1, 1926, and to "split," which in the parlance of the trade means to "clean," all appellant's "round tunas" during the life of the agreement, for which it was agreed that the said W. O. Chase should be paid on demand "the regular prices for fish as obtained between the fishermen and the canneries on the date of delivery," with 10 per cent. additional as a bonus, and also \$1.50 per ton of fish "split" for doing the "splitting." The contract provided that either party might terminate it by a notice in writing given to the other between May 1 and June 1 of any year of its life, but at no other time. It also undertook to provide, in the event of its breach by either party, for \$1,000 liquidated damages to the other.

Respecting this contract, respondent W. O. Chase testified as follows:

"Q. * * * Is this the one you claim to have been working under all that time,—this agreement of April 1, 1926? A. Yes, sir.

"Q. There never was any new one made? A. No, sir."

He goes on to say that a new arrangement was twice discussed, but never made. On another occasion during the examination of this respondent the court remarked: "There is another complication. This suit is 'W. O.

Chase and O. W. Chase.' This contract seems to be only 'W. O. Chase.'"

The witness responded: "W. O. Chase and O. W. Chase were partners. We were both the same thing."

Elsewhere, however, he said: "I hired O. W. Chase to help me split the fish and paid him one-half of what we received out of it, and still owe him for the balance of his half of what's coming."

O. W. Chase, the son, testified with respect to his arrangements with his father: "We agreed to work on a 50-50 basis and split this money between us 50-50 for all the fish that we cleaned."

And again: "Q. Do you claim any part of this money that your father is suing for yourself? A. Half of it should be mine. It is supposed to be mine—50 per cent. That is the way we worked."

At the close of the plaintiffs' case in chief and while a motion for nonsuit was pending, plaintiffs' counsel, with leave of the court, dismissed as to the son, O. W. Chase, leaving as the only plaintiff the respondent W. O. Chase. No leave to amend the complaint so as to make the date alleged as that of the contract conform to the date of the writing nor to allege that appellant contracted with W. O. Chase alone, was asked, or granted and no amendment made. On the completion of the trial the court made findings to the effect that, on or about June 10, 1927, appellant employed respondent W. O. Chase (the father) for the period extending from June 10, 1927, to November 1, 1927, to clean, catch, and deliver fish to it at appellant's place of business at San Diego and agreed to pay him \$1.50 per ton for all fish cleaned by him there, and agreed, also, to pay him a bonus of 10 per cent. on the purchase price of all fish caught by him and delivered to appellant there between July 15, 1927, and October 27, 1927; that between June 10, 1927, and November 1, 1927, respondent under said contract cleaned there for appellant 3227.9 tons of fish, and between July 15, 1927, and October 15, 1927, delivered there to appellant "a quantity of fish the purchase price of which amounted to" \$1,672.70. The court further found that there became due under the contract from appellant to respondent W. O. Chase for such cleaning of fish \$4,840.85 (there being an error of \$1 in the computation, since, on the basis adopted, it would figure \$4,841.85), and for fish delivered, \$1,672.70, and for the bonus on the latter sum \$167.27; making in the aggregate \$6,681.82 (this being \$1 more than the footing of the three items as given in the findings, which error corrects the other error in computation just referred to). It was further found that on said sum there had been paid all together \$4,411.05, leaving a balance due from appellant to respondent O. W. Chase of \$2,-

270.77. Judgment against appellant and in favor of respondent W. O. Chase was entered for that sum accordingly and it is from that that the present appeal is taken.

[1-3] Appellant contends that respondent W. O. Chase was not the real party in interest in respect of the entire claim set out in the complaint, nor in respect of the whole amount for which judgment was rendered, and therefore that such judgment, running in favor of him alone, was erroneous. There is no substantial evidence in the record that appellant made any contract with the Chases or either of them other than the written contract of April, 1926, to which, on its face, appellant and respondent W. O. Chase were the only parties. While, however, there is no evidence of any other contract, the answer undertakes to admit that some contract was made on or about June 10, 1927, whereby appellant employed both respondent W. O. Chase and said O. W. Chase to "work for defendant in the occupation of fishing and cleaning fish." Undoubtedly it is true, as urged by appellant, that evidence may not be received to contradict an admission on the pleadings. *Burke v. Table Mountain Water Co.*, 12 Cal. 403, 407; *Blankman v. Vallejo*, 15 Cal. 639; *Mulford v. Estudillo*, 32 Cal. 131, 138; *Hellman v. Howard*, 44 Cal. 100, 103; *Howard v. Throckmorton*, 48 Cal. 482, 490; *People v. Stockton & C. R. R. Co.*, 49 Cal. 414; *Malone v. Roy*, 118 Cal. 512, 514, 50 P. 542; *Adams v. Wallace*, 119 Cal. 67, 51 P. 14; *Murphy v. Coppieters*, 136 Cal. 317, 319, 68 P. 970; *Gabriel v. Tonner*, 138 Cal. 63, 67, 70 P. 1021. It is also true that findings in contravention of admissions on the pleadings must be disregarded. *Hendy Mach. Works v. Pac., etc., Co.*, 99 Cal. 421, 424, 33 P. 1084; *Gamache v. South School Dist.*, 133 Cal. 145, 147, 65 P. 301; *Welch v. Alcott*, 185 Cal. 731, 198 P. 626. But, in this case, when the supposed admissions are analyzed, it appears that they are largely without content. Instead of admitting the allegations of the complaint that the Chases were to be paid "\$1.50 per ton for any and all fish cleaned by them," the agreement admitted in the answer is to pay \$1.50 per ton for "hauling any fish cleaned," which admits nothing that is alleged. Appellant may be right in saying that the use of the word "hauling" was a clerical error, but the pleadings supply us with no means of correcting it, and, there being in the answer a denial of whatever is not in terms admitted, the allegation regarding the price to be paid for the cleaning stands denied. Again, if, as distinguished from what is said about the agreed price for fish cleaned, we construe the complaint as undertaking to allege that a price was agreed on for fish delivered in substantially the terms suggested, such allegation, by virtue of the general denial of whatever is not admitted, stands denied, and we just saw that the allegations about the bonus are expressly denied. Moreover, as

respects the period of the employment, we saw that the complaint alleges that the work was done between June 10 and November 1, and that the bonus was applicable to fish caught and delivered from July 15 to October 27, whereas the answer undertakes to admit what is not alleged, namely that the period during which it was agreed that the work generally should be done was from July 10 to November 1. In fine, when the allegations are compared with the admissions, the discrepancies are so apparent that, taking them all together, we cannot say that there is admitted on the pleadings a contract to which we can attach any meaning, or such a contract as should exclude proof that the actual agreement was that embodied in the writing of April 1, 1926. On the other hand, if we are permitted to look beyond the pleadings on the subject to the evidence, it cannot be doubted that that writing was the contract and the only contract under which the work here in question was done. Again, if we are permitted to look beyond the pleadings to the evidence, there is no actual doubt regarding the respective relations of the two Chases to the enterprise in so far as their relation to it concerned the appellant. Though the elder Chase testified, as we saw, that he and his son were "partners," he also testified that he "employed" his son. It is, of course, apparent that he had the vaguest ideas about what the relations between himself and his son really amounted to. So far as appellant was concerned with the contract, however, it was that of the father, and that remains true whatever may have been the actual arrangements of father and son with each other. Beyond doubt, therefore, it would have been competent for the elder Chase to have originally brought this action in his own name alone, for, under section 369, Code of Civil Procedure, a trustee of an express trust may sue without joining with him the persons for whose benefit the action is prosecuted and a person with whom or in whose name a contract is made for the benefit of another is, by the express terms of the statute, declared, within its meaning, to be the trustee of an express trust. As the rule is put in 47 C. J. 64: "A person contracting in his own name with another may sue the other party to the contract without joining with him as coplaintiffs persons who may have an interest in the contract as against plaintiff."

To this point are *Brown v. Salisbury* (C. C.) 123 F. 203; *Beekman Lumber Co. v. Kittrell*, 80 Ark. 228, 96 S. W. 988; *Hall v. Allen*, 46 Colo. 355, 104 P. 489; *Halliday v. White*, 66 Hun, 635, 21 N. Y. S. 878; *Murchison v. W. U. Tel. Co.* (Tex. App.) 15 S. W. 416.

[4] While, however, this action might, thus, have been brought by the father Chase, it was in fact brought by father and son, and therefore appellant was confronted with a claim made by both jointly against it. Evi-

dently if notwithstanding the fact that on motion of plaintiffs' counsel the case was dismissed as to the son, the latter could commence a new action for the same cause, it would prejudice appellant's rights were judgment rendered in favor of the father in the son's absence. We think, however, that the trial court was right in regarding the dismissal by the son as a retraxit which would estop him as against appellant from suing anew.

"A retraxit occurred at common law when a plaintiff came into court in person, and voluntarily renounced his suit or cause of action; and when this was done, and a judgment was entered in favor of defendant, the plaintiff's cause of action was forever gone." *Westbay v. Gray*, 116 Cal. 660, 666, 48 P. 800, 802.

[5] It is, in this state, held that the authority to make a retraxit is vested in an attorney of record. *Westbay v. Gray*, supra, page 666 of 116 Cal., 48 P. 800, citing *Board of Commissioners v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Merritt v. Campbell*, 47 Cal. 542.

It has, indeed, been held (*Merritt v. Campbell*, 47 Cal. 542, supra, 547) that "a mere dismissal of an action by the plaintiff under the statute, and without any agreement upon his part to do so," will not ordinarily constitute a bar to its renewal, nor will a nonsuit, though entered by consent, and in *Pyle v. Piercy*, 122 Cal. 383, 385, 55 P. 141, the Supreme Court said that it was not inclined to extend the doctrine of retraxit as recognized in *Merritt v. Campbell*. In the present case, however, though the dismissal was without any agreement with appellant, it was in the circumstances done with the manifest purpose on the part of the son, acting through the counsel who represented both himself and his father, to enable his father to prosecute the action to judgment without being embarrassed by his presence as a party. In these circumstances every consideration of justice to appellant demands that the son's conduct be treated as a retraxit and we do not hesitate to say that it must be given that effect.

[6] Upon the dismissal of the action so far as O. W. Chase, the son, was concerned, then, there remained no other obstacle to its proceeding to judgment on the basis of the contract of April 1, 1926, than the circumstance that no leave to amend the complaint was actually sought or given so as to allege the employment of W. O. Chase alone instead of the employment of both O. W. Chase and W. O. Chase. Undoubtedly, so far as the formal pleading was concerned, the allegation of an arrangement made with the two original plaintiffs remained unaltered, and there is some ground for the contention that the proof of an obligation to one of them only was a variance. *Weinreich v. Johnston*, 78 Cal. 254, 20 P. 556. Yet it seems clear that the dismissal as to O. W. Chase was treated both by

counsel for respondent and by the trial court as substantially amounting to an amendment of respondent's pleadings so as to allege that appellant's arrangements were made with W. O. Chase only, and that the trial proceeded on that basis, though over the protest of appellant. Appellant's objection, however, was not directed to any amendment, for none was offered, but was to the fact of dismissal itself. In effect, this was a claim that the court had no right to permit a change in the complaint as it then stood. As a matter of fact, the trial proceeded as though the complaint had been amended. The dismissal as to the one plaintiff went further than removing his name from the title of the case, and the case proceeded upon the basis that this plaintiff had been eliminated from the cause of action. This having operated as a retraxit as far as that plaintiff's rights are concerned, the answer having denied all that remained of the complaint, and the trial having proceeded upon that theory, no substantial right of the appellant was affected by treating the complaint as so amended, which, in effect, is what the trial court did. No miscarriage of justice appearing, we think the case should not be reversed for this wholly technical error, the practical effect of which was nil. Const. art. 6, § 4½.

The evidence is far from direct about the quantities of fish cleaned. It appeared without conflict that for fish cleaned between June 10, 1927, and August 26, 1927, respondent W. O. Chase was, in two checks, paid an aggregate of \$529.35. There is in the record nothing else to show the weight of fish cleaned by him during that time; but, at the rate of \$1.50 per ton, that would account for 352.9 tons. The main effort was directed to showing the quantity cleaned between August 26, 1927, and October 27, 1927, which respondent claims to have been 2875 tons. This figure, added to the said 352.9 tons, makes the aggregate of 3,227.9 tons mentioned in the findings as the aggregate quantity of fish cleaned. Appellant, however, vigorously attacks the proposition that respondent W. O. Chase has established 2,875 tons or any definite quantity of fish as actually cleaned by him between August 26 and November 1, and it is therefore necessary to notice the evidence relied on to establish the quantity. Respondent claims that in person, or through his son and another helper employed by him, he cleaned all the fish that were cleaned at all at appellant's establishment during the period in question, whether bought from him or other fishermen. The method employed to fix the quantities of fish cleaned was to endeavor to determine the aggregate quantity of fish delivered, during the time, from the various boats engaged in the fishing, by whomsoever owned. Appellant's practice was to have each boatload of fish weighed as received and to issue what was known as a "fish ticket" for the quantity delivered. The person ordinarily charged

with doing the weighing and issuing the "fish tickets" was one Walter Oliver, an employee of appellant, apparently serving as a subforeman, general utility man, and more or less as a bookkeeper as well as a fisherman. He was not always there, however, and when he was not, other employees would weigh fish received and issue tickets. The evidence tends to show that such tickets, or copies of them, were preserved on appellant's files, though to some extent they seem to have temporarily remained in Oliver's possession. During the times with which we are concerned, up to October 25, 1927, one John Sieverling was manager of appellant's San Diego establishment. On that day he was superseded as manager by one Johnson and one Quamma, who were, thence forth, joint managers for appellant at San Diego. On the same day W. O. Chase was discharged, but was allowed to go on and clean fish for two days more. Just then Oliver was in Mexican waters fishing for appellant, and, on returning, he also left appellant's employ. The evidence tends to show that despite his discharge as manager, Sieverling remained at appellant's establishment at least part of the time for some days thereafter, apparently engaged in cleaning up the accounting for the period of his management. According to respondent he had, for some time prior to Sieverling's discharge, been trying to get from the latter a settlement of respondent's account to date. From October 25, 1927, on, according to respondent, he made daily demands on Johnson for appellant's figures as to the fish he had cleaned for it, and demanded his money. The following is excerpted from his testimony on the subject: "I told him, I says: 'You have got the books' and so on. 'Well now,' he says, 'wait a minute,' he says: 'We are not concerned; we do not know anything about this business; we have just come in; we are all strangers,' and so on. 'Well,' I says, 'you have got the books. Why can't you pay me?' 'Well, Walter (Oliver) is going to be back in a few days; and John (Sieverling) is straightening these things up as fast as he can.'

Elsewhere respondent testified: "Mr. Sieverling was going to stay there two weeks after he was discharged and settle up all this business."

Questioned about this phase of the matter, he further testified:

"Q. You have told us here that there was some arrangement by which Mr. Sieverling was to stay there and look after things for two weeks after he was discharged? A. Yes, it would take him about two weeks to straighten everything up.

"Q. Did he do that? Did he go on looking after things for two weeks? A. Yes."

Elsewhere he testified: "I went down to Mr. Johnson and Mr. Quamma and demanded my money; and they told me that Mr. Sieverling would settle. So I went to Mr. Sie-

verling. He said that he would have to wait until Walter got back—Walter Oliver got back; he was down in Turtle bay, in the employ of the Van Camp Company. And he did come back; and then they had him go to work on the books and make out the statement so we could settle how many fish was brought in."

Both appellant's present managers, Johnson and Quamma, testify that Sieverling had no authority to transact any business for appellant after October 25, 1927, and that Oliver had none after he returned from Mexican waters, but the effect of this is considerably weakened by other testimony given by Johnson. Being asked whether he ever authorized Oliver or anyone else to submit statements of fish received by appellant, he, after some hesitation, said:

"I may have—I will say that I have asked them, believing everything had been carried on previous to my taking that job as it should have been. I do not know whether there is any objection to that or not if my statement is qualified in that manner. I may be wrong too. * * * I may have asked him to, believing * * *

"Q. Asked who? A. Either Sieverling or Oliver, to have—I question very much, however, that it was Oliver. I may have asked Sieverling because I have known this man for years.

"Q. Asked Sieverling what? A. To help formulate the figures. As soon as I took this job, Mr. Chase came and wanted a settlement, wanted the money for the cleaning of these fish. * * *

Respecting his request to Sieverling, he says further: "I didn't make the statement that I did ask him. I may have asked him."

Oliver returned at some time, which the evidence does not precisely fix, after November 1. After his return a boy delivered to respondent W. O. Chase an envelope addressed to respondent, in Sieverling's hand, containing three sheets of the printed form used by appellant to summarize the data compiled from "fish tickets" on which were filled out in Oliver's hand what purported to be a statement compiled from the fish tickets of the weights of fish delivered to appellant by the boats of the several fishermen between August 26, 1927, and November 7 of that year; the date, name of boat, and number of pounds delivered being specified in the case of each delivery. These three sheets were admitted in evidence over appellant's objections and are, together, known as Exhibit 2. Respondent W. O. Chase kept a rough record of fish cleaned, with which he compared the quantities given on this Exhibit 2, and by which he testifies that he was able to verify them as correct. He says that by experience he has found that there is about one can of offal for every two tons of fish cleaned, and that he was in this way able to tell pretty

closely how many tons he had cleaned and that this was the basis of his own record. Having received this quantity statement and checked it with his own record, after having Oliver at his residence checking it over with him, respondent says that he agreed with Sieverling on what was due him. "Yes; we settled on the amount of tonnage and the amount of money that was due me." Elsewhere he says that the tonnage for which it was so agreed that he was entitled to pay for cleaning after August 26, 1927, was the 2,875 tons already referred to. Referring to Sieverling, he testified that: "As soon as he got this (i. e. the statement compiled by Oliver)—he sent me up this statement and asked me to compare it with my book. And I * * * compared it and found it was correct." He says that on one occasion he went to the cannery; that Johnson and Quamma were there, but without speaking to him went into another room with Sieverling and Oliver and engaged in a prolonged conference; that finally Oliver came out and said they had not reached respondent yet, but to come back that afternoon. He says that he did come back on the Saturday following, taking the statement (Exhibit 2) to Sieverling. He described the situation there as follows: "They was busy down there. And I says: 'Well John, let's get busy now; I want my money.' 'All right Billy,' he says, 'We are awful busy.' Sieverling was there at the desk with Mr. Quamma and Mr. Johnson, the new manager; and he says: 'It will be a special favor to me if you will wait until Monday. You can come down Monday and we will make you out a check for these various items and there is no question about the amount.'"

All this respondent says, occurred in the presence of Johnson and Quamma, and he says, further, that he showed the statement to Johnson, who did not, however, read it. He places this occurrence on the next Saturday after November 4. According to the calendar this would make it November 5. That cannot be the right Saturday, because, as we saw, the last item in Oliver's statement was dated November 7. The trial court may have believed that respondent mistook the date and that this conference really occurred a week later. At all events, respondent says that he called at the cannery the Monday after this, but that Sieverling failed to appear and that he never saw him afterward. Sieverling, in fact, seems shortly afterward to have undergone an operation and has since died.

The settlement was never made. Respondent did get a \$300 check dated, and cashed by him, on November 4. This, he says, was handed to him as a payment, pending a settlement of his full account, though there is some confusion in his statements about the particular connection in which this occurred. There is much vagueness and some contradiction in respondents' testimony both about what was

done and the dates of the occurrences, but perhaps not more than must be expected from a somewhat unlettered man trying to recall what occurred long before he was testifying.

[7] In view of the evidence that we have in part recited, we cannot say that the court erred in admitting the quantity statement (Exhibit 2) on the theory that Oliver and Sieverling were authorized by appellant to compile it and to furnish it to respondent.

It is still objected that this statement, even if properly received, proves nothing. There are several boatloads of fish shown on it, for cleaning which respondent concedes that he has no right to charge. He has, as he claims in collaboration with Sieberling, calculated these out by his own figures on the face of the several pages of the statement itself. It seems that numerous boatloads of fish were, for convenience, delivered at appellant's cannery, but immediately turned over to another concern. These are distinctly indicated on the statement by the initials "C. P. C." and have been calculated out except in one instance where the testimony indicates that 72 tons of one boatload is so designated by error, and really belonged to the Van Camp Company. Such 72 tons are therefore retained. An inspection of these pages, making up Exhibit 2, discloses certain errors in calculation apparent on its face. The addition of quantities in the last column of its first page, footed as 1,356,760 pounds, is wrong, the correct footing of the column being 1,467,480 pounds. The addition of the quantities in the first column of its second page, footed as 1,749,937 pounds, is wrong, and should actually foot 1,749,918 pounds. The addition of the quantities in the first column of the third page, to wit, 2,343,441 pounds, is right. The aggregate of the figures in those three columns, plus 300,000 pounds for fish caught in local waters, was relied on by respondent as totaling 5,750,138 pounds or, when reduced to tons, the 2,875 tons charged for as cleaned between August 26 and October 27. With the corrections noted, this aggregate should be 5,860,839 pounds. Apparently, however, there were included in the total for which respondent charged, an aggregate of 79,318 pounds delivered in the first week of November after respondent had quit work, which he attempted to deduct without carrying out the deduction, and 62,984 pounds delivered by the boat "Uncle Sam" on October 29, which was also after he had quit work and which he omitted to deduct. The aggregate of the last two items is 142,302 pounds. If that is deducted from the said 5,860,839 pounds, there is left 5,718,537 pounds, or 2,859.2 tons, which is less than the tonnage charged for by 15.8 tons, which, at the rate of \$1.50 per ton, would call for a reduction of the judgment by \$23.70.

[8] The point is made that some of the fish which respondent is by the judgment given the credit for "splitting" were not split at

all, but cooked whole, a practice referred to in the evidence as unlawful. According to the respondent the Chases were there ready, as contemplated by the contract, to split all the fish, gained nothing from the circumstance that some were not split, and were told that no deduction would be made from the compensation because of the fact that for reasons of its own, appellant saw fit to cook some of the fish without having them cleaned. In these circumstances we cannot say that the court erred in failing to make a deduction on that account. Appellant claims that the trial court found that respondent was not entitled to credit for cleaning the fish that appellant cooked whole. We do not so construe its finding.

[9] We have next to deal with the fish of respondents' own catch, delivered to appellant during the time in question; for, though respondent cleaned fish for appellant regardless of who delivered them, he delivered only those caught by his own boat. Appellant claims that the record is "absolutely bare of any finding, allegation, claim or evidence of the quantity of fish that W. O. Chase and O. W. Chase delivered to appellant." That the complaint is lamentably vague on the subject we have seen, and it is true that the findings state neither the quantities of fish delivered nor the prices that prevailed when the several deliveries were made. What they do state is that respondent W. O. Chase, between July 15, 1927, and October 27, 1927, delivered fish for which the purchase price was \$1,672.70, from which it would follow that the bonus, computed at 10 per cent. of that figure, would amount to \$167.27 as found. We cannot agree that the record shows these figures to have been reached without evidence. Respondent W. O. Chase produced a memorandum book which, according to his testimony, he kept in his own hand, regarding these matters. It is claimed that this book was not in evidence, but the record shows that it was. It was distinctly offered and counsel for both parties had questioned the witness about the way that it was kept, and the court, having expressed its opinion that sufficient foundation for its use had been laid, the following colloquy occurred:

"Mr. Wylie, (Appellant's counsel) 'All right Your Honor; if you feel that way I will withdraw my objection. That is I have the general objection in there.'"

"The Court: 'Objection overruled.'"

No copy of this book, or of any of the entries in it, appears in the reporter's transcript, but, as it indubitably appears that it was before the trial court, and appellant has not brought it up as part of the record for our inspection, we must presume that it supports the court's finding.

Respecting the operations of his boat respondent W. O. Chase testified:

"Q. * * * We will take up the \$167. What is that? A. During the season I caught \$1672 worth of fish. You see we had a tremendously poor season. * * *

"This is for fish I caught in my own boat."

"We got 10% of that as a bonus in addition."

[10] Of the \$1,672.70, sometimes referred to by him as "\$1,672," the witness testified that there remained unpaid to him \$91.56, and, in course of the trial, appellant's counsel repeatedly conceded that, on account of fish delivered, there remained due and unpaid that much of a balance. The method followed in the findings was not to determine the balance due for each of the respective items claimed, i. e., the original price of the fish delivered, the bonus thereon, and the compensation for fish cleaned, but, rather, to add together the total amounts earned on each of the three accounts, and to add separately the payments made, without distinguishing the items to which these were attributable, and then to subtract the second total from the first, to arrive at the aggregate balance remaining unpaid. As respects the fish caught by respondent W. O. Chase and delivered, we are unable, from the record, to say that the court's finding as to its aggregate price, at what we must assume that it determined to be the agreed valuations as deliveries were made, was not supported by the evidence. If the finding on that subject is right, then, as we just saw, it follows that the finding about the amount of the bonus is right also.

There are other rulings on the admission of evidence assigned by appellants as errors. Suffice it to state that, after examining them all, we are unable to say that any such errors in admitting evidence have been made as to result in any miscarriage of justice. Appellant introduced no evidence at the trial to establish what were the actual quantities of fish delivered to it by respondent, or to establish what in fact were the quantities of fish cleaned for it by respondent. It chose to stand on its legal rights and devote its efforts to attacking the showing made by respondent. Doubtless it had the right to take this course, and, doubtless, notwithstanding that it took this course respondent was legally obligated to make a prima facie case before he could be entitled to any judgment. But we do not, in the circumstances, feel called upon to hold that the case made was insufficient to sustain in substance the action of the trial court.

The judgment is reduced by \$23.70, that is to the sum of \$2,247.07 and costs, and, as so reduced, is affirmed. Respondent is to recover his costs on appeal.

We concur: MARKS, Acting P. J.; BARNARD, J.

SHEETS v. SOUTHERN PAC. CO. et al.*

Civ. 7215.

Rehearing Denied Oct. 30, 1930.

District Court of Appeal, First District,
Division 1, California.

Sept. 30, 1930.

As Modified on Denial of Rehearing Oct. 30,
1930.

Hearing Granted by Supreme Court
Nov. 24, 1930.

1. Appeal and error ⇨933(4).

Order granting new trial without specifying ground therefor is presumed not based on insufficiency of evidence, which cannot be considered on appeal unless evidence is insufficient as matter of law (Code Civ. Proc. § 657, subds. 5-7).

2. Railroads ⇨335(1).

Railroad crossing is warning of danger, and failure to exercise ordinary care in crossing will not be excused by railroad's negligent omission to exercise care.

3. Railroads ⇨330(2).

Safety appliances at crossing does not absolve travelers from duty of exercising care for own safety.

4. Railroads ⇨330(2).

Railroad cannot encourage relaxation of vigilance and hold persons to same quantum of care as if no safety measures had been adopted.

5. Railroads ⇨350(13).

Whether driver of truck struck by freight car at crossing exercised ordinary care for own safety held for jury.

Driver of truck after sunset testified that before starting to cross railroad track he looked through isinglass panels in side curtains in truck in direction of approaching freight car, but did not see or hear it, and that he did not notice whether warning signal at opposite side of crossing was operating at time. Testimony disclosed that when locomotive passed crossing, brakeman, who signaled driver to stop, left crossing and walked in direction of locomotive, and that driver thereafter moved truck forward in reliance on brakeman's conduct.

6. Appeal and error ⇨994(2).

Where visibility was poor, appellate court could not say that truck driver's testimony that he looked and could not see approaching freight car was false, nor that, if driver looked around curtain, he would have discovered danger.

7. Appeal and error ⇨996.

Court could not say flagman's action in leaving crossing and locomotive's crossing would not reasonably justify conclusion that danger from train was past.

8. Damages ⇨132(7).

\$7,500 damages for fractured hip bone and bruises suffered by truck driver, who might not completely recover, *held* not result of prejudice.

9. Appeal and error ⇨933(4).

Order granting new trial, not specifying ground therefor, is assumed not based on excessive damages, where involving sufficiency of evidence (Code Civ. Proc. § 657, subs. 5-7).

10. Negligence ⇨122(1).

Charge that plaintiff is presumed, in absence of evidence, to have done all that reasonably prudent man would do for own safety, *held* proper (Code Civ. Proc. § 1963, subd. 4).

11. Negligence ⇨122(1).

Presumption that person does all that reasonably prudent man would do for own safety should be given weight only in absence of evidence (Code Civ. Proc. § 1963, subd. 4).

12. Trial ⇨234(1).

Charge authorizing recovery, if jury believed plaintiff used care and believed defendants were negligent, did not authorize verdict on jury's belief without reference to evidence.

13. Pleading ⇨127(1).

Plea of contributory negligence does not admit defendant's negligence so as to dispense with proof thereof.

14. Negligence ⇨141(1).

Charge that defendant, urging defense of contributory negligence, submits own negligence, but claims plaintiff was also negligent, *held* not error.

15. Trial ⇨256(1).

Defendant, if believing instruction deficient for generality, must request more specific charge.

16. Appeal and error ⇨901.

Appellant has burden of proving order granting or denying new trial was error, presumption being in favor of order.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by George L. Sheets against the Southern Pacific Company and others. Verdict for plaintiff, defendant's motion for new trial was granted, and plaintiff appeals.

Reversed.

George C. Hadley and J. Horton Beeman, both of San Francisco, and Franklin Swart, of Redwood City, for appellant.

Dozier & Kimball and Christian F. Kimball, all of San Francisco, and Kincaid & Fitzpatrick, of Redwood City, for respondents.

PER CURIAM.

This action is one for damages for personal injuries sustained by the plaintiff through the alleged negligence of defendant corporation. The latter denied the negligence alleged, and as a defense alleged contributory negligence on the part of the plaintiff. The case was submitted to a jury which returned a verdict for the plaintiff in the sum of \$7,500. Defendants moved for a new trial, which was granted, and plaintiff has appealed from the order.

The accident occurred shortly after 5 o'clock p. m. on November 30, 1928, at the intersection of the Middlefield road, a public highway, and the tracks of the defendant company in the outskirts of Redwood City. The plaintiff, who was familiar with the crossing, was driving a motor truck north along the highway, which runs approximately north and south. The railroad tracks cross the highway obliquely at an angle of about 35 per cent., and extend in a general northwesterly and southeasterly direction. The truck which plaintiff was operating was struck at the crossing by a single freight car, moving in a northwesterly direction under the momentum previously imparted to it by a locomotive in the course of making a flying switch. Previous to the approach of the locomotive, the truck arrived at the crossing and stopped on the southerly side thereof upon the signal of a brakeman stationed at the crossing to protect traffic. When some distance from the crossing the locomotive was detached from the freight car while both were in motion and continued on across the highway. After the locomotive had crossed the brakeman turned and left the crossing in the direction the locomotive was traveling, whereupon the plaintiff started to cross, and the truck was struck by the oncoming freight car, causing the injuries complained of.

[1] The motion for a new trial was based upon the fifth, sixth, and seventh subdivisions of section 657 of the Code of Civil Procedure, and was granted without specifying upon which the order was made. Under the above section it must be presumed that the order was not based upon the insufficiency of the evidence to justify the verdict, and the plaintiff claims that the record discloses no other ground for making the order. Under the circumstances we are precluded from considering the question of the insufficiency of the evidence unless it was insufficient as a matter

of law. *Yoakam v. Hogan*, 198 Cal. 16, 243 P. 21; *Kauffman v. Maier*, 94 Cal. 269, 29 P. 481, 18 L. R. A. 124; *Read v. Pacific Electric Ry.*, 185 Cal. 520, 197 P. 791. But defendant claims that plaintiff was shown to have been guilty of contributory negligence as a matter of law; also that certain instructions were prejudicially erroneous, and that the amount awarded as damages raises the presumption that the jury was influenced by passion and prejudice.

[2-7] It was stipulated that on the evening of the accident the sun set at 4:40 o'clock p. m., and, according to the testimony, the accident happened at about 5:15 o'clock p. m. At each end of the truck seat curtains were placed, through each of which an aperture 10 inches square had been cut and covered with a transparent sheet of isinglass. Although it was dusk, the plaintiff testified that he could see ahead 300 feet and objects distinctly 50 feet, but that objects were less visible through the isinglass. He further testified that before starting to cross he looked through the curtain in the direction of the approaching freight car, but did not see or hear it. He admitted that by leaning forward he might have looked around the curtain, but failed to do so. He also admitted that on the opposite side of the crossing was placed a signal which gave warning by means of a bell and a moving arm, called a wigwag, but that he did not notice whether this signal was operating at the time he attempted to cross. As stated, the testimony also shows that, when the locomotive had passed, the brakeman or flagman who signaled plaintiff to stop left the crossing and walked in the direction of the locomotive, and it was then that the plaintiff moved his truck forward. The latter in this connection testified, in substance, that he depended to a certain extent upon the flagman and would not have attempted to cross had the latter remained upon the crossing. It was also testified that a brakeman with a lighted lantern was standing upon the forward end of the approaching freight car, but according to the plaintiff he did not see either the brakeman or the lantern. Other witnesses testified to the unsuccessful efforts of the trainman and others to direct plaintiff's attention to the approaching car. As has often been held, a railroad crossing is itself an effectual warning of danger which must always be heeded, and the failure to exercise ordinary care in passing over such a place will not be excused by the negligent omission of the railroad company to exercise such care. *Green v. Southern California Ry. Co.*, 138 Cal. 1, 70 P. 926. Nor is it the law that, where a railroad adopts safety appliances or other methods of warning or protection, the crossing travelers are absolved from the duty of exercising ordinary care for their own safety (*Koch v. Southern California Ry. Co.*, 148 Cal. 677, 84 P. 176, 4 L. R. A. [N. S.]

521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795), but a railroad company will not be permitted to encourage a relaxation of vigilance by assurances that the danger has been minimized and at the same time hold persons to the same quantum of care as if no safety measures had been adopted (*Gregg v. Western Pacific Ry. Co.*, 193 Cal. 212, 223 P. 553). Again, it has been held in numerous decisions that the practice of making flying switches is inherently dangerous [*Elliott on Railroads* (3d Ed.) § 1813], and, where it appears that the injury complained of was so occasioned, the inferences drawn from the facts are not the same as those arising from the circumstances of the ordinary collision, as it usually appears that the injured person had not the same opportunity to discover the danger (22 Cal. Jur., *Railroads*, § 65, p. 312). While the cases hold that, when to look is to see, testimony that one did look and could not see will be disregarded (*Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 242, 116 P. 513), we cannot say, in view of the conditions as to visibility at the time of the accident, that plaintiff's testimony that he looked and could not see the approaching freight car is not true, nor that, had he looked around the curtain instead of through the isinglass, he would have discovered the danger. Neither can we say that the action of the flagman in leaving the crossing, taken in connection with the fact that the locomotive had crossed the highway, was not a fact which would reasonably justify the conclusion that the danger was past. Following the case of *Gregg v. Western Pacific Ry. Co.*, supra, wherein the facts were analogous, we are of the opinion that the question whether plaintiff under all the circumstances exercised ordinary care for his own safety was one for the jury.

[8, 9] According to the testimony of a physician who treated the plaintiff for a period of about two and a half months after the accident, he suffered a fracture of the hip bone extending down toward the hip joint and of the second and third left lumbar vertebrae in the transverse process, and also of the socket in which the hip bone sets. He also received extensive bruises, from all of which he suffered pain, and the physician was unable to state whether he would completely recover from his injuries. In view of this testimony, the amount of the verdict was not such as to necessarily lead to the conclusion that the jury was influenced by passion or prejudice. Moreover, the question involves a sufficiency of the evidence to justify the amount of the verdict (*Doolin v. Omnibus Cable Co.*, 125 Cal. 144, 57 P. 774; *Graybill v. De Young*, 140 Cal. 327, 73 P. 1067; *Zibbell v. Southern Pacific Co.*, supra), and, the order not having declared that it was based upon the ground of excessive damages, we are bound to assume that such was not the fact (*Griffey v. Pacific Electric Ry. Co.*, 58 Cal. App. 509, 209

P. 45; *Meinberg v. Jordan*, 29 Cal. App. 760, 157 P. 1005, 1007; *Tasker v. Cochrane*, 94 Cal. App. 361, 271 P. 503).

[10-15] Defendant complains of the following instructions which were given at the request of plaintiff. On the question of contributory negligence the jury was instructed that it was to be presumed in the absence of evidence that plaintiff did all that a reasonably prudent man would do for his own safety. While it has been held that this presumption should be given weight only in the absence of evidence (*Larrabee v. Western Pacific Ry. Co.*, 173 Cal. 743, 747, 161 P. 750), the instruction was nevertheless proper. It was not in conflict with others given by the court, and was a correct statement of the law (Code Civ. Proc. § 1963, subd. 4). The following instruction was also given: "If you believe that plaintiff used that degree of care and caution for the protection of his own safety which a reasonably prudent person under similar circumstances would have exercised, I instruct you that plaintiff was not guilty of contributory negligence, and if you further believe that the defendants were guilty of negligence which proximately caused the collision, then your verdict should be in favor of plaintiff." Defendant contends that here the jury was erroneously instructed that they might base their verdict upon their belief as to the facts without reference to the evidence. While it is the duty of the jury to confine their deliberations to the evidence, we are of the opinion that they would, being reasonable men, understand from this, together with other instructions, that the court referred to their belief based upon the evidence, and such was the view respecting a similar instruction in *Wood v. Los Angeles Traction Co.*, 1 Cal. App. 474, 82 P. 547. The jury was further instructed that: "There is a doctrine in law known as contributory negligence. When a defendant charged with negligence urges this defense for the purpose of defense he admits his own negligence, but urges that the plaintiff was also negligent and that the negligence of the plaintiff so charged was a contributing cause of the accident. To sustain such defense it is not enough that plaintiff happen to have been negligent, but it must appear as well that his negligence was a proximate cause of the accident." It is well established that a plea of contributory negligence does not admit the negligence charged in the complaint so as to dispense with proof of such negligence by plaintiff. *Hoffman v. Southern Pacific Co.*, 84 Cal. App. 337, 258 P. 397. The defense is nevertheless predicated upon the existence of negligence on the part of the defendant, the responsibility for which he avoids by showing concurrent and contributing negligence upon the part of the person injured. *Crabbe v. Mammoth Channel Gold Mining Co.*, 168 Cal. 500, 143 P. 714.

This, we think, was the plain meaning of the instruction, the jury being told that the admission upon which the plea was predicated was made only "for the purpose of defense." This was a correct statement of the law, and, if the instruction was deficient by reason of its generality, it was defendant's duty to request that the charge in this particular be made more specific. No such request was made.

[16] While all presumptions are in favor of an order granting or denying a new trial, and the burden is upon appellant to show that the order was erroneous (2 Cal. Jur., Appeal and Error, § 522, p. 887), in the present case there appears no support for the order on the ground of errors of law at the trial or that the plaintiff was guilty as a matter of law of negligence contributing to his injury. Although different conclusions on the issues of fact might reasonably have been drawn from the evidence, and an order specifying the insufficiency of the evidence to justify the verdict would have been supported, no order on that ground having been made, no reason is disclosed by the record for granting a new trial, and under the circumstances we are forced to the conclusion that the order was erroneous and should be reversed.

The order is reversed.

YOUNG v. HOAGLAND et al.*

Civ. 7312.

District Court of Appeal, First District,
Division 1, California.

Oct. 3, 1930.

Rehearing Denied Nov. 1, 1930.

Hearing Granted by Supreme Court
Nov. 28, 1930.

1. Payment ☞84(1).

Moneys voluntarily paid on claim of right cannot be recovered merely because payer was ignorant of or misunderstood law affecting liability.

2. Payment ☞82(1).

That demand, voluntarily paid, was illegal, is insufficient for recovery, unless compulsion or "coercion" controls payer's conduct.

To constitute "coercion," there must generally be some actual or threatened exercise of power possessed or supposed to be possessed by person exacting payment over person or property of payer, from which the latter has no means of immediate relief other than by advancing money.

[Ed. Note.—For other definitions of "Coerce; Coercion," see Words and Phrases.]

3. Payment $\S$ 82(3).

Money paid to prevent superseded directors from selling stock for assessments, canceled by lawful successors, *held* involuntarily paid, respecting recovery as money had and received.

4. Money received $\S$ 15.

Action for money had and received is equitable in nature, and generally lies where defendant possesses money belonging in equity and good conscience to plaintiff.

5. Corporations $\S$ 320(1).

Stockholder could not recover, as money had and received, money paid under canceled assessment, if directors expended money in paying corporate debts.

If money was used in paying corporate debts, stockholder got legal benefit of his payments, either as credit on stockholder's liability, or in canceling debts of corporation, thus increasing value of its tangible assets, and hence increasing value of stock.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by George H. Young against William Hoagland and others. Judgment for plaintiff, and defendant named appeals.

Reversed and remanded.

William Kehoe, of San Francisco, for appellant.

Corbet & Selby, of San Francisco, for respondent.

JORGENSEN, Justice pro tem.

This is an action by plaintiff, as assignee of certain stockholders of the Humboldt Oil Company, against defendant Hoagland, a former president and director of the company, and two former directors, to collect money theretofore paid by himself and others on a canceled assessment of a corporation. The complaint is in twenty counts, and seeks to recover the sums paid as money had and received. The court, sitting without a jury, rendered judgment for plaintiff for \$1,031.20, and defendant Hoagland appeals.

Plaintiff and each of plaintiff's assignors were stockholders in Humboldt Oil Company in December, 1923, at the time the payments were made. The three defendants had been, up to November 30, 1923, members of the board of directors of said company, consisting of five persons. On November 30, 1923, a meeting of the stockholders was held, at

which meeting the old board of directors were removed and a new board appointed. These defendants claimed they had not been legally removed, and kept the books, seal, papers, and records and other property of the company, and retained possession of its offices for more than one year thereafter, until they were compelled by writ of mandate, sustained on appeal, to turn the same over to the lawful officers.

An "assessment No. 3," levied by the old board prior to their removal on November 30, 1923, which would have become delinquent by its terms on December 3, 1923, was canceled at the first meeting of the new board on November 30, 1923.

Notices of this assessment had been delivered to all the stockholders, and notice had been regularly published that any stock on which the assessment was not paid on or before December 27, 1923, would be sold. The former directors purported to sell all stock on which the assessment was unpaid on said December 27.

The record shows that the defendants threatened to sell all of the stock on which assessments were not paid to them as officers of the company.

The findings are, and the evidence establishes, that all of the payments for which judgment was rendered were either paid directly to defendant Hoagland or to the other defendants, who were purporting to act as secretary and treasurer, respectively, and turned over to Hoagland and deposited in the bank in his name because the account of the company had been attached, except as to payments set forth in counts 2, 3, 4, and 13, aggregating \$93.50, which latter payments never came into the personal possession of defendant Hoagland.

None of the payments were made under a protest, but were made by the respective stockholders with knowledge of all the facts, to prevent the sale of their stock by defendants, claiming to be officers of the company, the stockholders so paying not knowing the validity of defendants' claim that they were the lawful officers of the company, and, being in doubt, paid the assessment to protect their interest, and in one case one of the defendants, Wilde, told the stockholder Lassegues that, if it was determined that the new board had rescinded the assessment, his money would be returned to him. There is nothing in the record to even tend to prove that defendants' claim to office was not made in good faith.

Defendant Hoagland offered to prove that he expended all the money received by him in payment of legitimate bills of the company. The trial court sustained an objection to this proffered testimony.

Issues:

(1) Was the money paid under such circumstances that the law will compel repayment?

(2) Did the court err in refusing defendant's offer to show that all money received had been used in paying legitimate bills against the company?

[1, 2] The rule is well settled that moneys voluntarily paid upon a claim of right cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to the liability. The illegality of the demand paid constitutes of itself no ground for relief. There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment. What shall constitute the coercion which the law will recognize as sufficient to render payments involuntary may often be a question of difficulty. It may be said in general that there must be some actual or threatened exercise of power possessed or supposed to be possessed by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money. *Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176.

The rule at common law was very strict, but has been tempered throughout the years. As is said: "The rule of the common law worked hardship and injustice in many instances, and this ancient doctrine of duress of person and later of goods has been much relaxed through the influence of equity and extended so as to admit of compulsion of business and circumstances." 21 R. C. L. at page 147.

"The general rule with regard to duress of this character is that where by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, he may recover it." 21 R. C. L. at page 155.

See *Kilpatrick v. Germania Life Insurance Co.*, 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574, 111 Am. St. Rep. 722, where mortgagee paid an illegal bonus after foreclosure proceeding had begun, and was allowed to recover such payment.

Each case, of course, must rest upon its own peculiar facts. Counsel have not cited any cases involving the question of the return of money paid on illegal assessments of corporations.

In the case of *Duke v. Force*, 120 Wash. 599, 208 P. 67, at page 74, 23 A. L. R. 1354, involving an illegal assessment, the court assumed that such payments were involuntarily

made and came within the above rule, but decided the case on other grounds. The same is true in the case of *Gillett v. Moore*, 74 Colo. 484, 223 P. 21.

[3] We think that, under modern conditions of business, where a man is constantly obliged to keep his credit good and unimpaired, and where stock is universally used for collateral for loans, etc., money paid on illegal assessments is involuntarily paid, and is payment which under modern conditions a reasonably prudent man finds that it is necessary to pay in order to preserve his property and protect his business interests, and under such conditions he should be entitled to recover.

In this case, however, the defendant Hoagland offered to prove that he did not have in his possession any of the payments, for the reason that he used all moneys received in paying legitimate bills of the company, which offer of proof the court, on objection, refused. Now these payments were not made to the defendants for their own personal use; they were made for the use and benefit of the corporation.

[4] The basis for an action for money had and received is that the defendant has money which in equity and good conscience he ought to pay to the plaintiff, and, generally speaking, the action lies in all cases where one person has in his possession money which in equity and good conscience he ought to pay over to another. The action is in the nature of an equitable one. *Hillwig v. Boyer*, 81 Cal. App. 763, at page 771, 254 P. 662. See *Sacramento County v. Southern Pacific Co.*, 127 Cal. 221, 59 P. 568, 825, where the Supreme Court held that an action cannot be maintained by a county to recover back money paid under contract entered into in good faith for the construction of a railroad bridge across a river with a separate overhead roadway to be kept in order by the railroad company for free public highway purposes, the construction of which was completed and enjoyed by the public, notwithstanding the contract may be invalid for want of compliance with the requirements of the law, because in equity and good conscience the defendant had no money which belonged to the plaintiff.

It has been held that, where money is paid to an agent for the purpose of being paid over to his principal, and has been actually so paid over, an action for money had and received will not lie against the agent to recover the same, on the ground of such payment to the agent having been induced by false and fraudulent representations made by him. *Butler v. Livermore*, 52 Barb. (N. Y.) 570.

Likewise, where the amount of a stock subscription is paid to the treasurer of a corporation and certificates are not issued to the person so paying, an action for money had and received will not lie against the treasurer of the corporation to recover money paid on

the subscription; the remedy being against the corporation. *Loring v. Frue*, 104 U. S. 223, 26 L. Ed. 713. See, also, *Tuttle v. Everett*, 51 Miss. 27, 24 Am. Rep. 622; *Meacham v. Newport*, 70 Vt. 264, 40 A. 729.

[5] Assuming that the money collected was used in paying the debts of the corporation, the payers got the legal benefit of their payments, either as a credit upon their stockholders' liability, or in canceling debts of the corporation, and thus increasing the value of its tangible assets and hence increasing the value of their stock,

The defendants were ostensibly acting in good faith for the corporation, and the payments were in effect made to and for the benefit of the corporation, and the corporation received the benefit, assuming the money was used in paying legitimate bills of the corporation, and the defendants are not liable, as they would have no money in their hands belonging to plaintiff.

The action of the court in sustaining the objection to the proffered evidence as above set forth was error.

The judgment is reversed, and the cause remanded for a new trial.

We concur: TYLER, P. J.; CASHIN, J.

108 Cal. App. 745

WARD v. DE MARTINI.
Civ. 7208.

District Court of Appeal, First District, Division 1, California.
Oct. 4, 1930.

Rehearing Denied Nov. 3, 1930.

Hearing Denied by Supreme Court
Nov. 28, 1930.

1. Assault and battery ⇨35.

Evidence showed that plaintiff, employed by company of which defendant was secretary, was willfully injured, probably permanently, when preventing defendant from assaulting manager.

2. Assault and battery ⇨43(6).

Evidence warranted instruction assaulted plaintiff, to prevent public offense, had right to offer assistance and use force necessary in preventing assault.

3. Trial ⇨296(11).

Instruction authorizing recovery for inability to pursue employment caused by assault *held* not objectionable as not specifically restricting damages to injuries, restriction being emphasized elsewhere.

4. Assault and battery ⇨43(5).

Evidence showing assault was wanton, malicious, and without justification, warranted instructions on exemplary damages.

5. Appeal and error ⇨1171(2).

Maxim de minimis non curat lex applied where jury, under allegedly erroneous instructions on exemplary damages, awarded \$6,000 as compensatory, and \$1 as punitive damages for assault.

6. Trial ⇨296(11).

Instruction jury must be "practically" certain of future suffering caused by assault *held* not misleading because not using "reasonably," "reasonably" appearing elsewhere in instruction.

7. Assault and battery ⇨33.

Where plaintiff claiming exemplary damages, alleged and proved wanton and malicious assault, evidence on defendant's financial condition was proper.

8. Assault and battery ⇨40.

\$6,000 *held* proper for probably permanent injuries caused by assault, producing contusions, paralysis of femoral nerve, and numbness and partial paralysis of leg.

9. Trial ⇨29(3).

Trial judge's expressing opinion that witness is respectable person, or lives reputable life, is improper.

10. Trial ⇨31.

Aggrieved party must promptly call court's attention to improper remarks, to allow opportunity to correct prejudicial effect by instruction.

11. Appeal and error ⇨1170(6).

In absence of exception, judge's remark that plaintiff in assault case "lived respectable life" *held* not reversible error; prejudicial effect possibly being correctible by timely instruction (Const. art. 6, § 4½).

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Irene Ward against Paul De Martini. From a judgment for plaintiff, defendant appeals.

Affirmed.

Waldo F. Postel, of San Francisco, for appellant.

Walter E. Hettman and Chauncey F. Eldridge, both of San Francisco, for respondent.

PER CURIAM.

An action to recover damages for personal injuries alleged to have been maliciously inflicted upon the plaintiff by the defendant. A jury returned a verdict against defendant for \$6,000 as compensatory, and \$1 as punitive damages. A motion for a new trial was denied, and defendant has appealed from the judgment.

The grounds of appeal are that the verdict is unsupported; that the court instructed the jury erroneously and also erred in admitting certain testimony; further, that remarks by the trial judge in the presence of the jury were prejudicial to defendant, and that excessive damages, appearing to have been given under the influence of passion or prejudice, were awarded against him.

[1] The plaintiff was employed by the City Garbage Removal Company. Her duties consisted in procuring contracts for the removal of garbage, and in addition she rendered clerical services. The defendant was the secretary of the company, which maintained offices in the Clunie building in San Francisco. It was testified that on November 10, 1927, an altercation occurred at the office of the company between the defendant and one Guido Braccini, the manager of the concern. Plaintiff, with another employee, was in an adjoining room when the altercation began. Hearing the noise she opened the door between the rooms and found the defendant beating Braccini with his fists. Braccini was the smaller man, and plaintiff attempted to separate the parties, whereupon the defendant attacked her. He pushed her back and struck her in the left groin with his knee. In addition to pain, the blow caused severe contusions, a paralysis of the femoral nerve, and a numbness and partial paralysis of the left leg. According to one physician her injuries will probably be permanent. Another testified that she may recover with proper treatment but that her recovery will be slow. The defendant denied that he struck or otherwise injured the plaintiff, and the evidence as to what occurred is conflicting. It was amply sufficient, nevertheless, to support the conclusion that plaintiff was willfully injured by the defendant in the manner claimed and that her injuries are likely to be permanent.

[2] The court instructed the jury that if the plaintiff went to the assistance of one being assaulted by another, and used no more force than was necessary to prevent the assault, she was acting within her legal right in preventing the commission of a public offense. Defendant claims that there was no evidence that a public offense was being committed and that the instruction was consequently erroneous. We think the evidence sufficiently shows that an offense was being committed by defendant at the time plaintiff intervened, and the instruction was proper.

The court also instructed that the jury might include in their verdict all costs reasonably incurred by the plaintiff in the treatment of any injuries she might have suffered, including medical and surgical charges; also, what they found she had lost by reason of her inability to pursue her employment, and the amount which she would be reasonably certain to lose in the future. Contrary to defendant's contention, the instruction was in effect that plaintiff could recover only such expenses as were reasonable.

[3] It is also urged that the instruction fails to state that damages allowed for loss due to her inability to pursue her employment must be those caused by her injuries. While plaintiff's injuries are not directly referred to in connection with her loss due to inability to pursue her employment, the court throughout was careful to confine the damage to the loss due to such injuries; and in concluding his instructions as to this character of damages said: "The damages thus far discussed with you are what is known to the law as compensatory damages. The word 'compensatory' may be said to be damages that will compensate the plaintiff for what she suffered as the result of her injury." We are of the opinion that there is no reasonable ground for believing that the jury was misled by the above or that the defendant was prejudiced.

[4, 5] It is claimed that there was no evidence to support a verdict for exemplary damages, and that consequently the court's instructions as to the facts which would justify such a verdict were erroneous. According to defendant's account of the occurrence there was no justification whatever for an assault upon the plaintiff, and under the circumstances shown the conclusion that the same was wanton and malicious would be fully supported. In view of the evidence the instructions were proper. *St. Ores v. McGlashen*, 74 Cal. 148, 15 P. 452; *Badostain v. Grazide*, 115 Cal. 425, 47 P. 118; *Bloomberg v. Laventhal*, 179 Cal. 616, 178 P. 496. Moreover, the case is one where the maxim *de minimis non curat lex* applies. *Moore v. Boyd*, 74 Cal. 167, 15 P. 670.

[6] There is no merit in the further claim that by reason of the insufficiency of the evidence instructions as to compensatory damages were also erroneous. In a general instruction on the subject of damages the jury was told that before awarding plaintiff damages on account of future physical or mental suffering they must be practically certain that she would so suffer as a result of the injury. It is claimed that a jury must be reasonably certain in such cases, and the instruction was consequently erroneous. In another part of the same instruction, however, in referring to future loss the jury was charged that they must be reasonably certain. It is manifest

that the words were used in the same sense, and there is no reason to conclude that the jury was misled.

[7] The court admitted evidence of defendant's financial condition. The complaint alleged and the evidence tended to show that the assault was wanton and malicious, and exemplary damages were claimed. Under such circumstances the evidence was properly admitted. *Marriott v. Williams*, 152 Cal. 705, 93 P. 875, 125 Am. St. Rep. 87.

[8] Likewise we find no merit in the claim that the damages awarded were excessive and appear to have been given under the influence of passion or prejudice, as the amount allowed was fully justified by the character of plaintiff's injuries.

[9-11] Finally it is urged that remarks by the court were prejudicial to defendant. The plaintiff testified that in her work as a solicitor of contracts for the garbage company she called on many persons each day; and the court remarked, "I have no doubt that being engaged in the work of soliciting involves a great deal of walking." Again, she testified that with two exceptions she had no occupation since the alleged assault, and that since 1927 she had been living with her sister, whereupon the court remarked: "She stated at the time she had been with her sister. I know she lived a respectable and reputable life wherever she lived." It has been held error for the trial court to express an opinion that the witness is a person of respectability, and such irregularities have been repeatedly disapproved. *McMinn v. Whelan*, 27 Cal. 300; *Estate of Blake*, 136 Cal. 306, 311, 68 P. 827, 89 Am. St. Rep. 135; *Abbott v. Coronado Beach Co.*, 55 Cal. App. 179, 203 P. 145. Nevertheless, as held in the following cases, it was the duty of the defendant to promptly call attention to the impropriety of the remarks in order to give the court an opportunity to prevent, by a proper instruction, any prejudicial effect upon the jury; and where there is a failure to do so the claim of misconduct will not be considered on appeal unless the conduct complained of was such that a harmful result could not be obviated by an instruction. *People v. Abbott*, 101 Cal. 645, 36 P. 129; *People v. Derwae*, 155 Cal. 592, 102 P. 266; *People v. MacDonald*, 167 Cal. 545, 140 P. 256; *People v. Mahoney*, 201 Cal. 618, 258 P. 607; *People v. Frank*, 71 Cal. App. 575, 236 P. 189; *People v. Singh*, 78 Cal. App. 488, 248 P. 986; *People v. Weeks* (Cal. App.) 286 P. 514. Nor has the rule been changed by the decision in *Berguin v. Pac. Elec. Ry. Co.*, 203 Cal. 116, 263 P. 220. While certain language in that case, taken alone, might be construed to have that effect, the facts show that the misconduct there considered was such that its harmful effect could not have been removed by an instruction. No reference

in this connection was made to the above cases, and it was manifestly not the intention to overrule the same or depart from the established doctrine. Here no exception was taken to the remarks of the court and the same were not assigned as misconduct. We cannot say that any harmful effect upon the jury could not have been removed by instructing them to disregard the remarks. In this connection, however, the record shows that the court instructed that questions of fact were solely for the jury's consideration, and that the court had no right to suggest, and did not suggest, what facts had been established in the case. Notwithstanding error or misconduct, in order to justify the reversal of a judgment the court must be of the opinion, after an examination of the entire cause, including the evidence, that the same resulted in a miscarriage of justice. Const. art. 6, § 4½. After such an examination we are satisfied that the verdict of the jury was fully sustained by the evidence, and that nothing complained of by defendant warrants the conclusion that the same resulted in a miscarriage of justice.

The judgment is affirmed.

DE WOODY v. BELDING, County Clerk, et al.
S. F. 14084.

Supreme Court of California.

Oct. 10, 1930.

1. Elections ⇨126(1).

Death, before general election, of supervisor elected at primary election did not convert primary election into nominating election, and Direct Primary Law did not apply (St. 1913, p. 1407, § 25, as amended).

2. Elections ⇨126(1).

Where one candidate received majority of votes for supervisor at primary election, he was elected, and neither he nor opponent was nominated, as contemplated by Direct Primary Law (St. 1913, p. 1407, § 25, as amended; Const. art. 2, § 2¾).

3. Elections ⇨126(1).

Right to office of supervisor of one elected at primary election was inchoate (St. 1913, p. 1407, § 25, as amended; Const. art. 2, § 2¾).

4. Counties ⇨43.

Death before general election of one elected supervisor at primary election did not create present vacancy in full-term office (Pol. Code, § 996; Const. art. 2, § 2¾).

5. Elections ⇨126(1).

Election of supervisor at primary election was rendered abortive by death before general election (Const. art. 2, § 2¾).

6. Elections ⇨172.

Where person elected supervisor at primary election died before general election, and opponent and another were thereafter nominated in accordance with statute, both names should be printed on ballot for general election (Pol. Code § 1188).

CURTIS and LANGDON, JJ., dissenting.

In Bank.

Application by R. M. DeWoody against C. F. Belding, as County Clerk of the County of Butte, and another, for writ of mandamus to compel respondent named to cause petitioner's name to be printed on ballot as candidate for supervisor.

Writ issued.

Bond & Dierup, of Chico, for petitioner.

J. Oscar Goldstein, of Chico, and Robert W. Harrison, of San Francisco, for respondents.

SHENK, J.

Petition for a writ of mandamus to compel the respondent C. F. Belding, as county clerk

of the county of Butte, to cause to be printed on the ballots to be used at the general election to be held on November 4, 1930, in the second supervisorial district in said county, the name of the petitioner as a candidate for supervisor for said district for the four-year term commencing the 5th day of January, 1931.

At the general election in November, 1926, one George T. Meeker was elected supervisor for said district for the four-year term commencing in January, 1927. He qualified and served until September 16, 1930, when he died. He was a candidate for re-election at the primary election held on August 26, 1930. The respondent A. H. Mahon was also a candidate at said primary election for said office for the full term. Meeker received 1,183 votes and the respondent Mahon received 726 votes. On September 20, 1930, the petitioner was appointed to the office of supervisor in and for said district to fill the vacancy caused by the death of Meeker and to hold said office until the election and qualification of his successor. He is now the duly appointed, qualified, and acting supervisor in and for said district.

On September 29, 1930, the petitioner filed a paper with the respondent county clerk pursuant to section 1188 of the Political Code, nominating the petitioner as a candidate for said office for the full term commencing January 5, 1931. On September 30, 1930, the respondent Mahon also filed with the county clerk, pursuant to said section 1188, a similar nomination paper for the same purpose. The respondent county clerk has announced that he intends to print said ballot with the name of the respondent Mahon as the sole candidate for said office. Hence this petition. A general demurrer has been interposed.

Incidentally it may be noted that both the petitioner and the respondent Mahon have filed nomination petitions under said section 1188 for the unexpired term commencing upon the qualification of the successful candidate at the general election on November 4th next and ending on January 5, 1931. No controversy has arisen with reference to the sufficiency or effectiveness of the nomination papers for the unexpired term. The question presented is whether the petitioner's name should be printed on the ballot as a candidate for the full term.

[1] Section 2¾ of article 2 of the Constitution, adopted in 1926, provides in part that: "Any candidate for a * * * county * * * office who at a primary election shall receive votes on a majority of all the ballots cast for candidates for the office for which such candidate seeks nomination, shall be elected to such office." The foregoing provision is self-executing and operates when there are two or more candidates for the one office. Meeker and the respondent Mahon were the two candidates for this one office at the recent pri-

mary election, and the constitutional provision above quoted was effective to constitute Meeker the duly elected candidate for said office. Whatever effect may be given to the last sentence in section 2¾ of article 2 of the Constitution, an inspection of the charter of the county of Butte discloses that there is nothing therein which would prevent the foregoing quoted constitutional provision from having full force and effect as to the election of Meeker. He was, therefore, elected at said primary election, and, if he had lived, he would have been entitled to a certificate of election, and, upon qualifying, to succeed himself for the full term commencing January 5, 1931, and his name would not appear on the ballot at the forthcoming general election. In legal effect the primary election was a final election so far as the two candidates for said office were concerned. The death of Meeker on September 16th did not convert the primary election into a nominating election as to either candidate, and section 25 of the Direct Primary Law (St. 1913, p. 1407, as amended) would have no application. That section contemplates a situation where no one of three or more candidates receives votes on a majority of all the ballots cast for candidates for the particular office. In such case there is no election, but the nomination only of the two receiving the highest number of votes. In other words, in the absence of an election under the new constitutional provision, two candidates are nominated for the office, and they are the "candidates chosen at the primary election to go on the ballot for the succeeding general election." If a vacancy occur as between those two candidates, "the name of the candidate receiving at said primary election the next highest number of votes, shall go upon the ballot to fill the vacancy."

[2-5] The result of the primary election in said supervisorial district of Butte county was therefore that Meeker was elected, Mahon was defeated, and neither was nominated, as contemplated by section 25 of the Direct Primary Law (St. 1913, p. 1407 as amended). Meeker's right to the office to which he had been elected was inchoate. He did not qualify and did not become an incumbent of the office. His death did not create a present vacancy in the full-term office. See Pol. Code, § 996. That office must necessarily be filled by election or by appointment by the Governor. The power of appointment would not accrue until after the commencement of the full-term office. *People v. Ward*, 107 Cal. 236, 40 P. 538. An election is available to the people of the district under the provisions of said section 1188, unless it must be said that Meeker's election at the primary election has deprived them of that right. We think it may not be so declared. The election of Meeker was rendered abortive by his untimely death.

[6] We have, then, a situation wherein there is a full-term office to be filled and no one elected to fill it; there is no candidate for said office resulting from the primary election; the time has not passed within which candidates may be nominated for that office and be voted for at the general election, November 4th; section 1188 of the Political Code provides the means for such nomination. Both the petitioner and the respondent Mahon have been nominated pursuant to that section, and the names of both as candidates for said office should be printed on the ballot to be used in said district at the ensuing general election.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.

We dissent: CURTIS, J.; LANGDON, J.

210 Cal. 366

PEOPLE v. DAWSON.

Cr. 3345.

Supreme Court of California.

Sept. 30, 1930.

Rehearing Denied Oct. 30, 1930.

1. Constitutional law ☞203.

Amendments concerning indeterminate sentence and probation were *ex post facto*, and therefore inapplicable to defendant who committed offense before amendments were enacted (St. 1929, pp. 1930, 1384, amending Pen. Code, §§ 1168, 1203).

2. Statutes ☞71, 77(1).

Statute applying equally to all within natural class is not special legislation or void as not operating uniformly.

3. Statutes ☞74(1), 86.

Statutory distinction between felonies and misdemeanors is natural and reasonable classification, not violating constitutional provisions against special legislation, or lack of uniformity (Pen. Code, §§ 17, 1387).

Pen. Code, § 17, defines felony as crime punishable by death or imprisonment in state prison and every other crime as misdemeanor, while section 1387 provides that dismissal of misdemeanor charge shall operate as bar to prosecution for same offense.

4. Criminal law ☞178.

Order dismissing felony information for delay in bringing defendant to trial did not

bar subsequent prosecution for same offense (Pen. Code, §§ 1382, 1387).

Pen. Code, § 1382, requires that action be dismissed if not brought to trial within 60 days after filing of information, unless good cause to contrary be shown.

5. Criminal law ☞1202(1).

To establish prior conviction of felony, prosecution must plead and prove that defendant served term in penal institution (Pen. Code, § 667).

Pen. Code, § 667, provides that one committing crime after having been convicted of offense punishable by imprisonment in state prison and "served a term therefor in any penal institution" is punishable as therein provided.

6. Criminal law ☞1202(6).

Judgment ordering imprisonment "for the term prescribed by law" after reciting conviction of forgery and prior conviction of felony, without reciting service of term in penal institution, *held* not void as imposing too severe punishment (Pen. Code, § 667).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

James H. Dawson was convicted of forgery, and he appeals.

Affirmed.

For opinion of District Court of Appeals herewith adopted, see 286 P. 749.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Alberta Belford, of Los Angeles, for the People.

CURTIS, J.

[1] A transfer of this action to this court after decision by the District Court of Appeal was ordered for the reason that we were impressed with the argument of the Attorney General that by the amendment in 1929 (St. 1929, pp. 1930, 1384) to sections 1168 and 1203 of the Penal Code it was unnecessary after the enactment of said amendments, in a case where the defendant was charged with a prior conviction of a felony, to either plead or prove that said defendant had served a term of imprisonment in a penal institution under said prior conviction. Whatever may be the force or effect of said amendments, we are convinced that they are not applicable to the present action for the reason that neither of said amendments was in effect at the date of the commission by the defendant of the offense charged in the information in this action. In so far, therefore, as the present ac-

tion against the defendant is concerned, said amendments are *ex post facto* as to the appellant whose offense was committed before the enactment of said amendments. In *re Lee*, 177 Cal. 690, 171 P. 958; In *re Fritz*, 179 Cal. 415, 177 P. 157; *People v. Schmidt*, 33 Cal. App. 426, 435, 165 P. 555; *Kring v. Missouri*, 107 U. S. 221, 2 S. Ct. 443, 27 L. Ed. 506. The opinion, therefore, of the District Court of Appeal, which was written by Justice Houser and concurred in by Presiding Justice Conrey and Justice York, we think correctly and satisfactorily disposes of all questions presented in this action, and we adopt the same as the opinion of this court.

Said opinion is as follows:

By an information filed in the superior court, defendant was charged with the crime of forgery; also, that before the commission of such offense he had been convicted of another felony on which judgment had been pronounced, which latter charge defendant admitted. It is asserted by appellant that, following his conviction of the offense of forgery, judgment was pronounced by the trial court against him, not only on his conviction of the crime of forgery, but as well under the provisions of section 667 of the Penal Code, as for one who theretofore had been convicted of a felony and had served a term therefor in a penal institution.

In substance, it is first contended by appellant that the provisions of section 1387 of the Penal Code to the effect that an order for the dismissal of an action "is a bar to any other prosecution for the same offense, if it is a misdemeanor," but shall not constitute a bar to a further prosecution if the offense charged be a felony, is special and class legislation, and consequently unconstitutional and void, for the reason that if it be the law that a dismissal of an indictment or an information by which a defendant was charged with the commission of a felony does not bar a subsequent prosecution of the defendant for an offense identical with that originally charged against him, the effect is that upon the dismissal of a felony information, which is followed by a prosecution for an offense identical with that charged in the original information, the defendant is denied a speedy and public trial as guaranteed to him by article 6 of the amendments to the Constitution of the United States, as well as by article 1, § 13, of the Constitution of this state, and section 686 of the Penal Code.

In substance, section 1382 of the Penal Code provides that, unless good cause to the contrary be shown, the action against the defendant must be dismissed if not brought to trial within sixty days "after the finding of the indictment, or filing of the information." *Matter of Ford*, 160 Cal. 334, 338, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267.

[2, 3] By the record herein, it appears that defendant was actually brought to trial on the original information filed against him, but that, before the jury was impaneled in the action, "defendant did make his motion before said court to dismiss the said information and cause, and to discharge said defendant upon the ground that defendant, James H. Dawson, was not brought to trial within the time limited by law, and that he was not given a speedy trial," etc., which said motion was granted. In such circumstances, it would appear that defendant is in no position now to complain that he was not prosecuted under the original information. Furthermore, in the case of *People v. Palassou*, 14 Cal. App. 123, 111 P. 109, where a similar situation obtained, it was held that the fact that on the defendant's own motion he was discharged and the information dismissed because he had not been brought to trial within sixty days, as required by law, did not constitute a bar to a further prosecution under a new information for the same offense. However, appellant argues that because section 1387 of the Penal Code provides that the dismissal of a misdemeanor charge against a defendant shall operate as a bar "to any other prosecution for the same offense," the same rule should obtain where the defendant is charged with the commission of a felony; otherwise, in addition to the point that the statute constitutes special and class legislation, appellant contends that the statute is not uniform in its operation, convicts the defendant without due process of law, and denies to him the equal protection of the laws, in that the statute discriminates in favor of a defendant who may have committed a misdemeanor, as against one who may have committed a felony. The several questions thus presented may be reduced to the single inquiry as to whether offenses against the body politic may be legally divided into the two classes of misdemeanors and felonies, and procedure enacted which will be applicable to persons who are charged with the commission of the one class of criminal offenses and not be applicable to the other. A general rule, and one which has been so universally followed as to require no citation of authority therefor, is that, where a statute is made to apply equally as to all persons embraced within a natural class, the constitutional provisions directed against special legislation, lack of uniformity in the operation of the law, and the like, are not violated. From a consideration of section 17 of the Penal Code, which includes the statement that a felony is a crime which is punishable with death, or by imprisonment in the state prison, and that every other crime is a misdemeanor, it becomes apparent that as to the punishment or penalty which is to be imposed for a violation of the penal laws of the state, the Legislature by its enactment of the statute has

recognized a distinction in degree as between or among different kinds of penal offenses. That such a classification is a natural one, not arbitrary, but based upon valid reasons and distinctions, and consequently not violative of the several constitutional provisions to which reference has been had, may be inferred from analogous adjudications by the Supreme Court of this state. *People v. Finley*, 153 Cal. 59, 94 P. 248; *People v. Quijada*, 154 Cal. 243, 97 P. 689; *People v. Carson*, 155 Cal. 164, 99 P. 970; *People v. Oppenheimer*, 156 Cal. 733, 106 P. 74; *Selowsky v. Superior Court of Napa County*, 180 Cal. 404, 181 P. 652; *People v. Camp*, 42 Cal. App. 411, 183 P. 845; *In re Todd*, 44 Cal. App. 496, 186 P. 790. Moreover, the classification as recognized in section 1387 of the Penal Code has stood, practically unchanged and unchallenged, for seventy-nine years. *Crim. Prac. Act*, St. 1851, p. 279, sec. 599.

It would seem clear that, as compared one with the other, a given offense may not be so serious in its consequences as another specified offense. In other words, as between two distinct offenses, one may be insignificant as far as its effect upon the body politic is concerned, while the other may be so heinous in character that to its frequent and unchecked commission might be attributed the origin of a possible state-wide disaster, or, eventually, the downfall of organized society. Manifestly, as relates to the penalty for the infraction of criminal statutes, the segregation into one class of comparatively trivial offenses from those which are placed into a second class because of their more serious effect upon the morals, the safety, or the welfare of the community, is justified. That the lesser crimes should be denominated misdemeanors, and the greater, felonies, is of no consequence; nor does the fact that in its regulation, especially as it affects the dismissal of a prosecution for its commission, the one class is treated differently from the other, give occasion for any valid objection on the ground that such action amounts to an arbitrary or unreasonable discrimination. It is a most natural classification, and one which does no violence to constitutional guaranties.

[4] Appellant presents the specific point that the order of dismissal of the original action was final; also that it was appealable; and that it acted as a bar to further prosecution of the defendant for the same offense. It is apparent that the people accepted such order of dismissal as final. That the people attempted no appeal therefrom furnishes no ground for complaint on the part of defendant, and that such order did not bar a subsequent prosecution of defendant for the same offense is decided adversely to appellant's contention, first, by the provisions of section 1387 of the Penal Code, to which reference herein has been had; and, secondly, by the ruling in the case entitled *In re*

Begerow, 136 Cal. 293, 68 P. 773, 56 L. R. A. 528, in which it is also held that, by the prosecution of the defendant therein on the second information filed against him, no constitutional right of the defendant was invaded. See, also, *People v. Palassou*, 14 Cal. App. 123, 111 P. 109; *People v. Ammerman*, 118 Cal. 23, 50 P. 15.

[5] It is urged by appellant that the judgment pronounced against defendant was void for the reason that it imposed on him a more severe punishment for the crime of which he was convicted than is provided by the statute which specifically prescribes the penalty for the commission of such crime.

As hereinbefore intimated, by the information in the instant action defendant was "accused * * * of the crime of forgery; * * * and that before the commission of the offense charged, * * * the said defendant was * * * convicted of the crime of violation of section 146 of the California Vehicle Act (St. 1923, p. 564), a felony. * * *"

That part of the judgment of which appellant complains was as follows:

"* * * James H. Dawson having been duly found guilty in this court of the crime of forgery, a felony, as charged in the information, and having admitted prior conviction of a felony,

"It is therefore ordered, adjudged and decreed that the said James H. Dawson be punished by imprisonment in the state prison of the state of California at Folsom for the term prescribed by law."

In part, section 667 of the Penal Code provides that:

"Every person who, having been convicted of any offense punishable by imprisonment in the state prison, and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows: * * *"

It will be noted that a part of the requisites to the imposition of the sentence of which complaint is herein made is that, following a prior conviction of an offense punishable by imprisonment in the state prison, the defendant must have "served a term therefor" in some penal institution; also, that the information herein was silent as to any allegation which related to any former service of a "term" by defendant in any penal institution; furthermore, that defendant pleaded guilty only to the charge of a prior conviction—which necessarily omitted the element of his having "served a term therefor in any penal institution."

Many authorities attest the rule that, in order to establish the prior conviction of a defendant of a felony, the statutory requirements must be fulfilled; that is to say, the necessary facts must be both pleaded and

proved. *People v. Coleman*, 145 Cal. 609, 79 P. 283; *People v. King*, 64 Cal. 338, 30 P. 1028; *People v. Wagner*, 78 Cal. App. 504, 248 P. 946; *People v. Wallach*, 79 Cal. App. 605, 250 P. 578.

The opinion in the case of *People v. Sampson* (Cal. App.) 278 P. 492, contains a recognition of the fact that, in establishing a foundation for a valid judgment by which a more severe sentence may be imposed upon a defendant convicted of a criminal offense because of his prior conviction of a felony, it is essential that in some manner it appear that he has "served a term therefor" in some penal institution.

[6] It is clear that the duty of proving each of the statutory elements devolved upon the prosecution. Defendant pleaded guilty only to as great a charge as was contained in the information. Although it is manifest that a judgment by reason of which defendant would be subjected to punishment for the commission by him of the crime of forgery as severely as though both by the pleading and the proof in the action it appeared that theretofore he had been convicted of a felony, and had served a term therefor in some penal institution, would be violative of the rights of defendant; an examination of the judgment actually pronounced herein discloses that, after reciting the facts, to wit, that defendant had been convicted of the crime of forgery and that prior thereto he had been convicted of a felony, it was ordered that he be imprisoned "for the term prescribed by law." The attention of this court has been directed to no statute which, by its terms, purports to impose a more severe penalty on one convicted of a felony who theretofore simply has suffered a similar conviction, than is imposed upon one who never before has been convicted of a felony; and since the judgment herein contained no recital that following his conviction of a felony defendant had served a term therefor in a penal institution, the construction which should be placed upon the order contained in the judgment that defendant should be imprisoned "for the term prescribed by law," is that defendant be punished, not as prescribed by section 667 of the Penal Code, but only as is provided by the appropriate statute for a first offender convicted of the crime of forgery. So construed, as far as the point presented by appellant is concerned, the judgment is unexceptionable.

On examination of the record herein, this court is of the opinion that the evidence was sufficient to sustain the verdict of the jury.

Following his conviction, defendant gave notice of appeal, not only from the judgment and the order denying his motion for a new trial, but as well from several other orders which were incidental to the judgment.

It is ordered that the judgment as well as each of the several orders specified by defendant in his notice of appeal be, and they are, affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

210 Cal. 449

**MORTON v. BEATY et al., Board of
County Sup'rs.
S. F. 14073.**

Supreme Court of California.
Oct. 1, 1930.

Mandamus $\Rightarrow$ 74(4).

Petitioner *held* not entitled, under circumstances, to mandamus for recount of ballots to determine right to office of justice of the peace (St. 1913, p. 1408, § 27, and p. 1489, § 14; Pol. Code, § 1216; Const. art. 2, § 2¾).

Although under Pol. Code, § 1216, and St. 1913, p. 1489, § 14, the registrar of voters of the county had possession and control of ballots cast at primary election, he was not a party to the proceeding, and no error, omission, wrongful act, or neglect of duty on part of board of supervisors was made to appear, in addition to fact that there was no method provided by law for the separate return by election officers of the number of ballots on which a vote or votes were cast for justice of the peace.

In Bank.

Original proceeding by writ of mandate by J. Russell Morton against Fred T. Beaty and others, as Board of Supervisors of Los Angeles County and acting as Primary Election Board of Canvassers.

Petition denied.

R. A. Morton, of Los Angeles, for affiant.

Everett W. Mattoon, Co. Counsel, and Ray C. McAllaster, Deputy Co. Counsel, both of Los Angeles, for respondents.

Hewitt, McCormick & Crump, of Los Angeles, for intervener.

PER CURIAM.

This is a proceeding under section 27 of the Direct Primary Law (Stats. 1913, p. 1408). The petitioner claims to have been elected at the primary election held on August 26, 1930, to one of the two offices of justice of the peace of Pasadena township. There were three can-

didates for the two offices to be filled. No returns were made to the respondent board of supervisors specifically or at all stating the number of the ballots cast in the precincts in said township on which a vote or votes were cast for the office of justice of the peace. In 29 of the 205 precincts in said township voting machines were used. By this method of voting 3,000 ballots were cast, and concededly it is not possible under present law to determine how many of the voters using voting machines voted for or failed to vote for a candidate for the office of justice of the peace. Nor is there any method provided by law for the separate return by the election officers of the number of ballots on which a vote or votes were cast for justice of the peace.

Notwithstanding the foregoing state of facts and the law, the petitioner contends that, if the ballots were now counted, he believes that such recount would disclose that he has been elected pursuant to the provisions of section 2¾ of article 2 of the Constitution as adopted November 2, 1926.

Under section 14 of the charter of the county of Los Angeles (Stats. 1913, p. 1489), and section 1216 of the Political Code, the registrar of voters of said county has the possession and control of the ballots cast at said primary election. He is not a party to this proceeding. No error, omission, wrongful act, or neglect of duty on the part of the respondent board of supervisors is made to appear.

The petition is denied.

109 Cal. App. 14

ALDRICH v. CHINO SCHOOL DIST.

Civ. 121.

District Court of Appeal, Fourth District,
California.

Oct. 8, 1930.

1. Appeal and error ⇨909(6).

Appellate court could assume neither that resignation of school superintendent was accepted nor that effective date thereof was changed without his consent, in absence of evidence.

2. Schools and school districts ⇨63(1).

School board could not accept resignation of school superintendent as of August 1st (Pol. Code, § 1609, subd. 3(g), as amended by St. 1927, p. 1913).

3. Schools and school districts ⇨63(1).

School board could not arbitrarily change date of resignation of school superintendent from August 1st to June 30th without notice to superintendent (Pol. Code, § 1609, subd. 3(g), as amended by St. 1927, p. 1913).

4. Schools and school districts ⇨63(1).

Statute regarding resignation of school employee could not be construed as fixing date of resignation by operation of law, in absence of action by school board (Pol. Code, § 1609, subd. 3(g), as amended by St. 1927, p. 1913).

5. Schools and school districts ⇨63(5).

Finding in action for salary of school superintendent *held* to sustain judgment for salary for July, 1928.

The evidence disclosed that there had been no effective resignation prior to July, and that there had been no dissatisfaction with the superintendent's services and no action on part of school board looking to termination of his employment, that the school superintendent had gone away on vacation as in previous years, but had left his address with secretary, and that the superintendent performed certain services under the contract during the month of July.

6. Schools and school districts ⇨63(5).

School superintendent could not recover salary, in absence of evidence that district had available funds at time services were rendered out of which amount due could be paid.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Ben McCall Aldrich against the Chino School District. Judgment for plaintiff, and defendant appeals.

Reversed, with instructions.

George H. Johnson, Dist. Atty., and James L. King, Deputy Dist. Atty., both of San Bernardino, for appellant.

Isaac Jones, of Ontario, for respondent.

BARNARD, J.

The plaintiff herein was employed by the defendant school district as superintendent of schools under a contract which covered a period ending July 1, 1929. On April 24, 1928, he received a telegram from the clerk of the school board, stating that the board was ready to elect his successor, if satisfactory to him, and asking him to wire his resignation to take effect August 1st. On the same day, he replied in part as follows: "This with general run down condition makes it necessary for me to resign, effective, August first." It is not shown that these messages were called to the attention of the board of trustees of defendant district, and, so far as shown by the record, the board took no action in reference to the resignation of the plaintiff, or in reference to terminating his employment.

About June 1, 1928, the plaintiff left the Chino school district and was gone all of June and July, except one day in June and except the last one or two days of July. His salary was paid for the month of June, but was not paid for the month of July, and this action was brought to recover the same.

In addition to the facts above stated, the court found that the plaintiff, during the month of July, 1928, communicated with the secretary of the school and kept her informed as to where he was; that this information was available at all times to the defendant school district and its board of trustees; that this was the vacation period of the school; that the school district and its board of trustees made no request of plaintiff to return or to perform any service, and made no protest because of his absence; and that plaintiff performed no service as such superintendent during the month of July, 1928, except the writing of two letters of instructions to the secretary of the school. The court found as conclusions of law, that, by reason of the provisions of subdivision third (g) of section 1609 of the Political Code, as amended in 1927, the resignation of plaintiff was ineffectual and void; that the plaintiff abandoned his contract of employment on August 1, 1928, and such abandonment was acquiesced in by the defendant school district; and that plaintiff was entitled to judgment for his salary for the month of July, 1928. From the judgment that followed the defendant has appealed.

Two points are raised by the appellant; the first being that, by reason of the provisions of subdivision third (g) of section 1609 of the Political Code as amended by St. 1927, p. 1913, the resignation of respondent became effective at the close of the school year, to wit, on June 30, 1928. The Code section referred to provides as follows:

"Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty:
* * *

"Third * * * (g) To accept the resignation of any employee and to fix the time when such resignation shall take effect, which date shall not be later than the close of the school year during which such resignation shall have been received by such board."

[1-4] Appellant assumes that the school board accepted respondent's resignation, and, since there is no evidence that the board fixed any date when the resignation should become effective, it is argued that it must be presumed that the school board performed its duty and fixed the effective date thereof as of the close of the school year, on June 30, 1928. It is further argued that, if the school board accepted the resignation as of August 1, 1928, this act was beyond their power and void, leaving the matter as though the board had not acted at all, in which case the resignation became effective by operation of law up-

on the close of the school year. If it be assumed that the telegram sent by respondent constituted a resignation, the record is devoid of evidence to show that such resignation was ever accepted by the board, or any date fixed when the same should become effective. If respondent resigned, it was conditioned to take effect August 1st. In the absence of evidence, it can neither be assumed that the resignation was accepted, nor assumed that the effective date thereof was changed without the consent of respondent or notice to him. The board had no power, under the Code section above quoted, to accept the resignation as of August 1st (see *Armstrong v. Board of Education*, 173 Cal. 217, 160 P. 414), but neither did it have power to arbitrarily change the date of the resignation from August 1 to June 30 without notice to the respondent. Nor does that result follow by operation of law. The most that could be claimed for the Code section above quoted, is that it authorizes the board to fix the date when a resignation shall take effect, regardless of the date named in the resignation itself. Even then, it could hardly be argued that the board would have such a right, without the duty and obligation of notifying the employee of the date fixed by it. But nothing in that section can be construed as fixing the date of a resignation by operation of law, in the absence of any action by the board. We are of the opinion that it cannot be held, as a matter of law, that the purported resignation under consideration took effect on June 30.

[5] The second point urged by appellant is that the evidence does not sustain the court's finding that respondent's contract with appellant was mutually abandoned by both parties on August 1, 1928, it being also argued that, since the attempted resignation was void, an abandonment of the contract took place on June 1, 1928, when respondent went away, and was acquiesced in by the appellant as of that date. We find no evidence in the record to support the finding that the contract was mutually abandoned on August 1, 1928. On the other hand, there is evidence to sustain the court's findings that respondent had a contract of employment with the appellant board, which did not expire until July 1, 1929; that respondent performed certain services under said contract, during the month of July, 1928; and that no protest was made by the board because of respondent's absence and no request made to him to return, or to perform services other than those which he did perform. In addition to the evidence of specific work performed during that month by the respondent, there was evidence that in the six previous years of his service it had been respondent's custom to absent himself during the vacation months, and that he was only required to leave his address in case the board wanted to get in touch with him during that period.

There was also evidence that no duties were required of him by the board or by his contract, during this month of July, that he did not perform. Under these circumstances, the fact that there is no evidence of an abandonment of the contract on August 1, 1928, is immaterial. Whether this contract was abandoned August 1, 1928, or whether it is still in full force and effect is of no importance in this action. The only question here involved is whether or not it was in effect during the month of July, 1928. There having been no effective resignation prior to July, and, there being no evidence of any dissatisfaction with respondent's services, and no evidence of any action on the part of the board looking toward the termination of his employment, his contract remained in force, and the findings of fact made by the trial court are sufficient to sustain the judgment, which covers his salary for that particular month.

[6] It has, however, been held that, in such an action as this, recovery by the plaintiff depends upon whether or not there were, at the time the services were rendered, available funds of the district out of which the amount due for the services could be paid. *Higgins v. San Diego Water Co.*, 118 Cal. 524, 45 P. 824, 50 P. 670; *Buck v. City of Eureka*, 124 Cal. 61, 56 P. 612; *Martin v. Fisher et al.* (Cal. App.) 291 P. 276. The record here shows no evidence or finding upon that point.

The judgment is therefore reversed, with instructions to the trial court to take evidence upon the one question, whether or not there were on August 1, 1928, available funds belonging to the appellant district out of which respondent's salary for the month of July, 1928, could be paid, and with the further instruction to then render judgment for or against the respondent, depending upon its finding upon that question.

I concur: MARKS, Acting P. J.

Mr. Presiding Justice CARY, being absent, takes no part in this decision.

108 Cal. App. 741

TYLER et al. v. PARK RIDGE COUNTRY CLUB et al.

Civ. 208.

District Court of Appeal, Fourth District,
California.

Oct. 3, 1930.

I. Venue ⇨21.

As general rule, defendant is entitled to have action tried in county of residence (Code Civ. Proc. § 395).

2. Venue ⇨68.

Burden is on plaintiffs to bring themselves within exception to rule giving defendant right to have action tried in county of his residence (Code Civ. Proc. § 395).

3. Venue ⇨5(3).

Action by golf club members to enjoin stockholders from transferring stock to persons other than those of Caucasian race did not involve "interest in real property" as regards venue (Code Civ. Proc. § 392, subd. 1).

Code Civ. Proc. § 392, subd. 1, provides for trial of action for recovery of real property or interest therein in county where subject of action or some part thereof is situated. The complaint alleged that by-laws of club limited members to persons of Caucasian race, and alleged upon information and belief that certain defendants were owners of all stock in corporation, and that they had entered into agreement to sell all of the stock to certain members of negro race, and that if not restrained defendants would transfer stock to such persons, and that by-laws would be amended so as to permit members of the negro race to become members of club, and that plaintiffs would thereby suffer great and irreparable damage.

[Ed. Note.—For other definitions of "Interest (In property)," see Words and Phrases.]

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by V. A. Tyler and another against the Park Ridge Country Club, Dan Gilkey, and others, for the appointment of a receiver and to enjoin defendants' transferring stock of the corporation to persons other than those of the Caucasian race. From an order denying a motion for a change of venue, defendants named appeal.

Reversed.

See also 284 P. 247.

Edward T. Sherer, Welburn Mayock, and Charles W. Cradick, all of Los Angeles, for appellants.

Sarau & Thompson, of Riverside, and A. G. Ritter and Henry G. Bodkin, both of Los Angeles, for respondents.

BARNARD, J.

This action was brought by certain parties holding memberships in a golf club in Riverside county, conducted by Park Ridge Country Club, a corporation; the action being brought on behalf of and for the benefit of all those holding such memberships. The action seeks the appointment of a receiver to take charge of and manage the property of

the corporation, and to restrain certain defendants who are alleged to own the stock of the corporation from transferring or selling said stock to any person other than one of the Caucasian race. The complaint alleges that the by-laws of said club limit the members thereof to persons of the Caucasian race; that those holding memberships therein are not entitled to voting power in the conduct of the club or in the corporation, nor in amending or changing the by-laws; that according to the articles of incorporation and the by-laws, the directors of the club and the owners of the corporate stock have the sole right to amend the by-laws and to provide rules and regulations for the conduct of the club and the members, including the right to change the by-laws in such a manner as to provide that memberships in said club shall not be limited to members of the Caucasian race; and further that the board of directors have full power to elect or reject candidates for membership. It is then alleged that the plaintiffs were induced to purchase memberships upon the representation that the members would be limited to persons of the Caucasian race; and that for the purpose of defrauding the defendants, the directors of said club have pretended and represented that the club is insolvent. Upon information and belief, it is alleged that certain of the defendants are the owners of all of the stock of said corporation, and that these defendants have entered into an agreement to sell all of said stock to certain members of the negro race; that if not restrained, said defendants will transfer said stock to such other persons; that the by-laws will be so amended as to permit members of the negro race to become members of the club; and that these plaintiffs will thereby suffer great and irreparable damage. Plaintiffs pray that a receiver be appointed, and that the defendants be enjoined from transferring the stock of said corporation to any person other than a person of the Caucasian race. The action was filed in the county of Riverside, and the defendants moved for a change of venue to the county of Los Angeles, upon the ground that all of the defendants are residents of that county. From an order denying this motion, this appeal is taken.

[1] The respondents apparently concede the sufficiency of the showing made by appellants as to the place of their residence. The only point raised on this appeal is as to whether or not this action is one involving real property within the purview of section 392 of the Code of Civil Procedure. As a general rule, a defendant is entitled to have an action against him tried in the county of his residence. Code Civ. Proc. § 395. Respondents contend that this action comes within that part of section 392, Code of Civil Procedure, which reads as follows:

"Actions for the following causes must be tried in the county in which the subject of the

action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code:

"1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property."

[2, 3] The burden is therefore upon respondents to bring themselves clearly within the exception to the general rule. *Smith v. Smith*, 88 Cal. 572, 26 P. 356. The respondents admit that they own no shares of stock in the corporation named, contending, however, that although they have no legal title to the real estate in question, this property is impressed with a trust, the title being held for the benefit of the members who are entitled to use the same, and that therefore they have such an interest in the real estate involved as brings the action within said section. We think this contention cannot be sustained. The complaint shows no fact to establish such a trust, nor does it set up any injury to the land itself resulting from the acts which are asked to be enjoined. Those acts are merely the transfer of corporate stock and a change in the directorate of the corporation. What is alleged in the complaint is not an interest in the land, but a contractual right to use the land, subject to the by-laws of the corporation, the rules made by the board of directors, and the equal right of others to the use of the premises. It is not even alleged that the right of respondents to use the land is affected or in any manner threatened. The complaint shows plainly that the real purpose of the respondents in this action is not to secure to themselves the right to use the land for the purposes embraced within the privileges of their membership, but to prevent certain other parties from acquiring or obtaining a similar right to use the same property. If it could be considered that any interest in real estate is involved, it would only be involved inferentially, and the complaint principally involves other matters not embraced within the provisions of section 392, Code of Civil Procedure, and that section would therefore not apply. *Smith v. Smith*, supra.

Not only is the action, seeking to enjoin the sale of corporate stock and to restrain certain persons from acting as directors of a corporation, a personal one, but it nowhere appears that the contractual right of the defendants to use the property in common with others has been or will be interfered with. It is sought to restrain the parties, to whom the stock may be sold, from doing certain acts which it is alleged they are entitled to do, under the articles and by-laws of the corporation. But it is not even claimed such new owners of the stock would or might attempt to prevent respondents from using the property. Instead of seeking to recover or establish their own right to use the property, respondents are seeking to prevent certain other persons from acquiring such a right. In effect,

the action is one to obtain and exercise control of a corporation, rather than one involving an interest in real property.

The order appealed from is reversed.

We concur: MARKS. Acting P. J.;
WARMER, Justice pro tem.

108 Cal. App. 737

**BRAZIL v. PACIFIC AMERICAN
PETROLEUM CO. et al.**

Civ. 5895.

District Court of Appeal, Second District,
Division 2, California.

Oct. 3, 1930.

1. Partnership $\S$ 218(3).

Evidence showing partner sought to be held liable owned business and did not ratify unauthorized contract of alleged partner who had no interest in business warranted nonsuit.

Evidence showed that agreement sued on was executed by alleged partner who had no interest in business conducted by other partner under name and style of partnership. There was no evidence tending to show that partner sought to be held liable had actual knowledge of contract or had given other partner any authority whatsoever.

2. Contracts $\S$ 346(10)

Where contract introduced was not contract alleged in complaint, material variance existed, warranting nonsuit.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by P. E. Brazil against the Pacific American Petroleum Company, a copartnership, composed of John O. Haley and another, and against the partners individually. Judgment for plaintiff, and defendant John O. Haley appeals.

Reversed and remanded, with directions.

Edward Winterer and Winterer & Ritchie, all of Los Angeles, for appellant.

J. H. Van Law and A. G. MacRobbie, both of Los Angeles, for respondent.

SCHMIDT, Justice pro tem.

Plaintiff brought action in the lower court on an alleged "agreement in writing" (plead-

ing the contract in substance and not in hæc verba) against the defendant Pacific American Petroleum Company, it being alleged that same was a copartnership composed of John O. Haley and C. R. Haley, and against the two Haleys individually. Defendant John O. Haley answered, claiming that he was the sole owner of the Pacific American Petroleum Company. No service was had upon defendant C. R. Haley. The case went to trial upon the complaint and answer of John O. Haley.

The evidence in the case shows that the alleged agreement was executed on behalf of the Pacific American Petroleum Company by C. R. Haley and not by John O. Haley. The evidence further shows, and the court found, that the defendant John O. Haley, during all of the times mentioned in the complaint, conducted and carried on business under the name and style of Pacific American Petroleum Company. In order to prove the alleged contract plaintiff was permitted in the lower court to show what acts had been done by the defendant John O. Haley, this over the objection of defendant John O. Haley, it being urged that before ratification of a contract can be proved by acts of the person to be charged there must be a showing: First, that the person to be charged had knowledge of the contract; and, secondly, that the person signing the agreement had either actual or ostensible authority to sign for the principal.

[1, 2] The record is entirely void of any evidence: First, that the defendant John O. Haley had actual knowledge of the contract permitted to be introduced in evidence by plaintiff; and, secondly, of any authority whatsoever on the part of C. R. Haley to execute a contract for John O. Haley or for the Pacific American Petroleum Company. Under this state of the evidence, the motion for nonsuit by the defendant John O. Haley on these grounds should have been granted. Furthermore, the contract introduced in evidence is not the contract alleged in the complaint. No request to amend having been made, the motion for nonsuit on the ground of material variance should have been granted. *Ortega v. Cordero*, 88 Cal. 227, 26 P. 80; *Riverside Water Company v. Gage*, 108 Cal. 240, 41 P. 299.

In view of this conclusion, no other points need be discussed.

Judgment reversed, and cause remanded to the lower court with directions to grant the motion for nonsuit and enter judgment accordingly.

We concur: WORKS, P. J.; CRAIG, J.

109 Cal. App. 19

ENOS v. NORTON et al.
Civ. 216.

District Court of Appeal, Fourth District,
California.
Oct. 8, 1930.

1. Negligence ⇨117.

Generally, contributory negligence must be specifically pleaded, unless appearing from complaint, or from plaintiff's evidence.

2. Automobiles ⇨239(2).

Special defense *held* merely to deny motorist's negligence, and to allege motorcyclist's negligence; hence, did not plead motorcyclist's contributory negligence.

Special defense in question alleged substantially that plaintiff so negligently drove his motorcycle that by reason thereof, without any fault of defendants, motorcycle was driven against their automobile, and injury, if any, was caused by negligence of plaintiff, and not by fault of defendants.

3. Automobiles ⇨206.

Motorcyclist had right to assume approaching motorist would not make left turn in front of him to enter garage without warning (St. 1923, p. 553, § 113).

California Vehicle Act (St. 1923, p. 553) § 113, provides that operator of vehicle shall drive at careful and prudent speed, not exceeding what is reasonable and proper with regard to traffic, surface, and width of highway.

4. Appeal and error ⇨999(3).

Finding denying contributory negligence of motorcyclist, confronted with emergency when approaching motorist made left turn without warning, was conclusive (St. 1923, p. 553, § 113).

5. Automobiles ⇨225.

Unwise choice in emergency, caused by motorist's making left turn without warning in front of motorcyclist, does not alone constitute contributory negligence (St. 1923, p. 553, § 113).

6. Automobiles ⇨225.

Care required of motorcyclist, confronted with emergency when approaching motorist made left turn without warning, is care which ordinarily prudent person would exercise under similar circumstances (St. 1923, p. 553, § 113).

7. Appeal and error ⇨999(3).

Finding denying negligence, which in first instance is question of fact, is conclusive.

8. Negligence ⇨136(9).

Negligence is generally jury question, even in absence of conflict in evidence, if different conclusions can rationally be drawn.

9. Negligence ⇨136(9).

Negligence is question of law if only one conclusion can reasonably be reached on evidence.

10. Automobiles ⇨245(82).

Whether motorcyclist going 15 miles an hour, and stopping within 24 feet, was contributorily negligent in colliding with approaching motorist, who made left turn without warning, *held* for trial court in nonjury case (St. 1923, p. 553, § 113).

Evidence showed that pavement over which plaintiff was operating motorcycle was wet, while that on which defendant's automobile was traveling was dry. Plaintiff saw wheels of automobile start to turn in front of him when 30 feet away. He stopped in 24 feet, whereas motorcycle in good working order could have been stopped in 20 feet.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by Ernest Enos against Nicholas P. Norton and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

W. G. Irving, of Riverside, for appellants.
Best & Best, of Riverside, for respondent.

WARMER, Justice pro tem.

This action was instituted by plaintiff to recover damages for personal injuries alleged to have been sustained in a collision between an automobile operated by one of the defendants and a motorcycle operated by the plaintiff. The facts may be stated as follows: Defendant Norton operated a garage in the city of Corona, and the defendant Matthews was in his employ. In the course of his business defendant Matthews had repaired a Chevrolet automobile. In order to test the same, defendant Matthews drove said car along Sixth street in said city, and while so driving said car the accident occurred. The garage of defendant is located on the south side of said Sixth street between Victoria avenue on the east and Ramona avenue on the west. There is an 18-foot Sixth street entrance to said garage. The distance from the east side of said entrance to the west curb line of Victoria avenue is 126 feet. The distance from the west side of said entrance to the east curb line of Ramona avenue is 207 feet. The distance between Victoria avenue and Ramona avenue is approximately 350

feet. Sixth street is paved and is approximately 50 feet wide between curbs. There was a pile of lumber about 4 feet high, and some gravel or sand on the southerly curb of Sixth street, extending some 6 or 8 feet out into the street a distance of approximately 116 feet west of the entrance to said garage. Defendant Matthews took the Chevrolet automobile from the garage to Victoria avenue, turned to the left, and returned to the garage, following a course a little to the right of the center of Sixth street. As he was proceeding south, when he arrived at a point a little west of said entrance to the garage, he turned to the left for the purpose of driving into the garage. The collision occurred near the east side of the entrance to said garage. Plaintiff got his motorcycle near the southwest corner of Ramona avenue and Sixth street, rolled it into Sixth street until he had passed the center line thereof, started his motor, and drove it east on Sixth street at a rate of 12 to 15 miles per hour. Plaintiff watched the car being driven by defendant Matthews from the time he began driving eastward, to see if any signal was given indicating the intention of the driver to turn into the garage. Plaintiff knew that a great many cars went into this garage. Defendant made no signal indicating his intention to turn. Plaintiff saw the front wheels of the car being driven by the defendant Matthews begin to turn toward the garage while he was at an estimated distance of 30 feet from the defendant's car. Plaintiff then applied his brakes and gradually slowed down. He had stopped at the moment of the impact. A motorcycle, properly equipped, can be stopped within 20 feet; plaintiff stopped his motorcycle in about 24 feet. The portion of the street upon which plaintiff was traveling was damp (wet). That portion upon which defendant Matthews was traveling was dry. The permissive speed limit on Sixth street between Victoria avenue and Ramona avenue at the time of the accident is conceded to be 15 miles per hour. The nature or extent of the injury need not be stated, except to say that plaintiff's leg was broken in the collision that occurred.

Appellant concedes that the evidence as to the negligence of the defendant is conflicting, and admits that under such circumstances the finding of negligence by the court as to the defendants must stand.

The complaint charges negligence. The answer especially denies the negligence on the part of the defendants and contains a defense, designated as a special defense. This separate defense alleges that Fred L. Matthews, one of the defendants herein, was operating his car on said street at the time and place referred to in the complaint in a careful and lawful manner, and alleges that the said "plaintiff, Ernest Enos, drove easterly along said Sixth street on his motorcycle at a rate of speed in excess of twenty-five miles

per hour, and so carelessly, negligently and improperly managed said motorcycle that by reason thereof said motorcycle, without any fault on the part of these defendants or either of them, and by want of due care in the management of said motorcycle by the plaintiff, was driven against said automobile and thereby sustained the alleged injuries mentioned in the complaint; and if any injury was sustained by said plaintiff, it was caused by the negligence of said plaintiff and not by the fault of said defendants or either of them." Respondent maintains that said special defense does not charge contributory negligence.

[1] "To be availed of the defense of contributory negligence must, as a general rule, be specifically pleaded. * * * Of course, if it appears from the allegations of the plaintiff's complaint or from the evidence introduced by him that he has been guilty of contributory negligence the defense may be availed of, even though not set up by defendant." 19 Cal. Jur. 681; Hall v. City and County of San Francisco, 188 Cal. 641, 206 P. 459.

In the case of Hughes v. Warman Steel Casting Co., 174 Cal. 556, 163 P. 885, 888, the court said: "Defendant having in its answer denied all negligence on its part, this plea, though denominated a special defense, is simply an affirmative charge of negligence on the part of plaintiff which was available under the general issue without special plea," etc.

[2] The special defense interposed herein is but a denial of negligence, and an affirmative allegation of negligence on the part of the plaintiff. Hence it is not a pleading of contributory negligence. The court found the allegations of the answer, as to the negligence of the plaintiff, untrue. Under such circumstances, the judgment must be affirmed, unless it appears from the evidence offered by the plaintiff that he was guilty of contributory negligence.

From the facts above stated it appears that the plaintiff was proceeding easterly on Sixth street in the city of Corona and that the defendant was proceeding westerly on said street. Appellants urge that notwithstanding such finding the evidence presents a state of facts that renders the respondent guilty of contributory negligence as a matter of law.

It must be remembered that the positions of moving machines are relative and small fractions of seconds change the relative positions materially. These machines were 30 feet apart when the defendant turned to cross the path of plaintiff. Plaintiff saw defendant's machine begin to turn and applied his brakes, coming slowly to a stop.

Estimated distances are not accurate. The road was damp on the side plaintiff was required to travel and dry on defendant's side. Plaintiff was keeping careful lookout, be-

cause he knew machines frequently crossed over from the left side of the street going into the garage. No signal was given by the defendant. Plaintiff had no way of knowing whether the defendant saw him or not; no way of knowing whether defendant was going to proceed at a slow rate of speed, permitting him to go in front, or whether he was going to continue across the street and force the plaintiff to go behind him.

"We are aware that the courts of this state have placed great emphasis upon the rule that a motorist must at all times use due care to avoid colliding with another; that he must be ever alert and watchful so as not to place himself in danger. And, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him." *Commonwealth Insurance Co. of New York v. Riverside-Portland Cement Co.*, 69 Cal. App. 165, 230 P. 995, 996.

[3-6] Plaintiff had a right to assume that defendant was not going to turn in front of him and cross his path without any warning signal. Under such circumstances, the sudden turning as though to cross plaintiff's path, without signal, constituted an emergency. In such an emergency plaintiff must determine his course at once and act on his choice. Whether or not such judgment in the light of after-acquired knowledge was the wisest or not cannot now be inquired into. Under such circumstances the determination of the trial court and its finding thereon is conclusive. An unwise choice in an emergency does not in itself constitute contributory negligence. *Hammond v. Pacific Electric Railway Co.*, 32 Cal. App. 756, 164 P. 50; 19 Cal. Jur. 763; *McPhee v. Lavin*, 183 Cal. 264, 191 P. 23. The rule as to the care necessary to use under such circumstances is "the care that an ordinarily prudent person would have exercised under the same or similar circumstances." *Tousley v. Pacific Electric Railway Co.*, 166 Cal. 457, 137 P. 31, 33.

Section 113 of the California Vehicle Act (St. 1923, p. 553) contains the provision that "any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

[7-9] In the case at bar if the riding of a motorcycle at a speed of 12 to 15 miles an hour constituted negligence or contributory negligence, then it was because the conditions present made such speed a violation of section 113, *supra*. Negligence is a question of fact in the first instance, and if a question of fact, the determination of the same by the

court's finding adversely to the plaintiff, is conclusive here. The general rule applicable to negligence cases is that often where there is no conflict in the evidence, negligence is a question of fact for the jury, if different conclusions on the matter can rationally be drawn from the evidence. However, if but one conclusion can reasonably be reached from the evidence, it becomes a question of law. *Murray v. Southern Pacific Co.*, 177 Cal. 1, 169 P. 675; *Jacobson v. Northwestern Pacific R. R. Co.*, 175 Cal. 468, 166 P. 3; *California Rendering Company v. Pacific Electric Co.*, 205 Cal. 73, 269 P. 922.

[10] Hence the true test as to whether or not the plaintiff Enos was guilty of contributory negligence as a matter of law must be measured by whether or not there is but one reasonable conclusion that can be reached from the evidence presented in the trial court. Appellant cites the case of *Davis v. Brown*, 92 Cal. App. 20, 267 P. 754, which is authority on the question that we think may be stated to be well-settled law in this state, to wit, that it may be negligence to drive an automobile at a rate of speed not in excess of the statutory speed limit within the district, depending upon the conditions present at the time. The plaintiff Enos fixed the distance between his motorcycle and the automobile at the time the automobile began to turn into the garage, as 30 feet. Enos was 10 or 12 feet west of the entrance to the defendant's garage at that time. Defendant Matthews' car was west of the center of Sixth street when it began to turn. Plaintiff Enos fixed the distance at which he could stop his motorcycle going at the rate of 15 miles an hour upon a dry street at 20 feet.

The question presented might be stated thus: Is it negligent under all circumstances for a person to drive a motorcycle at from 12 to 15 miles per hour when he sees a machine proceeding toward him at approximately the same rate, when the street is wet or damp, so that he cannot stop his motorcycle within the mathematical distance that a motorcycle could be stopped in, if it were in good working order, or, as estimated in this case, within 20 feet, when the driver of the automobile which he is meeting at a distance of 30 feet, suddenly, and without signal or warning, turns his car in the middle of the block, into the path of the motorcycle? Certainly it could not be claimed that 12 to 15 miles per hour on a damp street, without traffic, would be either an unlawful or careless speed at which to operate a motorcycle, and if it were a negligent operation, it would be negligent because of the presence of another condition upon the street.

In the case of *Simonsen v. L. J. Christopher Co.*, 186 Cal. 786, 200 P. 615, 616, the court said: "As has been frequently said by this court and the District Courts of Appeal, a person crossing a street in front of an ap-

proaching vehicle cannot close his eyes to threatening danger, relying upon the presumption that the other party will use reasonable care and prudence, and obey the traffic laws; but if there is nothing in the situation to warn him of impending danger he is not guilty of negligence in relying upon such assumption." (Citing cases.)

To the same effect, see, also, *McPhee v. Lavin*, 183 Cal. 264, 191 P. 23, supra.

The plaintiff had the right to assume that the defendant's car was going to proceed on its right side of the street, until advised that the defendant intended to turn into the garage. He was not advised by sign or signal, but, due to his own caution, he observed the car begin to turn, and immediately applied his brakes to avoid a collision, coming to a stop in 24 feet. Until he observed the car begin to turn, he had a right to proceed.

From all the evidence we cannot say that only one conclusion could be reasonably reached—hence, it was a question for the determination of the trial court. The trial court's finding that plaintiff was not guilty of negligence is conclusive upon this court.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

108 Cal. App. 759

TABACK v. GREENBERG.
Civ. 5981.

District Court of Appeal, Second District,
Division 1, California.

Oct. 6, 1930.

Rehearing Denied Oct. 24, 1930.

Hearing Denied by Supreme Court
Nov. 28, 1930.

1. Money received ⇨6(4).

Judgment for \$550 paid under contract, which was rescinded on sufficient grounds, held proper.

2. Courts ⇨188(7).

Action for \$550 paid under rescinded contract held properly brought in municipal court; action not being for rescission of contract, which was rescinded by notice of rescission.

3. Limitation of actions ⇨49(1).

Statute limiting recovery of money under rescinded contract began to run, not when fraud was discovered, but when cause of action accrued on rescinding contract (Code Civ. Proc. § 339, subd. 1).

Appeal from Superior Court, Los Angeles County: Walter S. Gates, Judge.

Action by Bella Gold Taback against Jack Greenberg. A judgment for plaintiff in the municipal court was affirmed on appeal to the superior court, and defendant appeals.

Affirmed.

Ernest M. Torchia and Jack Greenberg, both of Los Angeles, for appellant.

Fred Miller, of Los Angeles, for respondent.

YORK, J.

This cause was tried in the municipal court of Los Angeles county and judgment rendered in favor of the plaintiff for the sum of \$550, from which judgment appeal was taken to the superior court upon a statement duly settled by the judge of the municipal court, containing all the evidence adduced at the trial, the grounds of appeal, and copies of the pleadings. The superior court affirmed the judgment of the municipal court, and from the judgment rendered on that appeal, defendant appeals to this court upon the following grounds:

"1. That the decision is against the law.

"2. That the decision is against the evidence.

"3. That the plaintiff did not rescind within a reasonable time after her discovery that the contract had partially failed.

"4. That the second cause of action for money had and received is barred by subdivision 1 of section 339, Code of Civil Procedure."

[1-3] The record discloses that there was sufficient evidence to sustain the judgment. Five hundred and fifty dollars had been paid by the plaintiff to the defendant on a contract, which contract was rescinded by notice of rescission on April 13, 1926. The evidence shows that there were sufficient grounds for rescission. The action was properly brought in the municipal court, because it was merely an action for the recovery of \$550 and not for the rescission of a contract, because that was rescinded by the notice of rescission. Instead of the statute of limitations for the bringing of this action running from June, 1923, when the alleged fraud was discovered, it would not begin to run until the cause of action accrued—on the 13th day of April, 1926 when the notice of rescission was served.

As was said in the case of *Richter v. Union Land & Stock Co.*, 129 Cal. 367, at page 375, 62 P. 39, 41: "But the action is not for a breach of the original contract, but upon an obligation growing out of the failure to perform it. The plaintiff was not bound to treat the contract as abandoned on the first breach of it, or on any particular breach, but had his election still to rely upon it. The statute could not begin to run until he made his elec-

tion to rely no longer upon the contract, and to sue for the money paid to the defendant under it." See, also, *Rose v. Foord*, 96 Cal. 152, 30 P. 1114; 16 Cal. Jur. 512.

We see no merit in any of the grounds of appeal urged. The judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

109 Cal. App. 1

BAIRD v. McLEAN.
Civ. 7292.

District Court of Appeal, First District,
Division 1, California.

Oct. 7, 1930.

Rehearing Denied Nov. 6, 1930.

Hearing Denied by Supreme Court
Nov. 28, 1930.

§. Banks and banking §49(8).

Alleged stockholder sought to be held liable for assessment after bank's insolvency held not estopped to deny stock ownership under evidence.

The evidence disclosed that the president of the bank on January 16, 1919, placed ten shares of the bank's stock for his own convenience in defendant's name on the books of the bank; that defendant knew nothing of the matter until October, 1924, and that he then notified the president of the bank that he did not wish to accept the stock, and on November 12, 1924, indorsed certificate in blank so that the matter could be straightened out; that the transfer of stock was made on books of bank, and that the bank failed on October 29, 1925; that the defendant had no knowledge that verified list of stockholders of bank which included his name had been filed with bank examiner twice each year, and that defendant had never received any part of dividends.

2. Banks and banking §48(2).

Where bank stock was placed in defendant's name without his knowledge, that he indorsed certificate to clear records did not estop him from denying ownership.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by L. R. Baird, as receiver of Town-er County Bank of Perth, N. D., against A. W. McLean. Judgment for defendant, and plaintiff appeals.

Affirmed.

F. C. Heffron, of Eugene, Or., and George H. Stone, of San Diego, for appellant.

Elmer D. Jensen, of San Jose, and Anson Hilton, of Oakland, for respondent.

KNIGHT, J.

This action was brought by the receiver of an insolvent North Dakota state bank to recover the sum of \$1,000 on a stockholder's liability created by the statute of that state. Judgment was given for the defendant, and plaintiff appeals. The determinative question presented relates to the legal effect of, and the sufficiency of the evidence to sustain, the trial court's finding that defendant was not at any time the owner of the stock.

Briefly stated, the essential facts are as follows: On January 16, 1919, while the defendant McLean was serving as an officer in the army in France, his brother-in-law, named Rother, who was president of said bank, placed ten shares of the bank's stock, for his own convenience, in McLean's name on the books of the bank. McLean knew nothing about the matter until October, 1924. At that time he was living in California, and he received a letter from Rother, stating what he had done, and adding that, if McLean would permit the balance of his account which he had been carrying with the bank to remain there, he (Rother) would continue to let the stock remain in McLean's name. McLean replied immediately, stating that he had established a permanent residence in California, that he wanted to use his money here, and that consequently he did not wish to accept the stock. Shortly afterwards Rother sent him a certificate representing the stock which he was asked to indorse in blank, so that the matter could be straightened out on the books of the bank. McLean indorsed the certificate as requested and returned it at once to Rother, the indorsement thereon bearing date of November 12, 1924. The transfer of the stock was made on the books of the bank accordingly. The bank failed October 29, 1925, and two months thereafter an assessment was levied on the stock. Under the North Dakota statute a stockholder's liability continues for one year after the transfer of the stock. After returning the indorsed certificate McLean heard nothing more about the matter until some time subsequent to the bank's failure and the levy of the assessment, at which time he was notified that he was expected to pay the assessment.

The evidence further shows that, as required by the statute of that state, the president and cashier of the bank filed with the bank examiner and auditor, twice each year, a verified list of the stockholders of the bank, which included McLean's name during the time the stock stood in his name on the books of the bank; also that in 1919 a dividend was declared, and that during the years 1920, 1921, and 1922, annual meetings of the stock-

holders were held, at which the stock in question was represented. But, admittedly, at no time did McLean have any knowledge of the filing of said lists, nor of the contents thereof; nor did he ever receive any part of the dividend; nor was he aware of the stockholders' meetings; nor does it appear from the record by whom or under what circumstances the stock was represented at said meetings.

[1] In view of the foregoing facts, we find no reason to disturb the judgment. As held in *Schlitz v. Thomas*, 61 Cal. App. 635, 216 P. 51, in cases such as this where ownership of stock is denied, the liability "is not based upon ownership, but upon estoppel to deny such ownership, and to establish it the elements of an estoppel must be shown." In the present case, as will be observed, there is no evidence whatever establishing, even inferentially, any element of estoppel.

[2] Appellant contends, however, that, even conceding that defendant never was the owner of the stock, his voluntary act in indorsing the certificate rendered him "just as liable to the creditors of said bank as if it were conclusively established that he was the owner of said stock * * *"; and as supporting such contention appellant relies mainly upon the case of *O'Connor v. Witherby*, 111 Cal. 529, 44 P. 227, 229, wherein it was held with reference to the peculiar facts of that case that the indorsement of the certificates of stock by the defendant therein was "conclusive proof, by his own admission, that he knew, or ought to have known, that they had been issued to him." But the facts of that case are far different from those of the present one, for there, as the decision plainly states, the party denying ownership of the stock certificates was a director and vice president of the bank, and attended the directors' meetings and gave advice as to the bank's business; and the court said, therefore, that under such circumstances he "certainly ought to have known his relation to it." As will be seen from an examination of the decision in that case, the court made no attempt to declare a broad inflexible rule to apply in all cases that the single act of indorsing a certificate of stock shall of itself constitute conclusive evidence of ownership. Indeed in that very case it was said: "Of course a man cannot be made liable to the creditors of a bank merely because, without his knowledge and under circumstances which did not put him on inquiry, someone had, without authority, caused some stock to be issued in his name." That is the situation here, and the evidence shows without dispute that, immediately upon learning that the stock was standing in his name, McLean adopted the only possible course open to him to clear the records of the bank by indorsing the cer-

tificate in blank and returning it to the president of the bank; and this was done more than eleven months before the bank failed and long prior to the levy of the assessment on the stock. Surely, under those circumstances, it cannot be fairly held that McLean was estopped from asserting the truth as to the ownership of the stock.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

WELLS FARGO BANK & UNION TRUST
CO. v. BANK OF ITALY et al. *
Civ. 6623.

District Court of Appeal, First District,
Division 1, California.
Oct. 11, 1930.

Rehearing Denied Nov. 10, 1930.

Hearing Granted by Supreme Court
Dec. 9, 1930.

1. Banks and banking ⇨145.
Bills and notes ⇨15.

Check is bill of exchange, and certification is equivalent to acceptance (Civ. Code, § 3265a).

2. Bills and notes ⇨338.

Presentation of check to drawee for payment is not "negotiation," and involves no warranties, since drawee is not "holder" or "holder in due course" (Civ. Code, §§ 3133, 3266).

[Ed. Note.—For other definitions of "Holder," "Holder in Due Course," and "Negotiate," see Words and Phrases.]

3. Bills and notes ⇨296.

Warranties of general indorser are based upon transfer of title, and run only to holders in due course (Civ. Code, § 3147).

4. Bills and notes ⇨440.

Drawee who paid instrument is not transferee of title, since last holder's indorsement does not transfer check, but converts it into voucher.

5. Bills and notes ⇨434.

Payment ⇨80.

Liability to refund rests upon quasi contractual duty to return money received under mistake, not upon warranty, and action therefor is not founded upon instrument drawee has paid.

6. Bills and notes ⇨434.

To establish obligation to reimburse, drawee who paid money on forged instrument

their intent, purpose, and manifest tendency an interference with the orderly administration of justice in pending causes that they can be held to so far exceed the constitutional boundaries to freedom of speech and of the press as to constitute contempt of court.

5. Contempt $\S$ 28(1).

Fact that numerous utterances of influential minister commenting on proceedings in pending causes were truth would not be defense to contempt proceedings.

6. Contempt $\S$ 9.

Public utterances to constitute "contempt" need not have actually influenced actions of court or judge.

7. Contempt $\S$ 14.

Whatever manifestly tends to constitute interference with proper exercise of duties and functions of grand jury would constitute "contempt of court."

Grand jury is instrumentality of court, and as such is charged with quasi judicial inquisition into the conduct of citizens and of public institutions and officials, and must be as fully protected in exercise of its powers and functions in that regard as the courts themselves.

8. Contempt $\S$ 14.

Public utterances by influential minister in radio speeches regarding investigation of sheriff's office by grand jury held to constitute "contempt of court."

Substance of speech was to effect that there was understanding between grand jury and sheriff that grand jury would not proceed further with charges against sheriff. At time speeches were made grand jury was duly impaneled and acting as such and engaged in investigating criminal offenses and alleged misconduct on part of public officers committed within county.

9. Contempt $\S$ 72.

Several utterances by influential minister in radio speeches commenting on causes pending and undetermined before court and judges thereof held to each constitute separate offense.

Several broadcasted speeches occurred upon different dates and were delivered to different audiences and dealt in main with different phases of proceedings then pending in courts and before judicial officers against which broadcaster's animadversions were in each instance directed.

10. Contempt $\S$ 72.

Courts in contempt cases may impose consecutive sentences for separate contempts (Pen. Code, §§ 11, 669).

In Bank.

Original application by R. P. Shuler for a writ of habeas corpus prayed to be directed to William I. Traeger, as Sheriff of Los Angeles County, to secure release of petitioner from custody on commitment for contempt.

Writ discharged, and petitioner remanded.

Thomas S. Bunn and Schweitzer & Hutton, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

Alexander Macdonald and Allen W. Ashburn, both of Los Angeles, for W. I. Traeger, sheriff.

RICHARDS, J.

The applicant herein applied for a writ of habeas corpus and was granted a hearing thereon upon his averment that he was imprisoned, detained, confined, and restrained of his liberty by William I. Traeger, sheriff of Los Angeles county at Los Angeles in said county, and that said imprisonment, detention, confinement, and restraint were and are illegal, the alleged illegality of which arises out of the existence of certain facts which are set forth in his aforesaid petition, and which may be stated as follows: On or about the 28th day of April, 1930, one L. Vaillancourt made and filed in the superior court of the state of California in and for the county of Los Angeles an accusation in the form of several affidavits, verified by said Vaillancourt, charging the applicant herein with having made a series of addresses to the public over and by means of a certain radio station, which addresses are set forth in hæc verba and seriatim in said affidavits, and upon the statements and substance contained therein it is alleged by the affiant they were intended and were calculated and were spoken and broadcasted by the petitioner for the purpose and with the intent that they should and would interfere with, influence, sway, and control the proceedings in a certain action numbered Criminal No. 35227 then pending in said court and in the department thereof presided over and conducted by Superior Judge Marshall F. McComb, and interfere with, sway, control, embarrass, and influence the action and decision of said Judge McComb, acting as said judge of the superior court in said cause, and of any other judge who might be called upon to take any action or make any ruling or decision therein, and also to interfere with, influence, sway, and in-

timidate any person or persons who might be called upon to act as jurors in said action, and also to bring into disrepute the said Judge McComb and the court over which he was at said time and in the conduct of said cause presiding, and expose him and it with respect to said action then pending to public disfavor, distrust, suspicion, ridicule, and opprobrium, and impute to said Judge McComb dishonest, corrupt, and unlawful motives, purposes, and actions in connection with his rulings and decisions of said action, and by so doing interfere with the orderly and due administration of justice in said court in respect to said action. Coincidentally with the filing of the aforesaid accusation and affidavits of said Vaillancourt, there were also filed and presented to said court certain further affidavits made and sworn to by one Walter S. Cox, setting forth certain further facts with respect to certain other utterances of the petitioner herein, also publicly broadcast over and by means of said radio broadcasting station, and having reference to certain other actions and proceedings pending in said court and before said Judge McComb and other certain judges of said court, and also having reference to pending proceedings of a grand jury then in session and functioning as a part of said court, and which statements and utterances of the petitioner, as set forth in detail therein, were also alleged to have had a like tendency and purpose to interfere with the orderly proceeding of said court and of said grand jury and the due administration of justice in said county.

Upon the filing and presentation of the foregoing accusation and affidavits before said superior court that tribunal on the 29th day of April 1930, issued its order and direction to R. P. Shuler, the petitioner herein, requiring him to show cause on May 8, 1930, in department 45 of said superior court, why he should not be adjudged guilty of contempt of said court. Said affidavits and order were duly served upon said Shuler upon said last-named date, and thereafter and prior to the aforesaid date of hearing thereon the said R. P. Shuler, appeared and filed in said court his verified answer to the aforesaid accusation and the affidavits filed in support thereof. A hearing upon said accusation and the answer thereto was thereupon, upon the request of said Shuler, advanced and set for hearing for May 2, 1930, at which time the matter was heard and evidence for and against the accusation and the answer thereto was duly received and said matter was thereupon submitted for decision to the court in department 45 thereof, Clair S. Tappaan, judge of said court then and there presiding in and over the aforesaid department thereof. Thereafter and on the 5th day of May, 1930, the judgment and commitment of said

court and of the aforesaid judge thereof was given, made, and entered, adjudging that the petitioner herein by his aforesaid utterances, publishings, and broadcastings of the matters set forth in said affidavits, and each of them, had committed a contempt of said court and was thereby adjudged and declared to be in contempt of said court on account thereof, and should be punished therefor by such imprisonment and fines as were set forth and provided for in the aforesaid judgment and commitment, and that the terms of imprisonment set forth therein and designated as his punishment for the several and separate acts of contempt, as designated by the terms of said judgment, should run consecutively. Thereupon and upon the entry of the aforesaid judgment and commitment the petitioner was committed to the custody of the sheriff of Los Angeles for the execution thereof. Thereafter and pursuant thereto the petitioner was, as shown by his petition herein, imprisoned for the period of ten days immediately after the entry of said judgment, and in pursuance thereof, thereafter the petitioner having in the meantime offered to pay the portions of the several fines as specified in said judgment remaining due after such term of imprisonment, applied to this court for release upon habeas corpus upon the grounds hereinabove set forth. A writ of habeas corpus was thereupon issued out of this court and the petitioner was released upon bail pending the hearing thereon. Such hearing has been held, and the matters therein considered have been duly submitted to this court for decision. In order of such decision a more detailed statement of the facts and circumstances, as the same were presented to the superior court upon the aforesaid accusation and affidavits and the answer of the petitioner thereto, will be required. The facts about to be thus set forth, with sufficient of detail to form the basis of a correct conclusion thereon, are as follows:

On or about February 23, 1930, there was pending and undetermined in the superior court of the state of California, in and for the county of Los Angeles, a criminal action numbered "Criminal No. 35227," in which the people of the state of California were plaintiffs and one Ben Getzoff and one Jacob Berman, alias Jack Bennett, were defendants, and in which action said defendants were accused by indictment of the crime of bribery. The acts of bribery in which said defendants were implicated directly involved one Asa Keyes and one Harold L. Davis, the former having been at the time of the occurrence of said acts of bribery district attorney of the county of Los Angeles, and the latter having been chief deputy district attorney under said Keyes. The accusation presented against said two officials arose out of and was directly connected with two other cer-

was in existence and that Andrew H. Manning at the time of acceptance was not suffering any legal disability which would affect his ability to pass title to the instrument accepted by means of indorsement. According to the plain language of this section appellee by its general acceptance bound itself to pay a draft for \$629.80, payable to the order of Andrew H. Manning. After the draft was accepted by appellee the drawer was discharged from liability thereon. When appellant took the draft it was complete and regular upon its face. It had been duly accepted by the drawee. It was taken in good faith and for value, and appellant then had no notice of any infirmity in the instrument or defect in the title of the person negotiating it, and appellant was therefore a holder in due course. It relied upon the general acceptance of appellee, and under the Negotiable Instruments Law was protected by it. This construction of section 62 is in accordance with that sound principle which declares that where one of two innocent parties must suffer a loss the law will leave the loss where it finds it."

The common-law rule had been previously followed in *First National Bank, etc., v. Northwestern National Bank, etc.*, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247, and *Metropolitan National Bank, etc., v. Merchants' National Bank, etc.*, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180, which were decided previous to the adoption of the Negotiable Instruments Law. In *State Bank, etc., v. Mid-City Trust etc., Bank*, 295 Ill. 599, 129 N. E. 498, 12 A. L. R. 989, decided after the adoption of the law, the payee's name was forged as an indorsement upon a check after its certification, and the same was paid by the acceptor to the indorsee. The acceptor sought to recover upon the theory that it was liable to the real payee for the amount of the check. It was held that the check had never been delivered to the real payee and had never come into his possession, and that he had acquired no right by reason of the acceptance. Dean Ames contended before the Negotiable Instruments Law was adopted that upon principle an alteration before acceptance of any of the terms of a genuine bill should not affect the liability of the acceptor to an innocent holder. 4 *Harvard Law Review*, p. 297. The editors of the *American Law Reports Annotated*, vol. 22, p. 1162, express the view that the conclusion reached in the Illinois case is more in accord with the language of the Negotiable Instruments Law than the other cases cited, and, as said by Prof. Brannan in his work on the Negotiable Instruments Law (4th Ed.) at page 567: "It is difficult to see how he (the acceptor) can escape liability if any meaning is to be given to the words 'engages that he will pay according to the tenor

of his acceptance.' The tenor of the acceptance is determined by the terms of the bill as it is when the drawee accepts and that is a bill for the raised amount. That is the bill he accepted and no other, and according to its tenor he has engaged that he will pay it." And where, as in the present case, an indorsee without notice has given value upon the faith of a certification and the instrument has been paid by the drawee, the result reached in the Illinois case not only makes for the usefulness and currency of negotiable paper, but, as held in that decision, is in accord with the principle that, where the parties are equally innocent, the law will leave the loss where they have placed it.

Appellant cites numerous decisions holding that money paid by the acceptor of a check upon the forged indorsement of the payee named therein can be recovered. *Wellington National Bank v. Robbins*, 71 Kan. 748, 81 P. 487, 114 Am. St. Rep. 523; *Andrews v. Sibley*, 220 Mass. 10, 107 N. E. 395; *National Union Fire Ins. Co. v. Mellon National Bank*, 276 Pa. 212, 119 A. 910; *Union Tool Co. v. Farmers', etc., Bank of Los Angeles*, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417; *American Exchange, etc., Bank v. Yorkville Bank, etc.*, 122 Misc. Rep. 616, 204 N. Y. S. 621; *Missouri, etc., Trust Co. v. St. Louis National Bank*, 154 Mo. App. 89, 133 S. W. 357; *Gasper v. Security State Bank*, 109 Neb. 495, 191 N. W. 654; *American Express Co. v. Peoples' Savings Bank*, 192 Iowa, 366, 181 N. W. 701; *Charleston, etc., Co. v. Exchange, etc., Co.*, 129 S. C. 290, 123 S. E. 830. The same rule applies to checks altered as to the amount or the name of the payee after certification. *Ozark Savings Bank v. Bank of Bradleyville (Mo. App.)* 204 S. W. 570; *National Bank v. National Mechanics' Bank*, 55 N. Y. 211, 14 Am. Rep. 232; *Rapp v. National Security Bank*, 136 Pa. 426, 20 A. 508. *National Union Fire Ins. Co. v. Mellon National Bank*, supra, is also cited in support of appellant's contention that the acceptor does not, by his acceptance, admit the genuineness of the body of the draft. This action was by the insurance company against the bank to recover the amount paid by the latter and charged to the former's account on drafts on which the payees' indorsements were forged. The drafts were drawn on the insurance company by its agents, and were payable to policy holders for supposed fire losses. The drafts came into the possession of an employee of the agent, who forged the names of the payees upon the back thereof, deposited the same in defendant bank, which forwarded them to the insurance company for acceptance. They were accepted without investigation as to the genuineness of the payees' signatures, were paid by the bank, and the amounts charged to plaintiff's

account. A judgment for plaintiff was affirmed on appeal; it being held that by acceptance the plaintiff did not admit the genuineness of the signatures of the payees. This was the question decided, and the case is not authority for the claim that an acceptance is not an admission of the genuineness of the body of the draft. In many of the cases cited by appellant a recovery was allowed upon the theory that the party to whom the drawee paid the check, having indorsed the same, thereby warranted the genuineness of prior indorsements. But, as has been pointed out (Brannan, *The Negotiable Instruments Law* [4th Ed.] p. 618), the presentation of a check to a drawee for payment is not a negotiation and involves no warranties, as the drawee is not a holder in due course under section 52 of the *Negotiable Instruments Law* (Cal. Civ. Code, § 3133), nor a holder as defined in section 191 thereof (Cal. Civ. Code, § 3266). And, as held in the following cases, the warranties of a general indorser as provided by section 66 of that law (Cal. Civ. Code, § 3147) are based upon a transfer of title, and run only to holders in due course; consequently a drawee who has paid the instrument is not a transferee of title as the last holder's indorsement does not transfer the check, but converts what was a check into a voucher. *South Boston Trust Co. v. Levin*, 249 Mass. 45, 143 N. E. 816, 817; *National Bank, etc., v. First National Bank etc.*, 141 Mo. App. 719, 125 S. W. 513; *Woodward v. Savings & Trust Co.*, 178 N. C. 184, 100 S. E. 304, 5 A. L. R. 1561; *Bank of Commerce v. Seattle National Bank*, 109 Wash. 312, 187 P. 342; *American Hominy Co. v. Millikin National Bank* (D. C.) 273 F. 550; *Figuers v. Fly*, 137 Tenn. 358, 193 S. W. 117. The liability to refund rests upon the quasi contractual duty to return money received under mistake and not upon warranty, nor is an action therefor founded upon the instrument which the drawee has paid. *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Redington v. Woods*, 45 Cal. 406, 429, 13 Am. Rep. 190; *Brannan, The Negotiable Instruments Law* (4th Ed.) p. 619. The same rules apply to the claim against defendant Popkin. In order to establish any obligation on his part to reimburse the plaintiff, it would be necessary to allege and prove that he received a benefit from the plaintiff (Woodward, *Quasi Contracts*, § 7, p. 9; Keener, *Quasi Contracts*, p. 24), and the testimony shows that any benefit he derived from the transaction was received either from his co-defendant or from Behling.

[8, 9] We think the construction placed upon the section by the Illinois court is correct, and that it was not the legislative intent that the obligation of the acceptor should be limited to the tenor of the instrument as drawn by the maker, as was the rule at com-

mon law, but that it should be enforceable in favor of a holder in due course against the acceptor according to its tenor at the time of its acceptance or certification.

The judgment is affirmed.

108 Cal. App. 716

Ex parte LIVINGSTON.

Cr. 1983.

District Court of Appeal, Second District,
Division 2, California.

Oct. 3, 1930.

Rehearing Denied Oct. 16, 1930.

Hearing Denied by Supreme Court Oct. 30, 1930.

1. Habeas corpus ⇨117(1).

Discharge of prior habeas corpus writ by superior court on law question *held* not res judicata on habeas corpus, in District Court of Appeals, for custody of minor.

2. Judgment ⇨815.

Decree of court of sister state, having jurisdiction relating to custody of minor, is entitled to recognition, subject to right of parties to show change in circumstances.

3. Divorce ⇨332.

Wisconsin court had jurisdiction to modify divorce decree with regard to child's custody, on father's petition; nonresident respondent having entered general appearance.

4. Divorce ⇨332.

On habeas corpus for minor's custody, modified divorce decree of Wisconsin court awarding custody to petitioner *held* binding on local court; circumstances being unchanged.

On Petition for Rehearing.

5. Habeas corpus ⇨113(11).

Law does not provide for rehearing in District Court of Appeals in habeas corpus case for custody of minor.

Application by Herbert W. Livingston for writ of habeas corpus to secure custody of Dean Livingston, a minor, from Lois Livingston.

Writ granted.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for petitioner.

William F. Adams, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This is an application by Herbert W. Livingston, the father of Dean Livingston, a minor, for a writ of habeas corpus. The petitioner and Lois Livingston intermarried in September, 1918, and there was born to them during the year 1919 the son, Dean Livingston. On August 28, 1925, Lois Livingston commenced an action in the state of Wisconsin against petitioner for a divorce. She was granted a decree, on June 30, 1926, and upon stipulation of the parties the court awarded the custody of Dean Livingston, then of the age of about 7 years, to the mother, "subject to the supervision of the court," and with right granted to the petitioner to have the child with him each Sunday of the year with the exception of four to be designated by the mother, and excepting also that defendant was given the custody of the child during the school vacation occurring during the holiday period each alternate year commencing with the year 1926 and each Easter school vacation in alternate years commencing in 1927, and for two weeks during the summer school vacation of every year. The decree provided further that neither parent was to take or permit any one to take the child beyond the jurisdiction of the court without permission of the court, to be granted only after notice to the other party. On December 4, 1928, Lois Livingston removed from Wisconsin to Los Angeles, Cal., bringing the boy with her, in direct violation of the order of the court and without its consent or the consent of petitioner. On June 5, 1929, the circuit court of the county of La Crosse, Wis., issued its order to the respondent, Lois Livingston, commanding her to appear and show cause why the decree of June 30, 1926, should not be modified by giving to the petitioner herein the sole and exclusive custody of his son, and commanding her further to produce and have the child in court at the time of the hearing on June 25, 1929. This order was personally served upon respondent in the county of Los Angeles, and in response thereto she appeared by counsel, first, specially for the purpose of objecting to the jurisdiction of the court and then generally. She did not produce the child in court, but announced through her counsel that she had no intention of returning to Wisconsin or producing her son in court. Whereupon the court made its order modifying the decree theretofore rendered and giving to the petitioner here the sole and exclusive custody and control of the child. It is this order which furnishes the basis for the contention here, as it did in the superior court of Los Angeles county, where a former proceeding in habeas corpus was had resulting in the dismissal of the writ. No testimony was taken in the last-named court concerning any change of circumstances since the decree, the matter having been submitted upon exemplified copies of the proceedings

in the Wisconsin court; nor is such a contention advanced here, the respondent very properly taking the position that such "should be determined only in a regular action where the facts can be produced fully before the court in the regular way."

[1] It is first asserted by the respondent that the discharge of the writ by the superior court is binding upon the petitioner here and renders the matter *res judicata*. We are in thorough accord with the authorities upon which she relies, to wit, *In re Gille*, 65 Cal. App. 617, 224 P. 784, *In re Bees* (Cal. App.) 280 P. 1033, and *In re Gury* (Cal. App.) 284 P. 944; but those cases only decide that a final adjudication on a writ of habeas corpus brought for the purpose of determining the right of private parties to the custody of a minor child is conclusive of the identical facts therein involved. Those authorities do not hold that the determination by the superior court of a pure question of law could be binding upon an appellate tribunal. The argument amounts to this, and its absurdity is apparent: That because the superior court decided that the decree of the Wisconsin court was, even in the absence of evidence of changed circumstances, not of any force or effect outside the jurisdiction of Wisconsin, we are bound thereby. The same contention was raised in *Re Marshall*, 100 Cal. App. 284, 279 P. 834, 836, and dismissed with this language: "However, as no change is shown to have taken place in petitioner's condition or moral fitness since the date of the order and judgment of the Arizona court, and no change in petitioner's condition or moral fitness since such date was shown at the hearing in the superior court of San Mateo county, nor passed upon by that court, the decision of the Arizona court is *res adjudicata*, and is controlling until such change in appellant's condition is shown."

[2] The quotation just set forth not only answers the argument in the particular already mentioned, but also indicates the rule generally prevailing that a decree of a court of one state, having jurisdiction, relating to the custody of minor children is under the doctrine of comity prevailing among sister states and, subject of course to the right of the parties to show a change in the circumstances or conditions, entitled to recognition in another state. In *re Wenman*, 33 Cal. App. 594, 165 P. 1024; *In re Marshall*, *supra*; *State v. District Court*, 46 Mont. 425, 128 P. 590, Ann. Cas. 1916B, 256. Particular reference is made to a case note appearing in 20 A. L. R. at page 815, where the authorities are collected, and where the following statement is found: "With some variation of statement, and an occasional intimation to the contrary, it is established by the great weight of authority that in the absence of fraud or want of jurisdiction, affecting its

validity, a decree of divorce awarding the custody of a child of the marriage must be given full force and effect in other states as to the right to the custody of the child *at the time and under the circumstances of its rendition*; but that such a decree has no controlling effect in another state as to facts and conditions arising subsequently to the date of the decree; and the courts of the latter state may, in proper proceedings, award the custody otherwise upon proof of matters subsequent to the decree which justify the change in the interest of the child." (Italics ours.)

[3] The Wisconsin court undoubtedly had jurisdiction of the parties to this proceeding. The petitioner submitted thereto by seeking the modification of the original decree and the respondent by entering a general appearance.

[4] It is ordered that the respondent, Lois Livingston, forthwith deliver to the petitioner the minor child of petitioner and respondent.

We concur: WORKS, P. J.; CRAIG, J.

On Petition for Rehearing.

WORKS, P. J.

[5] Petition for rehearing is dismissed. There is no provision of law for rehearing in this court in habeas corpus cases, except in certain criminal cases of which this is not one. In re Zany, 164 Cal. 724, 130 P. 710; Penal Code, § 1506; In re Edwards on Habeas Corpus, 99 Cal. App. 541, 290 P. 591.

109 Cal. App. 5

BETHURUM v. KRUMM.

Civ. 127.

District Court of Appeal, Fourth District,
California.

Oct. 7, 1930.

1. Appeal and error ⇨110.

Appeal does not lie from an order denying motion for new trial (Code Civ. Proc. § 963).

2. Appeal and error ⇨989.

Appellate court, in determining whether evidence was sufficient to support judgment, need only consider evidence most favorable to prevailing party.

3. Assault and battery ⇨35.

Evidence held to support verdict for plaintiff in action for damages resulting from

alleged assault and battery (Pen. Code, §§ 240, 242).

"Assault" is defined by Pen. Code, § 240, as unlawful attempt, coupled with present ability, to commit violent injury on person of another, while "battery" is defined by section 242 as any willful and unlawful use of force or violence on person of another.

4. Appeal and error ⇨1002.

Finding of jury on weight of evidence in case of conflict is conclusive on appellate court.

5. Assault and battery ⇨38.

Mental anguish, following injury, is element of damage to be considered in fixing amount thereof.

6. Assault and battery ⇨26.

Defense of self-defense in assault or battery case is affirmative defense, burden of proving which rests upon defendant.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by E. A. Bethurum against Theodore Krumm. Judgment for plaintiff, and defendant appeals.

Affirmed.

Cossack & Krumm, of San Bernardino, for appellant.

Raymond E. Hodge, of San Bernardino, for respondent.

MARKS, Acting P. J.

[1] This is an action for damages resulting from an alleged assault and battery upon the person of the respondent by the appellant. The record shows that on the 5th day of September, 1928, the parties hereto had an argument in the council chambers of the board of trustees of the city of Redlands. They afterward met in a public market in the city of Redlands, and an altercation followed which resulted in an affray and this action for damages. A trial was had before a jury, which returned a verdict in favor of respondent in the sum of \$400. Appellant made a motion for a new trial, which was denied. He then appealed from the judgment and from the order denying his motion for a new trial. Since the amendment of section 963 of the Code of Civil Procedure in 1915, an appeal does not lie from an order denying a motion for new trial.

[2] Appellant relies upon two grounds for a reversal of the judgment. He maintains that the evidence was not sufficient to support the judgment, and complains of two instructions given by the court. Under his

first contention there is presented a very usual state of facts, in that the evidence for the two parties is directly conflicting. In deciding this point, we need only consider the evidence most favorable to the prevailing party, and, if it supports the judgment, we are bound thereby.

[3] The evidence in this case most favorable to respondent shows that, when he and the appellant met in the public market in the city of Redlands, appellant seized respondent by the arm and commenced pulling him toward the front of the building; that respondent hung back, and appellant thereupon picked him up bodily from the floor, threw him across his hip, and started to carry him from the building. Following this blows were struck by both parties without very serious injuries or damages to either one.

An assault is defined by section 240 of the Penal Code as follows: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

A battery is defined by section 242 of the Penal Code as follows: "A battery is any willful and unlawful use of force or violence upon the person of another."

[4] The evidence in this case most favorable to respondent amply supports the verdict of the jury under the definitions of an assault and a battery, which we have just given. The fact that the evidence for appellant would have sustained a verdict in his favor merely creates a conflict which the jury resolved against him. Under this state of facts the findings of the jury on the weight of the evidence is conclusive on this court.

[5] The first instruction complained of by appellant is one in which the court instructed the jury in effect that, in an action for assault and battery, the insult and indignity inflicted upon a person by striking him a blow in anger, rudeness, or insolence constitute an element of damage in connection with the mental suffering, if any, arising therefrom. This is but another way of informing the jury that mental anguish, following an injury, is an element of damage which may be considered in fixing the amount thereof. This principle of law has been recognized in many cases in this state. *Easton v. United Trades School Contracting Co.*, 173 Cal. 199, 159 P. 597, L. R. A. 1917A, 394; *Merrill v. Los Angeles Gas & Electric Co.*, 158 Cal. 499, 512, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

[6] In the second instruction complained of by appellant the court instructed the jury, in effect, that, where a defendant interposes a defense of self-defense in an assault or battery case, it is an affirmative defense, the

burden of proving which, from all the evidence in the case, rests upon the defendant. This principle of law has been approved in *Marriott v. Williams*, 152 Cal. 705, 93 P. 875, 125 Am. St. Rep. 87. Appellant not only pleaded self-defense, but relied upon it as a defense at the trial, and the court correctly instructed the jury in this regard.

We have examined all of the instructions given by the court, and believe that the jury was fairly and fully instructed upon all the law necessarily involved in the case.

Judgment affirmed.

We concur: BARNARD, J.; WARMER, Justice pro tem.

108 Cal. App. 761

LOS ANGELES—FIRST NAT. TRUST & SAVINGS BANK v. HOWLAND et al.

Civ. 6103.

District Court of Appeal, Second District,
Division 1, California.

Oct. 6, 1930.

1. Pleading ⇨121(4).

Defendant may not by denial on lack of information or belief of fact ascertainable from public record raise issue.

2. Pleading ⇨121(4).

Denial on information and belief of allegation in complaint in respect to alleged consolidation of banks raised issue as respected right to judgment on pleadings (St. 1927, p. 1796, § 31d).

Although under St. 1927, p. 1796, § 31d, recordation of certificate of consolidation is constructive notice of all of the rights, benefits, privileges, duties, and obligations of whatsoever kind or nature held or possessed by or imposed on the bank so converted or consolidated or merged are retained by and imposed on successor bank, recordation is not therein made compulsory, but is merely a privilege or right, so that evidence of the fact of alleged consolidation of banks was not legally required to be of public record whereby it could be readily ascertained by inspection of record.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Los Angeles-First National Trust & Savings Bank against Percy H. Howland and another. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

M. W. Conkling, of San Diego, for appellants.

William L. Kuehn and Arthur Loveland, both of Los Angeles, for respondent.

HOUSER, J.

The cause of action herein was based upon the nonpayment of a promissory note executed by the defendants in favor of the Pacific-Southwest Trust & Savings Bank, which bank was the alleged predecessor in interest of the plaintiff. In addition to the usual allegations in actions of this character—that is, of execution, delivery, and nonpayment of the note—the complaint contained the allegation: That, at the time of execution and delivery of the said note, the predecessor in interest of the plaintiff was a corporation which “by proceedings duly and regularly had and taken has been consolidated with plaintiff under the charter and corporate title of plaintiff. That said consolidation was approved by the Comptroller of the Currency and became effective at the close of business September 1, 1927. That by virtue of said consolidation plaintiff became and now is the holder of said promissory note.”

Based solely on the allegation that the defendants “had no information or belief” of the alleged consolidation of the two banks, mentioned in the complaint, as well as of plaintiff’s alleged ownership of said note, the answer of defendants was limited to a denial of those facts.

On motion presented to the trial court for judgment on the pleadings, judgment was ordered in favor of the plaintiff; and the defendants appeal therefrom.

Appellants now contend that their answer raised an issue of a material fact and consequently that the judgment of the trial court should be reversed.

[1] By a long line of decisions by the courts of this state, the rule is settled that, where the determination of the existence of a material fact alleged in the complaint is readily ascertainable by the defendant from an inspection by him of a public record, he may not, by denial of such fact based on his lack of information or belief, raise an issue as to such allegation. 21 Cal. Jur. 150, and authorities there cited.

[2] The complaint herein contained no allegation to the effect that any instrument purporting to evidence the consolidation of the two interested banks was ever either filed or

recorded in any place whatsoever. Nor has attention been directed by respondent herein either to any mandatory or any directory provision of law by which it became or was the duty of either of the contracting parties to such merger or consolidation, their successor, or any other person, to file or to record any such instrument. The most that appears from any statute or authority cited by either of the parties litigant herein is a provision contained in section 31d of the Statutes of 1927, pp. 1789, 1796, by which “the recordation of such certificate [of consolidation] in the office of the recorder of any county shall be * * * constructive notice that all of the rights, benefits, privileges, duties and obligations of whatsoever kind or nature held or possessed by or imposed upon the bank so converted or consolidated or merged are retained by and imposed upon the successor bank. Any such certificate shall be prima facie evidence in all courts and places of the regularity of the proceedings taken and of the fact of such conversion or consolidation or merger.”

But nowhere, either in the cited statute or in any other to which the attention of this court has been attracted, is such recordation made compulsory. Apparently no duty or obligation is made to rest upon any person either to file or to record in any public office any instrument from which constructive notice of the consolidation of banks of the character of those here involved either will or may result. The act of recordation of the certificate of consolidation is but permissive; it may or may not be done, dependent upon no statutory demand or requirement. By the terms of the statute, the recordation of the certificate of consolidation is merely a privilege or right, of which some unnamed and unspecified person or corporation may avail himself or itself, and from which recordation, when accomplished, certain specified advantages may accrue. It follows that, since evidence of the fact of the alleged consolidation of the two banks mentioned in the complaint herein was not legally required to be of public record, the defendants were within their rights in denying the existence of such fact based upon their alleged lack of information and belief.

The judgment is reversed, with directions to the lower court to deny the motion presented by the plaintiff for judgment on the pleadings in the action.

We concur: CONREY, P. J.; YORK, J.

108 Cal. App. 764

**SCOTT v. SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY.**

Civ. 7274.

District Court of Appeal, Second District,
Division 2, California.

Oct. 6, 1930.

Courts ⇨472(6).

Superior Court's jurisdiction *held* exclusive in suits foreclosing mechanic's liens for less than \$2,000 on property within county outside municipal court's jurisdiction (Deering's Gen. Laws 1925-1927, Act 5238, § 29; Const. art. 6, § 13, and art. 6, § 5, as amended in 1928).

Const. art. 6, § 5, as amended in 1928, provides that superior courts shall have original jurisdiction in all civil cases, except where jurisdiction is given to municipal or other courts. Deering's Gen. Laws 1925-1927, Act 5238, § 29, gave municipal courts exclusive jurisdiction in cases arising within city where demand was \$1,000 or less, and concurrent jurisdiction with superior court in cases arising within county but outside city, in which demand was likewise \$1,000 or less. Pursuant to Const. art. 6, § 13, jurisdiction of municipal courts was later increased to \$2,000 (Deering's Gen. Laws Supp. 1929, Act 5238, § 29).

Petition by O. N. Scott for writ of prohibition to restrain the Superior Court in and for the County of Los Angeles from hearing and determining certain actions pending therein.

Petition denied.

Charles S. McKelvey, of Los Angeles, for petitioner.

Morin, Newell, Brown & Hamill, of Pasadena, for respondent.

CRAIG, J.

The petitioner is a party to five certain actions pending in the superior court of Los Angeles County, entitled, respectively, Oak Knoll Tile Shop v. J. S. Atkins et al.; C. A. Schoch v. J. S. Atkins et al.; Pasadena Ornamental Iron Works v. J. S. Atkins et al.; O. S. Purdy v. Marian Scott et al.; and Arthur I. Knox v. Marian Scott et al. It is alleged that each

suit is instituted for the foreclosure of a mechanic's lien, and that the amount demanded therein is less than \$2,000. The petitioner prays for a writ of prohibition restraining the superior court from proceeding to hear and determine the issues, for the reason that the municipal court of the city of Los Angeles is invested with exclusive jurisdiction thereof.

The property sought to be charged with liens is situated in the county of Los Angeles, but within the city of Pasadena, and outside the immediate exclusive jurisdiction of the municipal court. Section 5, article 6, of the Constitution, as amended by ratification of the people on November 6, 1928, provides in part that: "The superior courts shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices in other inferior courts). * * *" Section 29 of the original act, defining the jurisdiction of municipal courts (Deering's Gen. Laws 1925-1927, p. 1607, Act 5238), provided that they should have exclusive original jurisdiction in all cases at law in which the demand, exclusive of interest, amounted to \$1,000 or less, arising within the limits of the city, and jurisdiction concurrent with the superior court in actions for \$1,000 or less, arising outside of the city limits, but within the county. Thereafter, by section 13, article 6, of the Constitution, the Legislature was empowered to fix the jurisdiction of municipal courts, and pursuant thereto such jurisdiction was so fixed at \$2,000 (Deering's Gen. Laws Supp. 1929, Act 5238, § 29), upon the same conditions as to territorial limitations. From this it follows that the superior court was given original jurisdiction in demands for amounts exceeding \$300, but less than \$2,000, which would arise outside the limits of the city having a municipal court and within the territorial jurisdiction of the superior court. *Johnston v. Wolf* (Cal. Sup.) 280 P. 980.

From the foregoing it is apparent that the superior court has exclusive jurisdiction of the suits in controversy.

The petition for writ of prohibition is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

longed to bankrupt and was therefore liable to claims of bankrupt's creditors.

2. Fraudulent conveyances $\S$ 29(1).

Collusive and fraudulent sale under foreclosure, under power, or by legal proceedings, will be set aside at suit of creditors.

In Bank.

Appeal from Superior Court, San Diego County; Frank C. Collier, Judge.

Action by J. A. Isaacson, as trustee in bankruptcy of the estate of J. C. Rice, bankrupt debtor, against Union Trust Company of San Diego, J. C. Rice Company, and others. Judgment for plaintiff, and defendant last named and certain other defendants appeal.

Affirmed.

Superseding opinion in 286 P. 1017.

L. E. Dadmun, of Los Angeles, for appellants.

Curtis Hillyer and I. C. Boldman, both of San Diego, for respondent Isaacson.

Charles H. Forward, of San Diego, for respondent Union Trust Co.

Rolland C. Springer, of San Diego, for respondent Rae Inv. Co.

SHENK, J.

This action was brought by the plaintiff as trustee in bankruptcy of the estate of J. C. Rice, a bankrupt, to have it adjudged that certain property described in the complaint belongs to the plaintiff as trustee for the creditors of the bankrupt, and for an accounting. The court found in favor of the plaintiff and enjoined the defendants from asserting any claim or interest in and to the property in controversy. The defendants J. C. Rice Company and M. Y. Wolf are the appealing defendants.

[1] The court found that certain property, title to which stood in the name of J. C. Rice Company, was the property of the bankrupt, and that the title to 247 shares of stock in the J. C. Rice Company, although standing in the name of the defendant Wolf, was the property of the bankrupt, and that Wolf held title to the same in trust for the plaintiff. These findings are attacked as unsupported by the evidence. The evidence shows that J. C. Rice was engaged in numerous promotional enterprises in real estate and other property; that he did business through the medium of corporations which he organized, owned, and controlled, among which was the J. C. Rice Company. The court found that the J. C. Rice Company was merely the alter ego of J. C. Rice, and the evidence is amply sufficient to support that finding. The evidence also disclosed that on November 21,

210 Cal. 473

ISAACSON v. UNION TRUST CO. OF SAN DIEGO et al.
L. A. 9525.

Supreme Court of California,
Oct. 15, 1930.

Rehearing Denied Nov. 13, 1930.

1. Bankruptcy $\S$ 303(5).

Evidence sustained finding that property standing in name of certain defendants be-

1918, and at a time when Rice was insolvent, he was the owner of all of the stock of the J. C. Rice Company, consisting of 250 shares, excepting 3 thereof issued to qualify directors; that his creditors were numerous and insistent upon payment; that on November 21, 1918, he pledged to the defendant Wolf 247 shares of said stock as security for the payment of a promissory note executed by Rice to Wolf in the sum of \$21,458.79, due five years after date, with interest at 7 per cent. per annum payable at maturity; that the amount of the note represented an antecedent indebtedness from Rice to Wolf, with interest accrued over a considerable period of time; that in addition to 247 shares of stock the bankrupt pledged to Wolf other property and securities constituting in the main the entire assets of Rice which were estimated to be of the value of \$75,000; that under pledgee's sale, which took place on the 9th day of September, 1919, Wolf sold the 247 shares of stock and took the title in his own name. The court found that the pledge of the stock was a bona fide transaction, made for a valuable consideration, but that the pledgee's sale "was made with the secret understanding and agreement between said J. C. Rice and said M. Y. Wolf that said M. Y. Wolf would hold said stock in trust for said J. C. Rice, and that said M. Y. Wolf does now hold said stock in trust for said plaintiff as trustee in bankruptcy of said J. C. Rice and that the claim of said M. Y. Wolf to said stock of J. C. Rice Company is without any right whatever as against the plaintiff"; that the "sale of said stock of said J. C. Rice Company by said M. Y. Wolf was made by said M. Y. Wolf with the intent to aid and assist said J. C. Rice to conceal his assets from his creditors * * * that said pretended sale of said stock to said M. Y. Wolf was made with the intent to delay, hinder and defraud the creditors of said J. C. Rice and the creditors of said J. C. Rice were thereby hindered, delayed and defrauded and prevented from collecting their claims against said J. C. Rice."

[2] There is sufficient evidence to support the foregoing findings. The note had more than four years to run before its maturity. The due date was attempted to be accelerated by a call for further security, although the agreed value of securities pledged was \$75,-

000. The sale was deceptive in that it was noticed for and took place on a legal holiday. From the date of sale to the 16th day of February, 1925—the day before he filed his petition in bankruptcy—Rice continued to be the control of the J. C. Rice Company. Wolf paid no attention to the multifarious transactions in which it engaged. The evidence as a whole supports the conclusion that Wolf was in league with Rice to defeat the rights of the latter's creditors. The sale was not free from fraud, as appeared in *Pierce v. Pierce*, 16 Cal. App. 375, 117 P. 580, a case strongly relied upon by the appellants. Although the original note transaction was found to be in good faith, the circumstances surrounding the sale were sufficient to avoid it under the rule stated in 20 Cyc., at page 401, as follows: "A collusive and fraudulent sale under a foreclosure of a mortgage or deed of trust on real or personal property either under a power therein or by legal proceedings, will be set aside at the suit of the creditors of the mortgagor or grantor." The text is supported by the authorities cited in the footnote, one of which is *James v. Railroad Co.*, 6 Wall. (73 U. S.) 752, 18 L. Ed. 885, where the sale under the terms of a valid mortgage given to secure the payment of bonds was set aside on the ground of fraud.

An affirmance of the judgment will leave Wolf still as pledgee of the 247 shares of stock of the J. C. Rice Company, with the assets of that corporation in the hands of the plaintiff for the benefit of creditors. It may be said that the stock so held by Wolf is now worthless, but this result is not inequitable under all of the evidence, which shows also that during the time that Wolf was holding the legal title to said stock and before the filing of the petition in bankruptcy he withdrew from J. C. Rice Company the sum of \$18,000, which more than equaled the original indebtedness of Rice to Wolf, together with a substantial allowance for interest thereon. If, perchance, Wolf has any further claim against Rice, his place would seem to be as a general creditor in the bankruptcy court.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

210 Cal. 520

CARPENTER v. STATE BAR OF CALIFORNIA.**S. F. 13854.**

Supreme Court of California.

Oct. 23, 1930.

1. Attorney and client ☞38.

Evidence that attorney made settlement agreement with adverse party without consent of her counsel, and without informing her that her case had been affirmed, justified suspension (St. 1927, p. 38, §§ 25, 29; Code Civ. Proc. § 287, subd. 2).

The evidence disclosed that attorney complained against knew that decision of court had been rendered affirming order requiring his client as husband to pay his wife for support of children and that without informing wife of her rights or ascertaining whether she had received notice of such affirmation, attorney proceeded to draft in his office an agreement between parties, without notification to or presence of wife's attorney, and told her that it was not necessary to notify her attorney or have him present or that matter be taken up in court.

2. Attorney and client ☞76(4).

Affirmance on appeal did not terminate relationship of attorney and client as regards attorney's communication with adverse party without consent of such party's counsel (St. 1927, p. 38, §§ 25, 29; Code Civ. Proc. § 287, subd. 2).

In Bank.

Application by A. H. Carpenter to review a recommendation of the Board of Governors of the State Bar of California for the suspension of applicant as an attorney.

Order affirmed.

A. H. Carpenter, of Stockton, for petitioner.

Max Thelen, of San Francisco (Thelen & Marrin, of San Francisco, of counsel), for respondent.

PER CURIAM.

The above-entitled proceeding has for its object the discipline of A. H. Carpenter, an attorney at law of Stockton, Cal., and a member of the incorporated State Bar.

The charges are made in proper form and in essence are that said attorney is guilty of an infraction of No. 12 of the Rules of Professional Conduct approved by this court, in that he communicated with a party represented by counsel on the subject of controversy in the absence of and without the consent of such counsel. The basis for this charge will be found in the following statement:

In 1912 Henry R. Howe brought suit and obtained a decree of divorce from his wife, Clara Howe; minor children, the issue of such marriage, were not provided for in said decree. On October 4, 1927, some fifteen years later, after due proceedings to that end had, the judge of the San Joaquin county superior court made and filed an order in said cause requiring the husband to pay to the wife for the support and maintenance of the two children \$40 per month until the further order of the court, the first payment to be made on October 1, 1927, and monthly thereafter. The husband, through his attorney, appealed to this court from said order.

The wife, who had later married a man by the name of De Costa, was first represented by the firm of Stahlman & Bennett and later by Sydney C. Bennett, the latter's connection with the matter being known to petitioner, the husband's attorney. Under said order the amount due Mrs. De Costa as of December 1, 1928, was \$600. During the pendency of the husband's appeal he sought at various times to induce her to agree to some settlement, often telling her that she could not win the case on appeal anyway. He also made efforts to induce his son to talk to her and to influence her to make a settlement. It appears, however, that on December 20, 1928, the order appealed from was affirmed by this court. *Howe v. Howe*, 206 Cal. 1, 272 P. 751. It became final and remittitur issued on January 21, 1929.

There is satisfactory evidence that the attorneys for the respective parties received notice of the order of affirmance on or about December 21st and prior to December 24, 1928. On the latter date, however, Mr. Bennett, acting as attorney for Mrs. De Costa, had still been unable to communicate to her the fact that the order had been affirmed. On the morning of December 24th Mr. Howe telephoned his former wife and asked her to come to the office of this petitioner, A. H. Carpenter, to fix up a settlement. A previous offer of \$300 had apparently been discussed and agreed upon between the parties, with no evidence that petitioner had any knowledge thereof. Mrs. De Costa called at petitioner's office with her son, and while there, without disclosing to her in any way the affirmance of said order, petitioner prepared an agreement waiving the respective rights of the parties as husband and wife and mentioning as a consideration a promissory note of \$300. The testimony does not show that petitioner advised or participated in the negotiations for a settlement. It does show, however, that Mrs. De Costa asked petitioner if it would be necessary for her attorney to be present, to which he replied: "No, he does not need to be here at all, because we can fix the papers here." This proceeding was followed by the

giving of a promissory note without interest, due in sixty days, although Mrs. De Costa believed it to be a thirty-day note.

Later, Mr. Bennett saw his client and was informed of what had been done and as a result of such information the present proceeding was begun on January 1, 1929. Notice to answer complaint was served on petitioner on April 2, 1929, and his answer was made on April 11, 1929. The local administrative committee, which had the matter in charge, noticed it for hearing on May 6, 1929. Petitioner filed with said committee on April 27, 1929, a defamatory, if not scurrilous, communication directed at Mrs. De Costa and her attorney and also charging the local administrative committee with prejudice, bias, and hostility, and further alleging that if petitioner's objection should be disregarded, he demanded that the hearing be an open one and that he be confronted with the witnesses against him and that a court reporter be present. The secretary of the committee responded, offering to show petitioner every courtesy and to have a court reporter present if desired, and enclosed a copy of a subpoena for his use in procuring witnesses who would testify in his behalf. The hearing was nevertheless thereafter held at 8 o'clock on the evening of May 6, 1929, petitioner failing to appear. The evidence adduced showed the facts to be in substance as above stated.

The committee of five, only four of whom acted, were unable to agree upon a recommendation in the matter, and the whole proceeding was transmitted without recommendation to the Board of Bar Governors. Upon consideration of the evidence, said board, by eleven affirmative votes, concluded that petitioner ought to be suspended for the period of three months and a recommendation to that effect was made to this court.

[1] We have given careful consideration to all the evidence in this case and have reached the conclusion that the recommendation of the Board of Governors of the State Bar is fully justified and that it should be adopted by this court. It appears without substantial conflict that petitioner knew that the decision of the court had been rendered affirming said order; he also knew that Mr. Bennett was the attorney for Mrs. De Costa. Without so much as informing her of her rights or ascertaining whether she had received notice of said affirmance, he proceeded to draft in his office the agreement between the parties, without notification to or presence of her said attorney. Mrs. De Costa, in the presence of her son, was told that it was not necessary to notify the attorney or to have him present or that the matter be taken up in court. This conduct cannot be harmonized with the ethics of the profession (State Bar Act [St. 1927, p.

38] §§ 25, 29), nor with the letter or spirit of subdivision 2 of section 287 of the Code of Civil Procedure.

[2] The statement that the affirmance of the order terminated the relationship of attorney and client between Mr. Bennett and Mrs. De Costa is entirely without merit. Furthermore, the order of affirmance had not become final as the time for rehearing had not passed and the matter was still pending in every sense of the word. All the other points urged by petitioner herein have been disposed of in previous decisions of this court and time need not be consumed in discussion of them.

It is ordered that the action and recommendation of the Board of Governors in this matter be and it is hereby approved, and that petitioner herein, A. H. Carpenter, be and he is hereby suspended from the practice of law in this state for the period of three months from and after the date of filing of this order.

210 Cal. 450

MARTINELLI v. POLEY et al.

Sac. 4315.

Supreme Court of California.

Oct. 1, 1930.

1. Appeal and error ⇨1005(3).

Appellate court could not reverse judgment for insufficiency of evidence, where evidence was conflicting and trial court had refused to set aside verdict.

2. Evidence ⇨591.

That automobile guest introduced testimony of witnesses which he knew would exonerate automobile driver and show that collision was caused through negligence of truck driver did not deprive guest of benefit of evidence tending to prove automobile driver's negligence.

3. Appeal and error ⇨930(1).

Appellate court must adopt testimony most favorable to plaintiff obtaining judgment.

4. Appeal and error ⇨1050(1).

In automobile guest's action for injuries sustained in street intersection collision, error, if any, in admission of testimony regarding negligence of truck driver in cutting corner, held not prejudicial, where appeal involved only guest and automobile driver.

5. Appeal and error ⇨1064(1).

That court gave instructions casting burden on jury of ascertaining issues from pleadings held not sufficient cause for reversal.

6. Negligence ⇨117.

Contributory negligence, to be available as defense, must be specially pleaded.

7. Negligence ⇨117.

Where contributory negligence can be inferred from plaintiff's evidence plaintiff cannot recover, notwithstanding such negligence was not set up in answer.

8. Negligence ⇨138(4).

In absence of contributory negligence being specially pleaded as defense, instruction need not include reference to contributory negligence, unless from plaintiff's evidence contributory negligence has been proved or may be inferred.

9. Automobiles ⇨246(58).

Evidence in automobile guest's action for injuries *held* not to show contributory negligence so as to require instruction thereon; it not having been set up as defense.

10. Appeal and error ⇨882(12).

Party who offers instruction cannot complain of action of court in giving it.

11. Appeal and error ⇨1064(1).

Appellant could complain of erroneous instruction injuriously affecting his rights and for which he was not responsible.

12. Trial ⇨236(2).

Instruction that witness, willfully testifying falsely in part of testimony presumably testifies falsely in other parts, *held* erroneous (Code Civ. Proc. § 2061, subd. 3).

13. Appeal and error ⇨1064(1).

Error in instruction on credibility of witness testifying falsely in part *held* not prejudicial (Code Civ. Proc. § 2061, subd. 3).

There was no prejudice, since all the jury were told was that they were entitled to distrust such a witness as to the whole of his testimony.

14. Automobiles ⇨6.

Vehicle Act does not affect causes of action for damages for personal injuries existing on date statute took effect (St. 1929, p. 1580, § 141¼).

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Enrico Martinelli against Joseph Poley and others. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Myrick & Deering and Scott, of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

CURTIS, J.

The plaintiff in this action was injured in a collision between a passenger automobile, in which he was riding as a guest of the appellant, and an autotruck, driven by W. Barlow and owned by William McDermott. The collision occurred at the intersection of B and Third streets in the town of Davis, Yolo county, in this state. B street runs north and south, and is intersected practically at right angles by Third street, which runs east and west. The car in which plaintiff was riding at and just prior to the injury was traveling in a northerly direction and on the right or easterly side of the highway. The truck with which it collided was traveling in an opposite direction and on the westerly side of B street, and, when it reached the intersection of the two streets, it attempted to make a lefthand turn into Third street, with the result that the two machines collided at the intersection, seriously injuring the plaintiff. Plaintiff instituted this action for damages against not only the appellant herein, the driver of the machine in which he was riding as a guest, but also against the driver and owner of said autotruck. The action was tried by a jury, which rendered a verdict in favor of the plaintiff against all of said defendants in the sum of \$3,146.50. No question is raised as to the amount of the verdict, but, on motion for a new trial, the trial court, for errors of law occurring during the trial, set aside the judgment as to the driver and owner of the truck, but allowed it to stand as against the driver of the machine in which the plaintiff was riding. From this judgment said defendant has appealed.

On this appeal the appellant contends that he is entitled to a reversal of the judgment upon three grounds; namely: (1) Insufficiency of the evidence to justify the verdict; (2) error on the part of the trial court in permitting the witness Stitt to testify as to the location of the center point of intersection of B and Third streets; and (3) error in giving certain instructions to the jury. We will consider these assignments of error in the order just named.

[1] The plaintiff, appellant, and four other persons, who appeared as witnesses at the trial of the action, composed a theatrical troupe, and at the time of the collision were returning from Chico, Cal., to San Francisco for the purpose of appearing in a theatrical engagement in the latter city. They were traveling in two automobiles, one driven by appellant, in which the plaintiff and one other member of said troupe were riding; the plaintiff occupying the front seat with the driver, and the third passenger riding in the rear

seat. The other three members of the troupe were riding in the other car, which was following the car in which the plaintiff and appellant were riding. These six persons testified as plaintiff's witnesses at the trial, and it may be conceded that the testimony of all of these witnesses, with the possible exception of the plaintiff, was to the effect that the collision was due to the negligence of the driver of the autotruck in turning suddenly and abruptly at said street intersection into Third street without giving any warning, and thereby passing immediately in the path of the machine driven by the appellant. These witnesses further testified that at and just prior to the collision the appellant was traveling on the easterly side of the highway and at a speed of about 20 miles per hour, while Barlow, the driver of the truck, was traveling 22 to 25 miles per hour when he made the left turn at the intersection and collided with the machine of the appellant. The plaintiff testified that his attention was directed more to the scenery along the route just prior to the accident than at the highway over which they were traveling, and, when he observed the truck, it was about five feet from "our car and struck it sideways, and that is all I remember. I don't remember whether the truck driver had his hand out or not." Were this all the evidence in the case, it is clear that the contention of appellant as to the insufficiency of the evidence would have to be sustained. But the evidence of the driver of the truck corroborated by the witness Sutton, was in direct contradiction to that given by the above-mentioned witnesses. Barlow testified that, when he went to make the turn at the street intersection, the Poley car was about 150 feet to the south; that, at the time he made the turn into Third street he had his signal out for a left-hand turn and was traveling from 6 to 6½ miles per hour. "This other car was coming right along. I don't know how fast exactly. I had no speedometer or nothing to tell. He hadn't slowed up in speed. He was driving at that time about twenty-five or thirty, or maybe more. It took me to stop about two or three feet, two feet, something like that. I don't know exactly." Another witness, Rehm, testified that the Poley car was being driven at about 35 miles per hour, while the evidence showed that there were skid marks on the highway made by the Poley car 21 feet in length leading in a southerly direction from the scene of the accident. It is evident from this brief résumé of the evidence that there is a marked and substantial conflict therein as to whether or not plaintiff's injury was not caused by the negligent acts of the appellant. This conflict the jury, by their verdict, resolved in favor of the plaintiff and against the appellant. On motion for a new trial, the trial court refused to set aside the verdict. Under this state of the case an appellate court is without power to reverse the

judgment on the ground of the insufficiency of the evidence.

[2] This action was commenced in the superior court of the city and county of San Francisco, the place of residence of the plaintiff. A motion was granted to have the place of trial changed to the superior court of the county of Yolo, the place of residence of the defendants Barlow and McDermott. Plaintiff resisted said motion, and asked that the trial of said action be retained in the city and county of San Francisco upon the ground of the convenience of witnesses. In support of his demand for the retention of said action in the city and county of San Francisco the plaintiff filed his own affidavit, which, among other things, set forth the names of his witnesses and a statement of facts which he expected to prove by said witnesses. In this affidavit the plaintiff named as witnesses who would testify at the trial in his behalf the appellant and the four other members of said theatrical troupe, already referred to, together with a statement of facts to which each of said witnesses would testify. The statement of facts, thus set forth in plaintiff's said affidavit, agreed in all substantial respects with the testimony which these same witnesses subsequently gave at the trial of the action. Appellant contends, therefore, that the plaintiff, having called these witnesses with full knowledge as to what they would testify, is bound by their testimony, and that, as the testimony of these witnesses completely exonerated appellant, plaintiff should not be permitted to recover against him. As we have already stated, plaintiff brought his action not only against the appellant, but also against Barlow and McDermott, the driver and owner of the autotruck. Plaintiff was entitled to introduce any competent evidence which would tend to establish the negligence of either the appellant or the other two defendants in the case. The fact that the evidence of some of plaintiff's witnesses exonerated appellant and tended to show that the other two defendants were responsible for plaintiff's injuries should not deprive plaintiff of the benefit of the evidence of other witnesses whose testimony tended to prove the negligence of the appellant. Plaintiff at the trial introduced the testimony of the five witnesses above referred to. He then introduced in evidence the deposition of Barlow. He thus made out a prima facie case of negligence against appellant as well as against Barlow and McDermott. But, if we follow the reasoning of appellant, the plaintiff was out of court entirely. By knowingly introducing the evidence of the five witnesses who testified to Barlow's negligence thus exonerating appellant, he was bound by their testimony, and was accordingly precluded from recovering against appellant, and, by introducing the deposition of Barlow, the contents of which the plaintiff was presumed to know,

plaintiff was bound by the testimony of Barlow, and accordingly could obtain no relief against Barlow or his employer. Obviously the appellant has cited no authorities in support of this unusual and illogical contention. In our opinion, it is entirely without merit.

[3, 4] The only error assigned by appellant as to the admission of evidence relates to the testimony of witness Stitt, who was a surveyor and engineer. He testified that he had visited the scene of the collision, took certain measurements of the streets, and made observations as to the location of trees and dwellings along the highway at or near the intersection of the two streets, where the collision occurred, and had measured the distance from these objects to the streets at said intersection. He made a map of the street intersection and of the lands adjacent thereto. On this map were depicted the streets and other objects just referred to. This map was admitted in evidence, and was used by many of the witnesses in connection with their testimony. The streets were not paved except in the center of B street; the state highway, 18 feet in width, runs for some distance both north and south of Third street. There is no button or other mark indicating the center of the street intersection. North of Third street B street appears to be curbed, and the street is 50 feet between the curbs. Third street is not paved at or near its intersection with B street. Appellant contends that the traveled portion of Third street is 53 feet in width, and therefore the median line of said street would be 26½ feet south of and parallel to the north curb thereof. The witness Stitt placed said line 25 feet south of said curb or 1½ feet north of the location claimed therefor by appellant. He was permitted to testify that in his opinion the center line of Third street should be located as shown on said map. Appellant attaches considerable importance to the location of this center line, for the reason that he contends that Barlow, in making the left turn at said intersection, "cut the corner" and ran to the north of said center line. As we view the case in its present state, we think the point made by appellant is of but slight importance. Were Barlow and his employer before us, then the fact whether Barlow cut the corner in making the turn into Third street might be of material importance to determine whether Barlow was guilty of negligence in so doing. But, as between the appellant and respondent, the testimony most favorable to the respondent, and that which we are in law bound to adopt and follow, shows that Barlow made the turn after giving the required signal or warning when the appellant was some 150 feet south of said street intersection. The jury could well have determined from this evidence that the appellant had sufficient time to observe Barlow as he made the turn into Third street, and by

the exercise of ordinary care could have avoided the collision by turning his car to the left and thereby missed Barlow altogether. In this case, as between the parties to this appeal, the question of Barlow's negligence is of slight moment, provided the testimony was sufficient to establish the negligence of the appellant, which, according to our views already expressed, was ample for that purpose. If, therefore, the court erred in the admission of this testimony of Stitt, such error was not prejudicial to the appellant.

[5] Appellant takes exception to the action of the trial court in giving certain instructions to the jury. The first of these instructions given by the trial court to which appellant objects is as follows: "If you believe from the evidence that all of the allegations contained in plaintiff's complaint have been proven, then I instruct you that your verdict must be in favor of plaintiff, and against defendants." Instructions of this character, where reference is made to the pleadings, and which cast the burden upon the jury of ascertaining the issues in the case from the pleadings, instead of setting forth a clear statement of the issues, have been severely criticized in some jurisdictions. *Illinois Central R. R. Co. v. King*, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93; *Robinson v. Berkey*, 100 Iowa, 136, 69 N. W. 434, 62 Am. St. Rep. 549. We do not find, however, that any cause has been reversed solely for this reason. It is a practice not to be commended, and tends more to the confusion of the jury than to their enlightenment. It is, however, not sufficient cause for a reversal of the judgment.

[6-9] Objection is further made to this instruction for the reason, as contended by appellant, that it is a formula instruction, and that it omits all reference to the defense of contributory negligence. In the present action contributory negligence was not set up as a defense to plaintiff's cause of action. It is well settled that contributory negligence, in order to avail the defendant, must be specially pleaded. But, in the absence of such a defense set up in the answer, when contributory negligence can be inferred from the circumstances proved by the plaintiff, plaintiff cannot recover. Therefore, if it be conceded that the instruction of which complaint is made is a formula instruction, in the absence of contributory negligence being specially pleaded as a defense, it would not be necessary to include in said instruction any reference to contributory negligence, unless from the evidence of the plaintiff contributory negligence has been proven or may be inferred. We find nothing in the evidence, either that admitted on behalf of the plaintiff, or that introduced by the defendants, that would tend to show that plaintiff was guilty of contributory negligence. He was simply riding with the appellant as a guest of the latter, and had no power

of control over the machine in which they were traveling. Nothing had happened during the trip, so far as the evidence shows, at least until the collision occurred, which indicated in any manner that the appellant was not driving his machine in a perfectly proper and careful manner. There was no reason for the plaintiff, therefore, to be apprehensive of his safety while riding with appellant, or to take any unusual precautions against their running into danger. Just before the accident happened, he was observing the houses along the highway, and was not looking in front of the machine, and therefore did not see Barlow's truck until it was about 5 feet from the car in which he was riding. It was then too late for him to caution appellant regarding the latter's driving, or to do anything else to avoid the collision. There is nothing in this conduct of the plaintiff which would tend in the least to prove that he was guilty of contributory negligence in causing the injury sustained by him as a result of the collision. The instruction, therefore, was proper, and the court was not in error in giving it.

[10-13] Appellant also takes exception to the following instruction: "You are instructed that a witness false in one part of his testimony is to be distrusted in others, and if you believe from the evidence that any witness has willfully testified falsely in any part of his testimony, *then it is a presumption of law that he has testified falsely in other parts thereof* and you are entitled to distrust him as to the whole of his testimony." The part of the instruction which we have italicized above is the part to which the appellant objects, and contends that the giving of the instruction with this objectionable part included was error on the part of the trial court entitling the appellant to a reversal of the judgment. This instruction was given by the court at the request of the defendants Barlow and McDermott, and not at the instance or request of the plaintiff. We do not understand, however, that this fact would make any material difference as to the force or effect of the instruction. If it was given by the court, the jury were justified in acting upon it, and the consideration given to it by the jury would be the same whether the instruction was given at the request of one party to the action or of the other. The error in either case, if the instruction were erroneous, would be the same, except that the party who offers the instruction cannot complain of the action of the court in giving it. We think the appellant as he was not in any way responsible for the giving of the instruction, has the right to complain of any erroneous statement of law contained therein which injuriously affected his rights in the action or trial. The instruction is based upon subdivision 3 of section 2061 of the Code of Civil Procedure, which reads as follows: "That a witness

false in one part of his testimony is to be distrusted in others." We find no precedent in the decisions of this state, and our attention has not been called to any in other jurisdictions which sanctions or justifies the giving of the instruction in the form in which it was given to the jury by the court in this action. We question, however, whether the appellant has been seriously prejudiced by any statement contained in the instruction. The jury were told that, if a witness has willfully testified falsely in any part of his testimony, then it is a presumption of law that he has testified falsely in other parts thereof (a statement which we think was clearly erroneous and unauthorized under any provisions of law in this state); yet the jury were told that, if they had this belief, then they were simply "entitled to distrust him as to the whole of his testimony." They were not told that they must distrust or reject his testimony, as was the case in a case relied upon by the appellant *People v. Rosa*, 97 Cal. App. 501, 275 P. 961. On the other hand, the words of section 2061, Code of Civil Procedure, were followed by the court in the framing of the instruction, and particularly that part of the instruction defining the power of the jury in respect to the testimony of a witness whom the jury believed had testified falsely in one part of his testimony. All the jury were told was that they were entitled to distrust such a witness as to the whole of his testimony. We cannot feel that any prejudicial results followed from the giving of this instruction.

Complaint is also made by appellant to instruction 18, respecting the damages to be allowed the plaintiff, in that it contravenes section 3283 of the Civil Code, which provides that "damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." Like objection was made to an instruction similar to the said instruction 18, and the objection overruled in the case of *Burk v. Extrafine Bread Bakery* (Cal. Sup.) 280 P. 522. In *Norton v. Houlette*, 85 Cal. App. 233, 237, 258 P. 1104, 1106, the court gave extended consideration to an instruction similar in principle to instruction 18 in the present action, and held that, "while not to be commended, the instruction of which complaint is made was not prejudicial to the rights of defendant." See, on this subject, *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 P. 325.

A number of other instructions are criticized by appellant. We have carefully examined each of them, and have given consideration to the argument of appellant in support of these criticisms. In our opinion, these instructions contain no prejudicial error, and we think it is unnecessary to set out these instructions or the grounds upon which they are sustained.

[14] Since the oral argument of this appeal, both appellant and respondent have filed supplementary briefs as to the effect of section 141½ of the California Vehicle Act (St. 1929, p. 1580), which section was enacted and went into effect subsequent to the entry of the judgment in this action. At the time of the filing of said briefs, this court had never passed upon the question as to the retroactive effect of said section and whether or not it applied to pending actions. On July 24, 1930, however, this court handed down a decision in which it was held that section 141¾ of the California Vehicle Act, as amended, does not in any way affect causes of action for damages for personal injuries existing on August 14, 1929, the date the statute took effect. *Callet v. Alito* (Cal. Sup.) 290 P. 438. The ruling in this last-named case is a complete answer to the contention raised by the appellant as to the effect of said statute upon the present action.

We find no error in the record in this action which would justify a reversal thereof.

The judgment therefore is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

210 Cal. 514

**HARRINGTON v. STATE BAR OF
CALIFORNIA.
S. F. 13743.**

Supreme Court of California.
Oct. 20, 1930.

As Amended Nov. 15, 1930.

Attorney and client $\S$ 10.

Petitioner *held* entitled to admission to practice law in state on certificate from another state.

The only matters in record on which committee of the state bar denied application for admission to practice law related to petitioner's having been named codefendant in criminal proceedings wherein defendants were charged with conspiracy to obstruct justice by secreting a witness. In such proceeding petitioner was absolved from any guilt. Another matter related to his receiving from clerk of court money belonging to client, as he had a right to do under state statute, and which he thereafter failed to deliver to client because unable to find her, but which, about a year after client disappeared, he paid to her on her demand and under circumstances showing he was not guilty of any wrongdoing.

In Bank.

Proceeding by Gerald F. Harrington against the State Bar of California, to review an order of the Committee of the Bar Examiners of the State Bar, denying his application for admission to practice on certificate from another state.

Application for admission granted.

Wm. Kehoe, of San Francisco, and Isidore B. Dockweiler, of Los Angeles, for petitioner.

Morse Erskine, of San Francisco, for respondent.

PER CURIAM.

The petitioner herein, Gerald F. Harrington, presented to the committee of bar examiners of the state bar of California, on May 18, 1928, his application, in due form, for admission to practice as an attorney and counselor in the courts of the state of California, basing the same upon his certificate of admission to practice law in the state of Nebraska, duly issued to him in the year 1913 and unrevoked, and upon a considerable number of commendatory letters from judges, members of the bar and former clients of the petitioner while practicing law in the state of Nebraska between 1913 and 1926. Pursuant thereto the petitioner appeared before the committee of bar examiners on June 1, 1928, and was examined at length by the members thereof, from which it appeared that the applicant, prior to his admission to practice in the state of Nebraska, had received a high school education, followed by a college degree and two years' law school study at Creighton University, with one year at Harvard, after which he passed the bar examination in Nebraska and took up the practice of the law in Omaha, in which he had continued with apparently considerable success during the succeeding thirteen years. He frankly admitted that he had at one time, and about the year 1917, been named a codefendant with his father, who was also a lawyer, and with certain other parties, in a criminal proceeding wherein the defendants were charged with conspiracy to obstruct justice by secreting a witness in a white slave case, upon the trial of which he was, however, acquitted, the evidence in the case disclosing that he had nothing to do with the alleged offense, having been absent from the state at the time of its alleged commission. The record in that case, which was subsequently presented before the board, fully supported the claim of the applicant that he was entirely innocent of any wrongdoing or of any ethical misconduct in respect to that proceeding. In addition thereto, and in response to a letter written by one of the members of the board to the firm of attorneys in Dubuque, Iowa, who had been engaged in the prosecution of the defendants in

that case, a reply was received from the member of that firm who had personally conducted such prosecution and at the close thereof had advised the jury to acquit the applicant herein, and who in his said letter expressly stated that the said charge should not be a bar to his right to practice law in this state, and that the applicant was "a reputable young man of fine appearance and training and he should not be prevented from pursuing his career because of the unfortunate affair in which his father was involved." At the conclusion of the first hearing before the board of bar examiners that body delegated to Mr. George Stoneman, one of the members, the duty of further examining the record in that case, and this having been done by him he made and filed with said board his report thereon on September 20, 1928, stating that: "From the record I am unable to see that the application for admission to the bar of this state of Gerald F. Harrington is affected in any manner save unfortunately he became involved through his relationship to his father. I therefore recommend that his application for admission to practice law in this state be granted." In addition to the foregoing the petitioner herein has presented a letter from Judge Thomas C. Munger of the Circuit Court of Appeals in and for the circuit which includes Nebraska, and who had reviewed the aforesaid cause upon appeal, stating: "I am informed that you are applying for admission to the bar of California. I am pleased to recommend you for admission as an attorney. In the many years in which you have practiced in the United States court in this state I found you to be capable, industrious and honorable. I wish you success."

Notwithstanding the foregoing showing, the board of bar examiners manifested an indisposition to admit the applicant, and continued the matter of his admission for further investigation. At a later hearing the applicant was questioned with relation to another matter voluntarily adverted to by him, and which involved his professional relations with a client named Mrs. Frahm, from which it appears that in the year 1922 the applicant represented this client in a divorce suit against her husband, and procured for her a decree of divorce wherein it was provided that the plaintiff should be allowed permanent alimony in the monthly sum of \$25, together with attorney's fees in the sum of \$75. The husband made one payment of \$25 into court upon this judgment and then disappeared. The lady also presently remarried and disappeared, leaving with her attorney neither the name of her second husband nor her address. In the year 1924, in another action, affecting a piece of real estate in which her former husband had some interest, the sum of \$160.73 was paid into court to be applied upon account of the judgment in the divorce proceeding. The clerk of the court, not knowing the

plaintiff's address, but desiring to clear his records, wrote to the applicant herein, asking him to receive, on her account, this sum of money. This the applicant did, as he had a right to do, not only by virtue of the Nebraska statutes (section 266, Compiled Stats. of Nebraska, 1922), but also for the reason that he had an interest in said judgment to the extent of his unpaid counsel fees. At once, upon the receipt of this sum of money, the applicant wrote to the last-known address of his former client, stating the transaction and requesting her to call at her earliest convenience to get the money. His letter was returned undelivered, whereupon the applicant made a trip to Council Bluffs, sought out her last known residence and questioned her former friends and neighbors as to her whereabouts, but all in vain. About a year later the lady reappeared at the applicant's office at a time when he was moving, and was asked to return on the following day, by which time the applicant stated that he could get at his books and accounts in order to make his settlement with her. Instead of so doing she went to the court and the judge thereof notified the applicant to appear in court the following morning and explain the transaction. He so appeared and made his showing as to his vain efforts to locate the lady and his entire willingness to pay over to her there and then whatever portion of said money was coming to her after deducting his own fees and costs. At the close of such hearing the judge made an order allowing the applicant his aforesaid fees and costs and directing the payment of the balance to his client, which the applicant immediately paid over to her. It is a significant fact to be considered in relation to the foregoing transaction that the deputy clerk of Douglas county, Neb., who had immediately to do with the payment of the sum of money involved therein to the applicant and with the subsequent proceedings with relation thereto, has presented an affidavit absolving the applicant herein of any wrongdoing whatever in the matter, and that the presiding judge of Douglas county has contributed a letter strongly recommending the admission of the applicant to the California bar.

The original application of this applicant was presented to the board of bar examiners on May 18, 1928. Whatever examination was thereafter had into the merits of his said application, aside from the two hearings above referred to, were made ex parte by the members or committees of the board of bar examiners, during the course of which the matter was delayed from time to time for nearly a year. The applicant, becoming impatient of this delay, began making inquiries at the office of the board, but he could gain no satisfaction save that his application was still pending. When, in the month of December, 1928, he wrote a letter to the member of the board of bar examiners having particularly

to do with the investigation into the merits of his application, requesting information as to the status thereof, and also requesting that he be given information as to any other charges against him, in order that he might be in a position to refute the same, he received a reply stating that: "It is not the policy of the committee of bar examiners to disclose information received by it in investigations which it conducts," and further informing him that: "When our examination is completed, if we should be inclined to make an adverse decision based upon information which we have received pursuant to our independent investigation, you will be advised thereof in ample time to explain or rebut the same." Notwithstanding this assurance no further action was taken by the committee in the way of informing the applicant of the status of his application until the month of August, 1929, when, after repeated requests for information, he was finally and for the first time advised that his application had been denied on March 16, 1929. He at once applied for a rehearing, in connection with which he demanded that he be given copies of any affidavits or other papers bearing upon his character or fitness for admission to the bar, and offering to stipulate for the taking of any testimony by deposition in the state of Nebraska if the committee should deem it advisable. To this application and request the applicant received no other answer than that his petition for rehearing was denied. Upon being so advised he made application for a review by this court, in response to which the entire record of the proceedings before the board of bar examiners has been filed herein. An examination of this record discloses that other than the two matters in any way affecting the qualifications of this applicant to be admitted to practice in this state no charges have been either preferred or investigated, nor has anything whatever derogatory to the character or professional standing or fitness of the applicant been urged either before the board or any member thereof, or before this court. On the contrary, there has been presented in this record an unbroken line in the way of testimonials from the bench and bar of the state of Nebraska, including practically every judge of both the state and federal courts of that jurisdiction, certifying to the high standing and unblemished professional career of this applicant during his many years of practice in the Nebraska courts. In numerous instances these testimonials are couched in terms of personal

regard and even affection far beyond the ordinary language of formal recommendation. Coupled with these are also to be found like testimonials not only from the lawyers and firms of well-known standing and repute at the Nebraska bar, but also from members of the Nebraska Bar Association, all testifying to the enviable position and excellent character of the applicant while engaged in practice at the Nebraska bar. It was ill health which compelled this applicant to seek a change of residence and to come to California in the year 1926. Having recovered his health, in the year 1928 he sought admission to the California bar. He has thus far been denied that opportunity upon what seems to us entirely insufficient justification for such denial. He has also been delayed beyond reason and without adequate excuse for such delay. He has been, on the whole, harshly treated, quite contrary to what we think should be the policy of the membership and official representatives of the state bar in extending a welcoming hand to their professional brethren from other jurisdictions who, having there been duly admitted and having there pursued an honorable and successful career, conclude to make their home in California and in due course seek permission to continue the practice of their profession here with like assurances of honor and distinction.

It is therefore ordered that the petitioner herein be and he is hereby admitted to practice as an attorney and counselor at law, authorized to practice in all the courts of this state, and the clerk is hereby directed to issue and deliver to him a certificate of such authority upon his taking the prescribed oath and signing the roll of attorneys.

WASTE, C. J. (concurring).

As the petitioner has shown himself entitled to such admission, I concur in the order admitting him to practice law in this state. But I withhold my approval of any language in the majority opinion that may seem to imply that the "membership and official representatives of The State Bar" should not continue to be diligent and thorough in determining the character and qualifications of applicants for admission from other jurisdictions. Those members of the profession who have pursued an "honorable and successful career" elsewhere are, of course, welcome; but experience and the records of our courts show that not all who apply for admission here are worthy.

I concur: SIENK, J.

PEOPLE v. DIAS.

Cr. 3334.

Supreme Court of California.

Oct. 20, 1930.

1. Homicide Ⓒ253(1).

Evidence in prosecution for murder in first degree *held* sufficient to sustain conviction.

2. Criminal law Ⓒ1169(8).

Admitting evidence of defendant's mental status under plea of not guilty on issue whether confessions were understandingly made *held* favorable to defendant, since unauthorized by statutes (Pen. Code, §§ 1020, 1026).

3. Homicide Ⓒ282½.

In prosecution for murder in first degree, issue of defendant's mental capacity to make confessions gave jury right to exercise discretion in fixing penalty (Pen. Code § 190).

4. Homicide Ⓒ282.

Statute permitting jury to affix penalty in murder cases of first degree does not extend to degree of crime (Pen. Code, § 190).

5. Criminal law Ⓒ531(3).

Defendant's confessions of murder *held* shown to have been voluntarily made.

6. Homicide Ⓒ237.

Evidence in prosecution for murder in first degree on issue of not guilty by reason of insanity *held* sufficient to show defendant was legally responsible for crime of which he was convicted.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Earnest A. Dias was convicted of murder in the first degree, and he appeals.

Affirmed.

W. W. Shea, Public Defender, and Hugh K. Forsman, Deputy Public Defender, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Earl Warren, Dist. Atty., of Oakland, for the People.

SEAWELL, J.

The defendant was convicted of the double murder of Stanley Montaro and Mary Munoz, aged twenty-three and twenty years, respectively, committed in a suburban district of San Leandro, county of Alameda, this state, on December 19, 1929. The indictment upon which he was convicted contained two counts,

and the jury returned a verdict of guilty of murder of the first degree, without recommendation of imprisonment, upon both counts. The murdered persons were betrothed, and had parked the Chevrolet coupé, in which they were seated at the time they were fired upon, by the side of Holland avenue, one of the several crossroads in the locality in which the crime was committed, and which leads into the main thoroughfare of travel. The crime was committed approximately at 7:30 o'clock in the evening. The defendant, then twenty-four years of age, lived at the home of his mother and stepfather, situate in a fruit and agricultural district near the place where the crime was committed. The defendant and the victims of his deadly assault lived in the same community, at varying distances apart. It would seem that all of said parties had resided in the same vicinity since childhood, and a mutual acquaintance existed as to one another.

Three days after the commission of the crime the defendant made a confession of guilt, and related with considerable circumstance of detail the facts of the killing, which he repeated upon two or three other occasions, without material variation, to the officers of the law and the physicians called by the state to examine him as to his mental status. Later, however, he repudiated said confessions in toto and went to trial upon pleas of not guilty, and not guilty by reason of insanity. His confessions were corroborated by certain definite physical facts and also by independent evidence adduced at the trial.

From the above sources of information it would appear that he was the owner of a .38-caliber revolver which was kept concealed under the mattress of a bed, and the cartridges were kept under another bed at the home. He claimed to have been the owner of two other revolvers, which he had purchased from an unnamed man who had recently arrived from Honolulu, but which remained in the possession of said stranger, as there was some talk between them with reference to a suggested bank robbery. However, on the evening in question he left his home at about 7 o'clock, taking with him said revolver and a number of cartridges, which he carried loosely in his pocket. Upon leaving the home he loaded the revolver and walked through a field to Holland avenue. This and other avenues in the district seem to have been preferred places of retreat for youthful lovers, who frequently drew to the side of the road and, bringing their cars to a stop, tarried for a time in the seclusion which said less frequented avenues afforded. This fact was well known to defendant, who referred to such episodes as "petting parties," the suggestiveness of which seems to have inflamed his sexual passions to an abnormal point. He stated in his confession that he went up-

on the highway with the intention of compelling by force of arms the submission of a female member of such a "petting party" to an act of sexual intercourse, holding at bay, by threats and intimidation, her escort. Whether he had in mind the parties whom he slew, or whether he recognized them during the short interval that he was engaged in an attempt to force them to submit to his commands—which he denied—is not determinative from anything which appears in the record.

Shortly upon reaching Holland avenue he observed the Chevrolet coupé pass him, in which were seated said couple. He observed it to presently draw up beside the road, and he approached it on the side the man was seated, stepped upon the running board and, with drawn revolver, intended to command "Hands up!" but he got no further than "Hands", when, to use his own words, the man "got sore and started to swear" and made a forward motion, illustrating it, which caused the defendant to believe that the man was about to draw a revolver, and he began shooting. One version of the shooting was that he first shot the man, then he shot the girl, then shot the man again and tried to shoot the girl again, but missed the girl and hit the man. In a statement made to one of the alienists he said that when he first shot, the girl threw herself on the man to save him and that accounts for the shot in her right side. It is a fact that the bullet which struck the young lady entered her right side. He also made a statement that he ordered the man to take "a walk." After the shooting he ran across vacant land to his home. He wrapped the pistol in a small sack, hid it, and went to bed. In his flight he relieved himself of the extra cartridges which he had taken with him and also threw from the revolver the four exploded shells. The young woman, who had been mortally wounded by a bullet which entered her body, made her way with great difficulty to a main thoroughfare, where she attracted the attention of the driver of a truck, who took her to San Leandro, and she was placed in the Highland Hospital for treatment. She died the next day a few minutes past noon. An attempt was made to take her statement about one hour before she expired, but it proved futile. Her companion was found dead in a reclining position behind the steering wheel of the car with three bullet wounds in his body.

[1] An investigation of the crime brought to light circumstances which pointed to the defendant. He was thereupon placed under arrest and two days thereafter confessed and gave a detailed statement of his actions prior to, at the time of, and immediately subsequent to the murder. Several exploded and unexploded .38-caliber pistol cartridges were found at the places where he told the officers they would be found; the revolver, which

had been recently discharged, was recovered at his home, as he had told the officers where it would be found; bullets in the undischarged shells corresponded in size and shape with those taken from the bodies of his victims; the number of shots fired into each body corresponded with his narrative of the shooting. Other corroborative evidence was added, which, taken in all, makes the proof against the defendant conclusive.

On the first or general issue of not guilty, the issue of legal competency was brought into the case by the defendant by his objection to the introduction in evidence of the confession which he had made, on the ground that he was mentally deficient and that he did not and could not have comprehended the significance of the statements and admissions which he was purported to have made, and, further, that any statements or admissions made by him were induced by intimidation and threats. On the issue of mental deficiency the defendant was permitted to introduce such evidence as he chose to present. He called as his witness Mrs. Grace M. Hunt, the Alameda county psychologist, who first came into official contact with the defendant in 1922 and again in 1925 and lastly a few days after the commission of the crime for which he was on trial. She estimated his mental age, by the tests which she applied, at ten years and four months. The intelligence test which she used was a modification of the Binet system. Under such a system the 100 per cent. normal persons are rated between 14 and 16 years. There is no hard and fast rule by which results may be said to be exact, as the quotients are established by the process of approximation. His auditory memory was tested by repeating to him five numerals, with a slight pause between each, as, for example, 6, 9, 4, 8, 2, and then having him repeat them backwards, or in reverse order. His answer was 2, 9, 6, and then he became lost. The next test consisted of 5, 2, 9, 6, 1. He began with 1 and went no further.

Such a test unexpectedly applied would most likely perplex the average person untrained in the permutation of figures, to say nothing of one who is troubled with the consciousness of an appalling crime, with its consequent effect immediately before him. His early trouble in 1922 and his commitment to the Sonoma State Home for the care of feeble-minded children, as the result of complaint having been made against him on account of his serious criminal conduct in 1925, and his release from said institution in 1927, were referred to by the witness. His mentality had improved somewhat since Mrs. Hunt first made observation of him, and she expressed no opinion as to his responsibility to the law.

[2-4] Upon the trial of the issue of not guilty the prosecution offered in evidence the confessions of the defendant, one of which

had been reduced to typewritten form by the stenographer who reported it. The defendant objected to the introduction of said confessions, or either of them, on the ground that he was wholly unable to understand, by reason of a congenital mental deficiency, the meaning, effect, or force of said purported confessions. The trial court admitted evidence produced by the defendant as to his mental incompetency on the theory that it was the province of the jury to determine whether or not said confessions were understandingly made or could have been the products of a defective mind, such as the defendant was alleged to possess. The trial court limited such evidence to the sole inquiry as to whether the defendant possessed sufficient understanding to have comprehended the significance of his confession, was conscious of what he was saying, and understood the import of his words and acts and appreciated their significance. The court instructed the jury that they could not consider said confessions unless they were made by a mind which understood and appreciated their full import at the time they were claimed to have been made. The jury evidently impliedly found that the confessions were understandingly made, and accordingly gave them consideration. This evidence, while limited to the purpose indicated by the court, nevertheless brought an advantage to the defendant which otherwise would have been denied him by authority of sections 1020 and 1026, Penal Code, which excludes, on the trial of the issue not guilty, all evidence tending to show the mental condition of the defendant at the time of the commission of the offense, in that from necessity it placed before the jury, upon the trial of the main issue, the mental status of the defendant. The raising of the issue of want of consciousness on the part of the defendant with respect to his confessions brought to the jury's consideration its right to exercise its discretion in affixing the penalty (section 190, Pen. Code) and determine whether a sentence of life imprisonment would better serve the requirements of the law in the circumstances of the defendant's mental status than would the imposition of the death penalty. The section of the Code above cited makes it the duty of the jury to affix, in the exercise of its discretion, the penalty in all murders which are of the first degree, but in none other. It is strictly a matter of fixing the punishment, and does not extend to the *degree* of crime.

[5] The question, however, as to his responsibility to the law for his act will presently receive attention. It may be here stated that the confession was further opposed upon the ground that it was obtained by physical punishment inflicted upon him by one of the deputy sheriffs. He claimed that said officer told him on the day following the murders that, if he did not "tell," he would

kill him, and he replied that he had nothing to do with the killing, and further said that this "Isn't the Hickman or the Dorothy Ellingson Case." He further stated that said officer in an attempt to force a confession struck him upon the temple, upon the neck, and stomach. This could not be true, as defendant's body was examined carefully for specific purposes by alienists and physicians covering the period fixed by the defendant and afterwards and no indications of any marks or bruises were visible upon his person. In fact, his belated accusation was made after he had concluded to repudiate his confession, and it is also in direct contradiction of statements made to the foreman of the grand jury and several other persons that he had been well treated during his confinement. The officer denied that any threats or violence were employed by him to induce the confession. There is nothing in the record that would cause us to doubt his testimony, which finds corroboration in the evidence.

[6] The same jury which returned the verdict of guilty was retained to try the issue of not guilty by reason of insanity. By virtue of section 1027, Penal Code, the trial judge appointed three alienists with wide experience to examine the defendant and investigate his sanity. One of said alienists was the medical superintendent of the State Hospital at Napa and the other two were well-known alienists of the county of Alameda who had long experience in the treatment of the insane. In addition to said three alienists appointed by the court, the people called the medical superintendent of the Sonoma State Home, at which institution the defendant was an inmate for approximately two years; the former family physician of the defendant's parents; and the director of hospitals of Alameda county, who has had much psychopathic experience, all of whom devoted much study and time to the mental status of the defendant. Without attempting to review the testimony of the said several witnesses, it may be said that they were unanimous, except one, who apparently, through inadvertence, was not called upon to express an opinion that the defendant was legally responsible for the crime of which he stood convicted.

Throughout the larger part of his life the defendant has been anti-social and involved in numerous highly mischievous, if not positively criminal, acts. From the story of his life as unraveled by him it appears that the defendant attended the common schools from 8 to 15 years of age, at which time he had occasional trouble with his teachers on account of attendance derelictions, which resulted in his quitting school and seeking employment as a dairy or farm hand. He first came to the attention of the Alameda peace officers in 1922 by reason of petty thefts and other petty offenses in which he, with others, was implicated. He again came before the law

in 1925, charged with placing a telephone or telegraph pole across the track of the Western Pacific Railroad Company, which resulted in his commitment to the Sonoma State Home for training and discipline. He was paroled in 1927. He did not fit well into the home life and he appears to have harbored an unfriendly feeling against his stepfather, and in one or two instances against his mother, also. It would seem that he resented the adverse criticism made against him in the community by reason of having been an inmate of the home. The several examinations which the alienists made were unusually thorough and searching, and covered a wide range of subjects, including his personal and family history. His memory proved to be unusually good, in fact, one of the alienists described it as a photographic memory. He was good in mathematics and accurate in dates, and in a logical and sequential manner discoursed on events and their results. He appears to have grown more aggressive in his sex relationships during the past few years of his life. He denied that he had delusions or that there was any mental or nervous trouble in his history or his family's history. After leaving school he engaged in dairy, farm, and orchard work, did his own bargaining, and at the date of his crime or shortly before he had more than \$300 on deposit with a neighborhood bank. While he may be mentally deficient, as most persons who commit crime are held to be by alienists, all of the medical skill called into the case pronounced him unquestionably responsible as a moral agent. He knew that it was wrong and a violation of the moral and legal codes to commit murder, and that the law's penalty included the possibility of the infliction of the death penalty against those who unlawfully take human life, all of which fully appears in the record.

In addition to the opinions expressed by the alienists as to the legal responsibility of the defendant, his confession, as taken by questions and answers, and his testimony as a witness on his own behalf at the trial are before us. There is nothing in his statements or testimony that would justify this court in holding that his mentality was deficient or impaired to the degree that he did not fully understand the nature and quality of the acts which he committed or did not know that he was doing wrong in committing them. We have carefully read the record in the case and find no prejudicial errors were committed at the trial. The learned trial judge was liberal in his rulings and specially called to the attention of the jury that it was in their power to relieve the defendant of the extreme penalty of the law by the following instruction:

"The punishment for murder in the first degree is death, or confinement in the State Prison for life, at the discretion of the jury trying the case. The law prescribes no rules

or tests for the guidance of jurors in the exercise of its discretion in determining whether the greater or lesser penalty shall be inflicted, but leaves the question of punishment solely to the conscience and sound judgment of the jury.

"If the jury determines that the punishment shall be mitigated, that is, to life imprisonment in State Prison, then the verdict must distinctly state such punishment, for if nothing is said in the verdict as to the punishment, then always the court imposes the penalty of death."

The law is so thoroughly settled as to the kinds of mental disorders or mental incompetency which will relieve a defendant from punishment for his acts that it is not necessary to do more than cite a few of the more recent cases. *People v. Willard*, 150 Cal. 543, 89 P. 124; *People v. Gilberg*, 197 Cal. 306, 240 P. 1000; *People v. Sloper*, 198 Cal. 238, 244 P. 362; *People v. Perry*, 195 Cal. 623, 234 P. 890; *People v. Hickman*, 204 Cal. 470, 268 P. 909, 270 P. 1117; *People v. Troche*, 206 Cal. 35, 273 P. 767; *People v. Leong Fook*, 206 Cal. 64, 273 P. 779.

Measured by the law's standard, the jury found the defendant to be responsible for his crimes and with a full instruction before them as to their power to relieve him of the death penalty they refused to exercise said discretion in favor of the imposition of the lesser punishment.

The validity of sections 1017, 1020, and 1026, Penal Code, which provide the order and procedure which shall govern trials in which insanity is made a ground of defense and which also provide that, upon the trial of the general issue of "not guilty," the defendant shall be conclusively presumed to be sane, have been so fully discussed by the two cases last above cited that it is sufficient merely to cite them.

We find nothing in the record that would warrant us in disturbing the verdicts of the jury and the judgments.

The judgments and orders appealed from with respect to both counts of the indictment are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; CURTIS, J.

LANGDON, J. (concurring).

On the record before me I am compelled to concur in the judgment. I do so with the utmost reluctance, and solely because of the limitations upon this court in its review of criminal proceedings. I think that the matter of sentence should receive careful consideration by the chief executive of the state in the event that an application for such relief should come before him, for he alone may grant relief where we are powerless to act. It has heretofore been determined that the

defendant was so deficient in mentality as to require his confinement in the Sonoma State Home for the Feeble-Minded; and at the time when this crime was committed he was on parole from that institution. To me it appears monstrous that the state should execute one of its own wards, who should never have been set at liberty, and who at the time of this tragic event was still under surveillance as a mental defective.

Andrews & Brooks, for Orlando A. Barnett.
W. W. Kaye, of Los Angeles, and Siemon & Garber, of Bakersfield, for respondent.

WASTE, C. J.

Action brought by plaintiff to recover the sum of \$7,550 alleged to be due from defendants under the terms of a written contract for the drilling of oil wells. Defendants defended on the ground that plaintiff did not substantially perform his part of the contract, and that therefore no recovery could be had. Plaintiff's excuse for the alleged nonperformance is that defendants first breached the contract. The case was tried before the court without a jury, resulting in a judgment in plaintiff's favor in the sum of \$7,200. From this judgment, defendants prosecute this appeal.

The contract involved herein provides, among other things, that plaintiff agreed to drill four oil wells for defendants, keeping his two portable drilling rigs in continuous operation until each well is drilled to a depth of 500 feet, and, if necessary and feasible, to a greater depth; that plaintiff is to furnish all labor, fuel, water, tools, and equipment, except that defendants agree to furnish "all casing, also cement and all tools and materials whatsoever required in cementing off water"; that the compensation of plaintiff for such services shall be at the rate of \$3 per foot for the first 600 feet, 75 per cent. of which shall be paid at the completion of each 100 feet of drilling, the balance upon completion; that in the event [and this is an important feature of the contract] "rock is encountered in drilling any of said wells," plaintiff agrees to drill one foot through the same without extra compensation, but beyond that defendants agree to pay \$75 per day for each day of nine hours required in drilling through "all rock formations"; that if plaintiff finds that it is not feasible to drill through rock formations, he may abandon the well and drill another, plaintiff to receive compensation for the abandoned well on the scale set forth above; that defendants agree to pay to plaintiff \$25 per day for each day of nine hours lost by plaintiff on account of failure of defendants to supply casing or other materials; that defendants agree to deposit with the First National Bank of Delano the sum of \$3,000 as a cash bond to insure payment of all sums due plaintiff, the bank to make payments from said sum to plaintiff upon presentation of a certificate showing the sum to be due; that when such deposit is reduced to \$1,000 defendants agree to deposit a further sum of \$2,000 for the same purpose, and to continue such deposits so that at all times there shall be on hand a sum sufficient to meet all plaintiff's demands under the contract.

It is stipulated by defendants that they furnished no casing, and at no time made the

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SCHLITZ v. AKERS et al.

L. A. 10221.

Supreme Court of California.

Oct. 20, 1930.

1. Mines and minerals ⇨109.

Word "rock" or "rock formations," used in contract for drilling oil well, must be given general and popular meaning, and includes "shale" (Civ. Code, § 1645).

Contract in question provided for payment of extra compensation in case rock or rock formations were encountered during drilling operation. Term "shale" is defined as rock formed by consolidation of clay, mud, or silt, having a finely stratified or laminated structure.

[Ed. Note.—For other definitions of "Rock," see Words and Phrases.]

2. Mines and minerals ⇨109.

Under contract for drilling oil well, furnishing of casing by owner of land held condition precedent to performance of contract by driller.

Owner of land under terms of contract for drilling oil well agreed to furnish "all casing, also cement and all tools and materials whatsoever required in cementing off water." Contention was made that, as driller made no demand upon owner for casing, no default under contract arose for failure to furnish casing.

In Bank.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Frank Schlitz against C. S. Akers and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Oliver O. Clark, of Los Angeles, James F. McBryde, and Eugene J. Wix, both of Glendale, and Emerson B. DeVore, of Los Angeles, for appellants.

bank deposits as required by the contract. It is further agreed that plaintiff has been paid the sum of \$1,550. The principal findings of the court may be summarized as follows:

1. Plaintiff started performance and kept in continuous operation his two drilling rigs from November 30, 1923, to February 1, 1924.

2. That in drilling the wells plaintiff encountered rock formation and consumed 56 days of nine hours each with each rig in drilling through the same.

3. That on or about February 1 casing became necessary to further carry on operations, but defendants failed and neglected to furnish the same, and as a result thereof plaintiff lost 14 days with one rig on account of such delay.

4. That defendants failed, neglected, and refused to deposit in bank the sums required by the contract; that it was understood and agreed that such deposit was to enable plaintiff to pay the actual cost of doing the work during the progress thereof; that the compliance with this provision was a condition precedent to performance by plaintiff.

5. That on or about February 15, 1924, by reason of the failure and neglect of defendants to furnish the casing and to deposit the money in the bank, the plaintiff elected to treat the contract as broken by defendants.

6. That plaintiff became entitled to \$8,400 for drilling through rock formation for 56 days at \$75 per day for each rig, and to \$350 for the 14 days delay at \$25 per day caused by defendants' failure to supply the casing; that \$1,550 having been paid, there remains due, owing, and unpaid the sum of \$7,200.

7. That the alleged defenses of defendants are not true.

[1] On this appeal defendants strenuously contend that the evidence shows that plaintiff drilled the greater portion of the time through shale, and that the terms "rock" and "rock formations" do not include shale. To support this contention defendants produced a petroleum engineer who testified that technically the term "rock" includes "shale or stone," but in "oil field parlance" the term refers "to hard formations, usually in large bodies, as, for instance, granite"; and, further, that "shale is not considered rock by oil people." The trial court interpreted the term used in the contract in its general sense, and refused to interpret it in the limited fashion suggested by the expert. We agree with the interpretation of the trial court. In Webster's New International Dictionary the term "shale" is defined as "a rock formed by the consolidation of clay, mud or silt, having a finely stratified or laminated structure." Clearly, then, as the term "rock" is generally used it includes shale. Defendants refer to section 1645 of the Civil Code, which provides that "technical words are to be interpreted as usually understood by persons in the profession or busi-

ness to which they relate, unless clearly used in a different sense," and contend that the term is a technical one and therefore should be limited according to oil field usage. There is nothing in the contract nor in the evidence to show that the term was intended to be so limited; in fact, the inferences to be gathered from the evidence all tend to show that the term was intended in its general or popular sense. The evidence is uncontradicted that plaintiff was unfamiliar with the territory where the wells were drilled; that defendants knew that plaintiff was not experienced in oil well drilling, having heretofore engaged only in the drilling of water wells; that the territory with which he was familiar contained little or no shale; that defendants represented that the soil formation where the oil wells were to be drilled was similar to that with which plaintiff was familiar and where there was little shale. Moreover, the contract uses, in addition to the word "rock," the term "rock formations," and clearly the latter, if not the former, includes shale. Under the circumstances, the general and popular meaning of the term was reasonably intended.

Defendants likewise contend that there is no evidence to support the finding that plaintiff drilled 56 days of nine hours with each rig through rock. Defendants, by mathematical formula, attempt to discredit the finding. Plaintiff's drilling superintendent, among others, testified fully to the work done on the four wells. The evidence on the point seems to be quite complete, and amply supports the finding. In this connection, it should be noted that the trial court made no allowance whatsoever for the time spent in drilling through soil for which plaintiff was to be paid \$3 per foot.

[2] Appellants contend that under the contract they were only to supply casing when needed for a water shut-off. The quoted part of the contract, supra, provides otherwise. They also contend that plaintiff made no demand upon them for the casing, and that a demand was necessary to place them in default. We do not so interpret the contract. Under its terms, the furnishing of the casing was a condition precedent to respondent's performance. However, even if a demand were necessary, it would avail appellants but little, for the reason that they clearly breached the contract by failing to make the money deposit required by the contract.

The evidence is also sufficient to support the finding that the 14 days' delay which occurred was due to appellants' failure to supply casing.

For the foregoing reasons, the judgment appealed from is hereby affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

210 Cal. 479

MANFRE v. SHARP.
S. F. 13363.

Supreme Court of California.
Oct. 17, 1930.

1. Novation ⇐3.

Where new debtor is substituted for old one, sufficient consideration for agreement appears when it is shown that old debtor was released from obligation in consideration of substitution (Civ. Code, §§ 1530-1532).

2. Novation ⇐7.

Mere assignment of contract by buyer did not establish novation without proof of seller's acceptance (Civ. Code, §§ 1530-1532).

3. Novation ⇐12.

Seller's acceptance of buyer's offer to release himself and substitute another as buyer under contract could be inferred from conduct (Civ. Code, §§ 1530-1532).

4. Appeal and error ⇐1011(1).

Conflict in evidence was matter for trial court in trial before court without jury.

5. Novation ⇐12.

Evidence held to support finding that seller gave consent to release of buyer under contract and accepted plaintiff in lieu thereof (Civ. Code, §§ 1530-1532).

6. Appeal and error ⇐1071(1).

Failure to comply with statute regarding preparation of findings held not reversible error, where findings were proper (Code Civ. Proc. § 634).

Facts disclosed that defendant was served with copy of the proposed findings on August 24, 1928, and immediately prepared objections, which were never presented to trial court, and on August 25, 1928, trial court signed findings, of which fact defendant was notified on August 27, 1928, thereby showing failure to comply with Code Civ. Proc. § 634, providing that where court directs parties to prepare findings, copy of proposed findings shall be served upon all parties at least five days before findings are signed.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Action by Frank Manfre against C. B. Sharp, doing business under the name of the Sharp Flour Company, for breach of a sales contract. From a judgment for plaintiff, defendant appeals.

Affirmed.

Thomas, Beedy, Presley & Paramore, of San Francisco, for appellant.

Walter E. Hettman, of San Francisco, and Lafayette J. Smallpage, of Stockton, for respondent.

SHENK, J.

This is an appeal from a judgment in favor of the plaintiff in the sum of \$2,365.50.

The action is one to recover damages for an alleged breach by the seller of a contract for the purchase and sale of flour. It appears that in July, 1924, the defendant, appellant herein, entered into a contract with one Voight for the sale to the latter of a specified quantity of flour, the same to be delivered weekly over a period of time extending into 1925. This contract contemplated the extension of credit to Voight. Voight was then engaged in the bakery business in Stockton under the fictitious name of Snow White Bakery. On October 31, 1924, he sold the bakery business to his foreman, Manfre, the plaintiff and respondent herein, and assigned to Manfre all of his right, title and interest in and to the contract with the defendant. On December 15, 1924, Voight mailed a letter to the defendant which the defendant claims and the court finds was not received by him until December 20, 1924, informing the defendant that he had sold the business to the plaintiff. In this letter Voight stated, among other things, that he would "no longer be responsible for any bills which may be contracted hereafter, and any business done by you will be with Mr. Manfre direct." On December 20, 1924, the defendant replied to this letter acknowledging its receipt, but in no way mentioning that part of the letter dealing with the release of Voight. On December 31, 1924, the defendant wrote to the plaintiff, stating that certain moneys were due and likewise stating that they "must insist upon your living up to the terms of the contract, as booked, and on which you are at the present time in arrears." Finally the defendant refused to deliver more flour unless the plaintiff pay cash therefor, the price of flour having risen considerably in the meantime. As a result the plaintiff purchased flour in the open market and brought this action for the damages thus sustained. It was stipulated at the trial that if the plaintiff was entitled to any damages that sum should be \$2,365.50. It was likewise stipulated, or admitted by express statement of counsel and found by the trial court, that neither the plaintiff nor Voight were in default in taking deliveries or in the making of payments under the contract. The case was tried before the court without a jury.

The defendant contends that the finding to the effect that he gave his consent to the release of Voight and accepted the plaintiff in lieu thereof is not supported by the evidence.

If the defendant's contention is correct, we would then be presented with the question as to whether the buyer under a contract which involves personal credit may assign the same without the consent of the seller. The defendant contends that it is the law of this state that a buyer may not so assign. We do not find it necessary to decide that point, for the reason that we are of the opinion that the finding involved is supported by the evidence. For that reason, the transaction here presented does not involve the law of assignment of contracts at all, but is a novation; that is, the substitution of one debtor for another and releasing the first. The defendant contends that the contract with Voight was canceled and that no contract was ever entered into with the plaintiff.

[1-3] As defined by the Code, "Novation is the substitution of a new obligation for an existing one." Civ. Code, § 1530. The same Code likewise provides that, "Novation is made * * * 2. By the substitution of a new debtor in place of the old one, with intent to release the latter. * * *" Civ. Code, § 1531. Also it is provided that, "Novation is made by contract, and is subject to all the rules concerning contracts in general." Civ. Code, § 1532. Where a new debtor is substituted for an old one, a sufficient consideration for the agreement appears when it is shown that the old debtor was released from his obligation in consideration of the substitution. 20 Cal. Jur. p. 250, § 5. The whole question is one of fact and depends upon all the facts and circumstances of the particular case. In the case at bar the mere assignment by Voight to the plaintiff did not, of course, establish a novation, in the absence of the consent of the creditor, the defendant. The evidence must show an acceptance by the creditor of the substitution. The letter from Voight to the defendant informing him of the assignment and declaring that he would no longer be liable on the contract did not of itself accomplish a novation, but the letter may reasonably and fairly be interpreted as an offer on the part of Voight to release himself and substitute the plaintiff in his place. This was the conclusion of the trial court. The only remaining question is whether the defendant accepted this offer. This acceptance may be shown to have been made by acts as well as by words. That is, the acceptance may be inferred from conduct. In the case of *Leary v. United States*, 224 U. S. 567, 32 S. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029,

the court found it necessary to determine, before it could grant relief, whether or not an express contract had been entered into. Justice Holmes disposed of this point with the statement (page 575 of 224 U. S., 32 S. Ct. 599, 600): "It [the contract] would be none the less express if it was conveyed by acts importing it than if it was stated in words."

[4, 5] The trial court here, after considering all of the acts of the defendant, specifically found that the defendant gave his consent to the release of Voight and accepted the plaintiff in lieu thereof. It is true that there is some conflict in the evidence on that point, but such conflict was entirely a matter for the trial court. The letter of December 31st, above mentioned, sent by the defendant to the plaintiff, is capable, reasonably, of the interpretation that the defendant acquiesced in the release of Voight and recognized that the plaintiff had stepped into his shoes. This letter alone would be sufficient to sustain the finding. It would serve no useful purpose to recount the other testimony which likewise tends to uphold the finding. Sufficient it is to say that from all the facts and circumstances the finding of the trial court finds ample support in the evidence.

[6] The defendant also contends that he was deprived of a fair trial. The principal basis of this contention is that he was served with a copy of the proposed findings on August 24, 1928; that he immediately prepared objections to the proposed findings (which were never presented to the trial court); that on August 25, 1928, the trial court signed the findings, of which fact the defendant was notified on August 27, 1928. It is at once obvious that the provisions of section 634 of the Code of Civil Procedure were not complied with. The defendant contends that the failure to comply with this Code section is, under the facts of this case, reversible error. The cases do not so hold. It is clear that the above section was adopted for the purpose of aiding the trial court in making proper findings. If the findings are proper, no reversible error has occurred. If they are improper that will appear on the appeal. *Amundson v. Shafer*, 36 Cal. App. 398, 401, 172 P. 173; *Sadicoff, etc., v. Jackson*, 46 Cal. App. 256, 189 P. 111.

We find no merit in any other assignment of error. The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

210 Cal. 483

STARKWEATHER v. EDDY.

L. A. 10525.

Supreme Court of California.

Oct. 17, 1930.

1. Malicious prosecution ☞56.

Plaintiff, found not guilty on criminal charge, cannot recover for malicious prosecution unless he prove both malice and want of probable cause.

2. Malicious prosecution ☞59(10).

Evidence that defendant brought criminal charge on advice of prosecuting officers is admissible in action for malicious prosecution on question of probable cause.

3. Malicious prosecution ☞22.

Before fact that defendant brought criminal charge on advice of prosecuting officers can constitute defense in action for malicious prosecution, it must appear that defendant made complete disclosure and acted in good faith.

4. Malicious prosecution ☞64(2).

Finding that defendant in malicious prosecution action had made full disclosure to prosecuting officers before bringing criminal charge *held* unsupported.

5. Malicious prosecution ☞64(1).

In action for malicious prosecution, finding that plaintiff without cause leveled firearms at defendant, demanding possession of land, *held* unsupported.

6. Judgment ☞715(3).

Judgment in action to quiet title *held* not *res judicata* of issue of malice and probable cause in action for malicious prosecution of a criminal charge.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by J. W. Starkweather against F. J. Eddy. Judgment for defendant, and plaintiff appeals.

Reversed.

Harry J. Miller, G. M. Caldwell, Grove E. Walter, and C. S. Mauk, all of Los Angeles, for appellant.

George P. Cook, of Los Angeles, and F. E. Davis, of Hollywood, for respondent.

SHENK, J.

This action is one for malicious prosecution growing out of the acquittal of the plaintiff of a charge brought by the defend-

ant of assault with a deadly weapon. The case was tried before the court without a jury, judgment being rendered in favor of the defendant, and the plaintiff appeals.

The assault charge arose out of the following facts: The plaintiff was a large stockholder in the Minarets Mining Company, a corporation, whose principal properties are located in the high Sierras in Mono and Madera counties. For several years prior to the events about to be recounted, the plaintiff and the defendant had been connected with opposing factions; both sides being desirous of gaining control of the corporation. Early in 1921 the directors of the corporation had appointed the defendant president and general manager. This appointment the plaintiff contended was not valid, for the reason that the board of directors making the appointment had not been validly elected.

At the mining property, it appears there were two cabins, one known as the lower cabin close to the workings of the mine, and the other known as the upper cabin, being some distance from the mine. The upper cabin had been formerly owned and occupied by the plaintiff, but had later been sold to the corporation. Even after such sale, the plaintiff on occasions had occupied the cabin either while doing assessment work at the mine, or while running a guide business in the mountains.

It appears that the 1920 assessment work at the mine had not been completed, and that, in order to preserve the property, that work, under the law, had to be started by July 1, 1921. About the middle of May, 1921, the plaintiff had taken possession of the upper cabin. There can be no doubt that he intended to relocate the claims for himself and friends if the corporation failed in its assessment work. In addition to this purpose, the plaintiff had occupied the cabin with the intention of carrying on his guide business, having brought his horses and sleds with him.

On June 13, 1921, between the hours of 8 and 9 o'clock a. m., the defendant accompanied by several employees, arrived at the upper cabin, intending to start on the assessment work. They noticed unmistakable indications that the cabin was occupied, but no one answered their calls and knocks. As a matter of fact, the plaintiff and his son were in the cabin, but for their own reasons did not choose to answer. The defendant and his men then proceeded to a nearby barn and returned to the upper cabin a little later. One of the defendant's men was at that time carrying a box containing 25 pounds of dynamite, and another was carrying a long coil of fuse. All this could be seen by the plaintiff from the cabin. Upon arriving in front of the cabin, one of the men,

and probably the defendant himself, suggested that the dynamite be put under the house and touched off, in order to bring out the occupants. The plaintiff and his son, upon hearing these threats, immediately vacated the premises via the windows. The plaintiff was armed with a revolver, while his son was armed with a rifle. With these weapons they "covered" the defendant and his men, who, except for the dynamite, were unarmed. The defendant and his men cried out that they were unarmed, and that the dynamite threat was only a joke, whereupon the plaintiff's son said the rifle and pistol were also a joke, and offered his rifle to the defendant, who refused it. The plaintiff and the defendant then engaged in a short dispute, the defendant finally leaving with a threat to return with the sheriff and put the plaintiff in jail. The defendant thereupon hastened to Bridgeport, the county seat of Mono county, and laid some of the facts, at least, before the district attorney, emphasizing the gun incident, but, as will appear, placing very little emphasis on the dynamite incident. The defendant then, upon the advice of the district attorney charged the plaintiff with an assault with a deadly weapon, and a warrant was issued. The plaintiff was thereupon arrested and lodged in jail and kept there over two days. Upon his preliminary hearing he was released on his own recognizance and upon the subsequent trial found not guilty. The plaintiff thereupon brought this action for malicious prosecution against the defendant, the complaint being filed in 1922, but the action not being tried until 1926. The answer of the defendant admitted all of the allegations of the complaint save that the defendant had acted maliciously and without probable cause. During the course of the trial the defendant offered in evidence the complete record of an action brought in the superior court of Mono county, entitled *Minarets Mining Company v. Starkweather*, in which action the title of the corporation was quieted against Starkweather. One of the findings in that action, which action was not commenced until 1923 and judgment rendered in 1924, stated that Starkweather was then and had been since 1917 a trespasser on the property. The trial court believed that this judgment, from which no appeal was taken, was binding and conclusive in the malicious prosecution action for some reason that does not appear.

[1-4] Before discussing the points involved on this appeal, some general remarks are necessary concerning the nature of an action for malicious prosecution of a criminal action. In such cases it is well settled that, even though the person so charged is found not guilty on the criminal charge, he cannot recover unless he prove both malice and want of probable cause. Although malice may be inferred from lack of probable cause, the bur-

den rests on the plaintiff to prove the above two elements, and, unless he does so, he cannot recover. *Lee v. Levison*, 173 Cal. 166, 168, 159 P. 438; *Runo v. Williams*, 162 Cal. 444, 450, 122 P. 1082; *Pickering v. Havens*, 70 Cal. App. 381, 233 P. 346; *Franklin v. Irvine*, 52 Cal. App. 286, 198 P. 647; *Redgate v. Southern Pac. Co.*, 24 Cal. App. 573, 583, 141 P. 1191. It is also well settled that evidence of the fact that the defendant brought the charge on the advice of counsel or on the advice of the prosecuting officers is admissible on the question of probable cause, but, in order to constitute a defense it must affirmatively appear that the defendant made a full, fair, and complete disclosure of all the facts, and acted in good faith on the advice. *Dunlap v. New Zealand F. & M. I. Co.*, 109 Cal. 365, 369, 42 P. 29; *Sandell v. Sherman*, 107 Cal. 391, 397, 40 P. 493; *Hewelcke v. Shipman*, 65 Cal. App. 257, 265, 223 P. 1019; *Braga v. Ponte*, 50 Cal. App. 94, 98, 194 P. 514; *Jirku v. Brod*, 42 Cal. App. 796, 798, 184 P. 413; *Montz v. Nevins*, 40 Cal. App. 202, 207, 180 P. 537. In this case the trial court found that the defendant "did then and there fully, fairly, truthfully, impartially and correctly and without malice state and relate to said district attorney each, all and every of the facts and circumstances, and all of the evidence in relation to said offense." This finding is attacked by the plaintiff as unsupported by the evidence. In this we agree. The district attorney was called as a witness by the defendant. On his direct and cross-examinations he was thoroughly interrogated by both counsel as to his conversation with the defendant, and in no way even mentioned that the defendant had told him of the dynamite incident. That incident was very material, inasmuch as no assault was made if the plaintiff acted in self-defense. Upon being recalled later in the trial, he did testify that "I understood something about there was dynamite there." The defendant testified: "I told him about the joke about the dynamite. I might have told him that we had a box of powder and I might not." This evidence does not appear to us to be sufficient to sustain the finding above quoted.

[5] Another material finding is not supported by the evidence. The court found: "That the defendant demanded of the plaintiff in a quiet and peaceful manner possession of said property. * * * That thereupon said plaintiff and his said son without just cause, excuse or provocation drew and leveled the said firearms at and upon the defendant." If that finding is supported, the plaintiff was guilty of the assault. But it is admitted that he was found not guilty. The fact is, however, that the evidence does not support the finding; the evidence of the defendant himself being contrary thereto. The defendant in his direct examination, after testifying

that he and his men had gone to the lower cabin and then returned to the upper cabin and again knocked on the door, stated:

"* * * Not getting any response we rested a while; and one of the boys says 'Let's put some dynamite under the cabin and wake them up.'"

"Q. By the Court: And did you have dynamite with you? A. Yes sir. There was about a half a box of dynamite that had been in the tunnel all winter and was wet and had been frozen. We brought it up—I had one of the boys bring it up. And we set it down when we was waiting to see if anybody was there. And one of the boys had a roll of fuse on his arm that was in the tunnel, but we had no caps. * * *

"Q. By Mr. Davis: * * * What was said then on that occasion? A. Why, I think that remark [about placing the dynamite under the house] was made by two or three different ones, and it might possibly have been made by myself. * * * And soon after that remark was made one of the boys had a book that he had gotten at the lower cabin. He threw the book on the porch. And the next instant we faced guns. * * *

Moreover, the defendant corroborated the testimony of the plaintiff that, immediately upon the defendant's crying out that he was unarmed, and stating that the dynamite threat was a joke, the plaintiff's son stated that the guns were a joke, and offered the defendant his rifle, which was refused. From that testimony we do not perceive any such "quiet and peaceful" demand as is described in the finding above quoted, nor do we find any evidence to support the finding that the plaintiff acted without "excuse or provocation." When we consider the above testimony in connection with the long animosity that existed between these parties, it would appear that the plaintiff was amply justified in believing that the defendant was going to carry out the threat and therefore acted in self-defense. At any rate, the finding above quoted is not supported by the evidence.

[6] In another respect the trial court was in error. As stated above, the defendant introduced in evidence the entire record of a quiet title suit commenced in 1923 by the Minarets Mining Company against the plaintiff, and in which the judgment was rendered in 1924 in favor of the corporation. In that action there was a finding that the "possession of said defendant [the plaintiff herein] * * * since March 17, 1917, was unlawful and wrongful. * * *" The trial court evidently believed that that finding in the quiet title action, filed after the facts herein involved took place and between different parties, was decisive of the malicious prosecution action. On different occasions the court

stated: "This court is bound by that judgment as it stands now." And again: "I want to say frankly to you gentlemen I will not overrule that judgment the way it stands, and if that judgment stands this case is dismissed." So impressed was the trial judge with the judgment, that he granted a long continuance until the entire record could be produced. We cannot discover any reason sustaining the court's viewpoint that the judgment was binding in this case. Assuming that the judgment was res judicata as to the point that the plaintiff herein on June 13, 1921, was a trespasser on the property, which point we do not find it necessary to decide, how that fact could be conclusive on the issue of whether the defendant acted without malice and with probable cause in charging the plaintiff with an assault with a deadly weapon, does not appear. To state the proposition is to answer it. Any such theory was and is incorrect.

For the foregoing reasons, the judgment must be reversed. In so doing we in no way hold that the plaintiff has, upon the evidence produced, sustained the burden cast upon him in such an action. That is a question to be decided on the new trial, if one be had. We hold that the enumerated findings are not supported by the evidence, and that the trial court proceeded on an erroneous theory under which the plaintiff's testimony could be given no weight.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

210 Cal. 439

IN RE MCARTHUR'S ESTATE.

L. A. 11246.

Supreme Court of California.

Oct. 1, 1930.

1. Descent and distribution ☞52(1).

Ordinarily, term "widow" means woman whose husband is dead and who has not married again.

[Ed. Note.—For other definitions of "Widow," see Words and Phrases.]

2. Descent and distribution ☞61.

Sister and sole heir of deceased brother was entitled, on death of widow, to his share of community estate, regardless of widow's remarriage (Civ. Code, § 1386, subds. 4, 8, and § 1401).

Although community property vests in widow under Civ. Code, § 1401, with full

power of disposition thereover, and widow apparently would be entitled to property under blanket provisions of section 1386, subd. 4, such section deals with property of wife other than that which came through her husband or through marriage, dealt with in subdivision 8, expressly providing for disposition of community property on death of widow.

3. Descent and distribution ☞61.

Interests of relatives of one spouse may vest under statute, regardless of whether other spouse left any relatives to claim share (Civ. Code, § 1386, subd. 8).

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

In the matter of the estate of Iva Farrand McArthur, deceased. From a judgment directing distribution of the estate, Lillian Mae Flint appeals.

Reversed, with directions.

Superseding opinion, 284 P. 718.

H. G. Simpson, of Pasadena, for appellant.

Victor T. Watkins and Hugh A. McNary, both of Los Angeles, for respondent.

LANGDON, J.

The decedent was formerly the wife of William W. Farrand. He died on September 1, 1920. Subsequently she married Samuel L. McArthur. On May 7, 1926, she died intestate, leaving no issue of either marriage. McArthur, her second husband, survived her.

All of the property of her estate included in the petition for distribution involved herein was, at the time of the death of Farrand, her first husband, the community property of Farrand and herself.

McArthur, the second and surviving husband, claimed the whole of the property. Lillian Mae Flint, the sister and sole heir of Farrand, the first husband, objected, contending that one-half thereof should be distributed to her.

The court determined that the surviving husband was entitled to the whole, and, McArthur having died during administration, distributed the property to his estate. This appeal is taken by the said sister.

The single issue presented by this case is as to the interpretation of section 1386, subdivision 8, of the Civil Code, which reads as follows:

"If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property

goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.

"If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation."

The meaning and effect of this statute in the ordinary case is quite clear. A husband dies intestate, leaving his surviving wife and no issue. The estate consists of community property. The whole of such property vests in the widow under section 1401 of the Civil Code. She has full power of disposition over it. But, if she fails to exercise such power, and dies intestate, leaving no issue, an important problem arises: Shall the property accumulated by the joint efforts of both the husband and the wife, go solely to the wife's heirs, merely by reason of the fact that the husband predeceased her? The statute meets the problem by providing that one-half of the property shall go to certain designated members of the deceased husband's family or their descendants.

In the instant case, if the decedent be considered the widow of Farrand, then the statute applies, and the property should have been divided between her sole heir, her surviving husband, McArthur, and her deceased husband's sister. It is the contention of respondent, however, that, upon her subsequent remarriage to McArthur, she ceased to be the widow of Farrand, and that thereupon the statute no longer applied. The trial court so concluded, and distributed the property without regard to subdivision 8.

[1, 2] The primary question, then, is as to the interpretation to be placed upon the term

"widow" as used in the section. Ordinarily it means a woman whose husband is dead and *who has not married again*. Webster's New International Dictionary, p. 2334; Bouvier's Law Dictionary, vol. 3, p. 3454; Black's Law Dictionary, p. 1227; 40 Cyc. 934; Appeal of Kerns, 120 Pa. 523, 14 A. 435; In re Ryan's Estate, 174 Mo. App. 202, 156 S. W. 759; Rosenbloom v. Southern Pacific Co., 59 Cal. App. 102, 210 P. 53. But there is considerable authority holding that the term may, when used in a statute, be applied to a woman who, though a widow of her former husband, has remarried. In re Ray's Estate, 13 Misc. Rep. 480, 35 N. Y. S. 481, 484, comes to the following conclusion: "A woman, though the wife of another, is still the widow of her former husband; though married to another woman, the husband is still the widower of his former wife. * * * The law invests them with the name of 'husband' or 'wife' or 'widow' for certain legal purposes, and under these names, although the designation may not come within the definition of the dictionary, property may vest in them, whether it comes to them by legacy or otherwise. Notwithstanding the definitions of the words 'wife,' 'widow,' and 'husband,' we apprehend it is not our duty to accept them in place of the statutes of this state, which make use of these words, whether correctly or not, to designate persons entitled to certain legal rights." In Davis v. Neal, 100 Ark. 399, 140 S. W. 278, 279, L. R. A. 1916A, 999, the question was whether a woman who had remarried upon the death of her former husband, came within the terms of a homestead exemption for the "widow or child or children of any deceased person, who was when living, entitled to the benefits of this act." The court said (page 279 of 140 S. W.): "We think that the word 'widow,' as used in the act, *refers to the person, and not to her state or condition, whether she remains a widow or marries again*. The rule is that, whenever a right of law is attached to a person by reason of her being a widow, such right remains, unless other words are used in the act which limit it. If the Legislature had intended that her right of homestead should cease when she married again, it would doubtless have used words of that import such as during her widowhood which would refer to her state or condition, and not to the person, or would have added the words 'until she marries again' or 'so long as she remains unmarried.'" (Italics ours.) The case of Iltz v. Krieger, 104 Or. 59, 202 P. 409, 206 P. 550, reaches a similar result. In Mathews v. Marsden et al., 71 Mont. 502, 230 P. 775, at page 778, it is said: "We think that the word 'widow,' as used in both of these sections of our Codes, refers to the person and not to her state or condition, whether she remains a widow or marries again. We are of the opinion that it was not the purpose of our Legislature, to

penalize a widow in case of her remarriage. * * * See, also, Hansen v. Brann & Stewart Co., 90 N. J. Law, 444, 103 A. 696.

Such decisions are of no direct aid in the solution of the problem before us, but they are nevertheless of the highest value, for they indicate that the term is not of fixed and positive meaning, but on the contrary calls for construction. Our situation is aptly characterized by the court in the case of In re Ray's Estate, supra, as follows: " * * * We are confronted with the definitions of the word 'widow' as stated in the various dictionaries * * * and by the argument, based on these definitions, that in order to be a widow she must remain unmarried. *The question at issue is not whether these definitions are correct, but what is the legal import, meaning, effect, and object of the words 'wife or widow of a son,'* * * * as these words are used in this and other statutes of this state, or, if the language made use of to express the intention of those who prepared and passed the law is not clear, *what construction will best accomplish the design.*" (Italics ours.)

It follows that this court is charged with the duty of construing our own statute to determine the legislative intent. In this connection, we should observe that practically the only aid to interpretation to which we have been directed, or to which research has led us, is the statute itself, for the few decisions which have dealt with subdivision 8 have not mentioned the problem herein presented, with the exception of Estate of Underhill, 190 Cal. 233, 211 P. 801, in which the question was expressly left open. Our inquiry is, therefore, whether section 1386 of the Civil Code, and particularly subdivision 8 thereof, discloses any definite purpose which might indicate the sense in which the term "widow" was used in said subdivision. In brief, did the Legislature intend that the remarriage of a widow should eliminate the rule laid down in subdivision 8, and make the descent of the property follow the rules set forth in the other subdivisions?

The provisions of subdivision 8, in so far as they are relevant here, may be briefly summarized. In the first place, the subdivision deals with descent from a widow. Second, it deals with community property which vested in such widow by the death of her husband. Third, it covers a situation where there are no issue of the widow nor children of the deceased husband.

The purpose of these provisions is quite obvious. Subdivision 8 does not, of course, limit the testamentary power of the widow as to such property. Thus the decedent in the instant case had full control over it, and could have deeded it or willed it to her new husband or to any one else. Estate of Hill, 179 Cal. 683, 178 P. 710; Estate of Brady, 171 Cal. 3, 151 P. 275; Estate of Wenks, 171 Cal.

607, 154 P. 24; Veirs v. Roberts, 39 Cal. App. 684, 179 P. 689; Estate of Marshall, 42 Cal. App. 683, 184 P. 43; Wright v. Rohr, 41 Cal. App. 265, 182 P. 469. Nor does the subdivision conflict with other parts of section 1386. There is no indication that it is to be construed as subordinate to subdivision 4. Subdivision 4 gives the surviving husband the whole of the property of a deceased wife, where she leaves neither issue, parents, brothers, or sisters, nor children or grandchildren of a deceased brother or sister. Subdivision 8, which comes afterward, deals with a special class of property, and to that extent constitutes, it would seem, an exception to the blanket provisions of subdivision 4. In other words, subdivision 8 does not limit the right of a surviving husband to succeed to the whole of his wife's estate in the absence of the surviving relatives specified in subdivision 4, *where such property came to her from any source save that specified in subdivision 8*. But it does limit the right of the surviving husband to succeed to the wife's estate, *where that estate came to her through the death of her former husband*, either as his separate property, or as community property vesting in her under section 1401 of the Civil Code. In this situation, therefore, and with respect to property of such origin, subdivision 8 makes a rule of succession designed to benefit the objects of the bounty of the former owner—the deceased husband. It seeks to turn the descent of such property back to the line from which it was diverted by the first marriage of the wife, that is, back to the husband's family, instead of permitting it to go to the wife's family. In the case of community property, one-half goes back in this manner. In the case of separate property, the whole goes back. See Estate of Simonton, 183 Cal. 53, 58, 190 P. 442. With respect to the community property, the theory seems clear enough. The idea of the community under our statutes is that the whole undisposed of estate should go to the survivor, who was, during the lifetime, a member of the community and a contributor to the acquisition of the property. Hence, when the husband dies without making a will, the wife takes the whole. By this special rule embodied in section 1401 of the Civil Code, the deceased husband's share of such property is diverted from *his family*—parents, brothers and sisters, etc.—to *his wife*. But, upon the death of the wife, the reason for this special rule disappears, and the statute therefore provides that the one-half of the property representing the former interest of the deceased husband shall go back in the normal line of succession to *his family, and not the family of his wife*. This view is expressed in Estate of Brady, 171 Cal. 1, 4, 151 P. 275, 276, where it is said: "The apparent object of subdivision 8, where both spouses die without lineal descendants, is to provide for the in-

heritance of the property equally by the respective families of the two spouses by whose efforts it was accumulated."

The obvious conclusion from the above is that subdivision 8, in so far as it deals with the deceased husband's former interest in the property, is not concerned with the matter of *relationship to the wife*. As to that interest, the wife's parents, brothers, and sisters, etc., are definitely excluded, in favor of persons who bear no blood relationship to the wife at all, namely, the parents and brothers and sisters of the deceased husband. The subdivision makes *the origin of the property, and not the closeness of the relationship to the wife*, the test of succession in the particular situation covered by it. Hence it is illogical in this case to speak of the close relationship of the new husband, and his relative superiority, as an object of the wife's bounty, over her deceased husband's family. We are not here concerned with the objects of the *wife's* bounty. If we were, then her father and mother, or brothers and sisters, should all take to the exclusion of those of her deceased husband. They all have superior claims on the wife, just as has the new husband. But the statute does not so provide, and the provision that it does make shows unmistakably that the Legislature intended, in the particular situation covered by subdivision 8, that the origin of the property should indicate the persons to be benefited. Where the property, either in whole or in part, has its origin with the deceased husband, the statute provides that the whole or such part shall go to the objects of his bounty, not hers.

If this be the correct interpretation of the statute, it is clear that the remarriage of the widow can have no effect upon its operation, *for such remarriage has nothing to do with the persons whom the statute attempts to benefit*. So far as the objects of the husband's bounty are concerned, it is immaterial whether she remarries or not, for her new husband is as much a stranger to the family of her old husband, as are her other relatives.

Looking now not at the provisions of subdivision 8, but at its important omissions, we find additional support for these views. That the Legislature contemplated the passage of years between the deaths of the husband and wife is clear from the enactment of the statute. See Estate of Brady, 171 Cal. 1, 4, 151 P. 275. If it contemplated that years might so elapse, it must certainly have contemplated the possibility of remarriage by the survivor. This being so, a failure to limit the application of the statute to a widow who remains unmarried is, under the authorities discussed above, an indication that no such result was intended. See Davis v. Neal, 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A, 999, supra; Mathews v. Marsden et al., 71 Mont. 502, 230 P. 775, supra. Subdivision 8 makes

no such limitation. Moreover, it expressly provides for *the issue* of the decedent: such issue would take instead of the deceased spouse's family. But nothing is said about a new and surviving spouse, notwithstanding the fact that elsewhere in the same section a surviving spouse and a child are deemed equal in right to inherit. Civ. Code, § 1386, subd. 1. The omission seems deliberate and equivalent to an express exclusion. See *Estate of Underhill*, 190 Cal. 233, 235, 211 P. 801.

We are not unmindful of the blanket provision of subdivision 4, which reads, "If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the children or grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife," and of the added difficulties presented by this subdivision. To us, however, it hardly seems that subdivision 4 was intended to apply to the special situation of subdivision 8. Subdivision 4, like all previous subdivisions, is not concerned with the origin of the property. It deals with property of the wife other than that which came through her husband or through the marriage as provided in subdivision 8. And here we may point out that it is immaterial that the wife is the owner of the property. With respect to her new husband, the estate is her separate property, the moment of her former husband's death, and it remains her property whether she remarries or not. See *Estate of Brady*, 171 Cal. 1, 6, 151 P. 275. Subdivision 4, which does not deal with the origin of the property, cannot be construed as limiting or modifying subdivision 8.

To adopt the view contended for by respondent, that the Legislature intended to exclude from subdivision 8 a widow who subsequently remarried, would lead to results which are contrary to the plain purpose of the provision. Take, for example, the separate property of the deceased husband. Under the statute, when the widow dies without issue, the whole of such property goes back to the line of the deceased husband. Where the wife remarries, if she is not deemed a widow, none of such property goes back to the line of the deceased husband, but only half of it ordinarily goes to the new, surviving husband. The other half goes to the father and mother, or brother and sister, etc. of the wife (Civ. Code, § 1386, subd. 2), who would not take at all if she were a widow within the meaning of the statute. In other words, the remarriage of the wife serves, under this interpretation, to confer a new right on *others* than the new husband, strangers both to the

marriage and to the origin of the property, a purely arbitrary and illogical result which cannot be deemed to have been the intention of the Legislature.

Again, suppose the deceased husband has a child by a previous marriage, and upon his death, community property vests in the surviving wife. She then remarries. If she is still a widow under subdivision 8, the property goes to the child of her former husband. *Estate of Marshall*, 42 Cal. App. 683, 184 P. 43. If she is not, her new husband, a stranger to the acquisition of the property, takes the whole under subdivision 4, to the exclusion of a child of one of the parties who contributed to the acquisition thereof.

[3] Other examples might perhaps be found, but these are sufficient to show that the construction of the term "widow" which is urged by respondent would frequently lead to results entirely inconsistent with the purposes of the statute; and, on the other hand, the construction for which appellant contends appears to carry out these purposes. We cannot agree with respondent that the effect of this latter construction would be that, while the sister of a deceased spouse would take one-half of the property, the rest would, in our situation, escheat to the state. While such a result might be suggested from the absence of any mention of a surviving husband in subdivision 8, it is palpably unsound. Escheat only takes place when there are neither kindred nor heirs of the decedent (Civ. Code, § 1386, subd. 9); and, irrespective of the provisions of subdivision 8, the remaining one-half of the property not distributable to any persons named therein must be deemed to pass to McArthur as the surviving husband or heir of Mrs. McArthur. This point is, however, not involved in the present appeal. Appellant makes claim to but one half the property, and does not object to the order of distribution to McArthur to the extent of the other half. It has been decided by this court that the interests of the relatives of one spouse may vest, under this subdivision, regardless of whether the other spouse left any relatives to claim their share. *Estate of Ross*, 187 Cal. 454, 202 P. 641.

The judgment is reversed, with directions to the trial court to modify its decree of distribution so as to provide that one-half the community property in question shall be distributed to Lillian Mae Flint, appellant herein, and the remaining one-half to the estate of Samuel L. McArthur.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

210 Cal. 428

TERRY TRADING CORPORATION v. BARSKY.

L. A. 10521.

Supreme Court of California.

Oct. 1, 1930.

1. Appeal and error *§*843(4).

Sufficiency of denial of payee's allegation of nonpayment of note need not be considered, in absence of contention by maker that note was paid.

2. Usury *§*115.

That ostensibly lawful transaction constituted usurious loan, with intent to evade statute, may always be shown.

3. Usury *§*52.

That maker of note may have been required to enter into unprofitable contract, as condition to loan, would not itself make loan usurious.

4. Usury *§*12.

That usurious interest is described as payments for services or materials furnished by lender or his agent is immaterial, if actually intended as interest.

5. Usury *§*12.

Test of existence of usury is whether there was intent to evade law, circumstances and negotiations preceding transaction being competent in determining intent.

6. Usury *§*113.

Maker of note has heavy burden of proof in establishing alleged usury.

7. Evidence *§*35.

Under statute, California courts will take judicial notice of Usury Law of New York (3 Birdseye, Cumming & Gilbert's Consol. Laws [2d Ed.] p. 2950, § 370 et seq.), where note in controversy was executed (Code Civ. Proc. § 1875, subd. 3).

8. Usury *§*111(2).

Defense of usury need not be pleaded, since court, as in other cases of illegality, will deny recovery of usurious interest on its own motion.

9. Usury *§*142(3).

Maker of usurious note need not file cross-complaint for treble interest, but may recover by counterclaim (Code Civ. Proc. §§ 438, 442).

10. Pleading *§*142.

Whether pleading is counterclaim or cross-complaint will be determined from alle-

gations, regardless of improper designation (Code Civ. Proc. §§ 438, 442).

11. Pleading *§*147.

Counterclaim and cross-complaint by maker of note, alleging breach of contract, and plaintiff payee's collection of various moneys from maker's customers, necessitating accounting, *held* sufficiently to state cause of action (Code Civ. Proc. §§ 438, 442).

Defendant alleged that note in controversy was one of series given to pay for printing motion picture positives, under contract requiring plaintiff to use stock specified by defendant, and that plaintiff, disregarding specifications, used inferior stock, damaging defendant in stated amount. Defendant further alleged that, as security for loan, he assigned to plaintiff right to collect certain moneys receivable from defendant's customers, and that plaintiff had collected unknown amount, believed to exceed loan, and had refused accounting.

12. Set-off and counterclaim *§*23.

Counterclaim by maker of note for breach of contract, and demand that payee account for moneys collected under contract, *held* proper under statute requiring merely that counterclaim must tend to diminish or defeat recovery (Code Civ. Proc. § 438).

Under Code Civ. Proc. § 438, as amended in 1927, sole requisites of counterclaim are that it must tend to diminish or defeat plaintiff's recovery, and must exist in favor of defendant and against plaintiff between whom several judgment might be had. Under this amendment, there need be no connection between cause of action in complaint and that alleged in counterclaim.

13. Set-off and counterclaim *§*8(1).

That demand for accounting is equitable in nature is no objection to its assertion in action at law on note (Code Civ. Proc. § 438).

Under system of Code pleading, equitable defenses and counterclaims are available in actions at law, as well as legal defenses and counterclaims in suits in equity.

14. Set-off and counterclaim *§*35(1).

That counterclaim is based upon unliquidated demand is no objection (Code Civ. Proc. § 438).

15. Set-off and counterclaim *§*59.

Affirmative relief may properly be sought by counterclaim, which may not only defeat plaintiff's recovery, but result in affirmative judgment for defendant (Code Civ. Proc. § 438).

16. Pleading 34(1).

To deny party right to trial, there must be obvious failure of pleadings to state cause of action or defense (Code Civ. Proc. § 452).

Under Code Civ. Proc. § 452, pleadings are to be liberally construed with view to substantial justice between parties.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Terry Trading Corporation against Bud Barsky, doing business under the name of Bud Barsky Productions, with a counterclaim and cross-complaint by defendant. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Nathan Goldberg and Edward Linder, both of Los Angeles, for appellant.

John W. Hart and Delvy T. Walton, both of Los Angeles, for respondent.

LANGDON, J.

This is an appeal by defendant from a judgment for plaintiff, entered after an order sustaining general demurrers to defendant's answer and cross-complaint, without leave to amend.

The action was brought to collect the sum due on a promissory note. The complaint was filed August 10, 1927. The chief allegations of the said complaint are that the said note was for \$17,512.71, with interest at 6 per cent.; that it was executed and delivered by defendant to plaintiff in New York City on October 6, 1926; that by its terms it was payable at Bank of Italy, Hollywood, Cal., nine months after date; that it became due on July 6, 1927; that no part of the principal nor interest has been paid except the sum of \$1,200; and that the balance due and unpaid amounts to \$16,687.38 principal, \$389.52 interest, together with interest on the said balance of the principal at the rate of 6 per cent. per annum from February 14, 1927, to July 6, 1927, and thereafter at the rate of 7 per cent.

On September 26, 1927, defendant filed an answer, which included a counterclaim, and also filed a cross-complaint. General and special demurrers to each were sustained. Defendant filed an amended answer, containing two separate defenses and a counterclaim, and an amended cross-complaint containing three causes of action. General demurrers were sustained to the amended answer and to the first two causes of action in the amended cross-complaint. A second amended answer and cross-complaint were filed. This time general demurrers to each were sustained without leave to amend. Thereafter,

on January 17, 1928, judgment was entered in favor of plaintiff as prayed for.

[1] An examination of the pleadings shows that defendant does not directly allege that he has paid the note, and he makes no such contention in his brief. It is therefore unnecessary to consider the sufficiency of the denial of the allegation of nonpayment in the first defense. The facts relied upon in such first defense are more fully and more properly pleaded elsewhere.

The elements of defendant's case, set forth with some duplication in the answer and cross-complaint, boil down to pleas of usury and breach of contract, and a demand for an accounting.

In the answer it is alleged, in substance, that the note sued upon is one of a series executed by the defendant in accordance with a certain contract, dated July 29, 1925, between plaintiff and defendant, the said contract being incorporated by reference into the answer; that a rate of interest was charged in excess of that permitted by the law; and that the excess interest amounts to the sum of \$6,500, which is included as a part of the principal in the note sued upon herein. In the first cause of action of the cross-complaint more facts are stated. Among other things, it is alleged that by the terms of the above-mentioned contract, defendant agreed to use the laboratory of Hirlagrap Company, plaintiff's agent, exclusively, for the development of its films for a period of five years, and to secure certain materials from said agent of plaintiff at an excessive price, the result being an overcharge for the loan of about \$6,500; that under said contract defendant assigned all of his contracts with his customers and the right to collect the sums due thereon to plaintiff, and that plaintiff has made collections in excess of \$6,500; and that the said contract is a "scheme and device" on the part of plaintiff to evade the Usury Act (St. 1919, p. lxxxiii).

[2-6] The courts will not permit an evasion of the Usury Law by any subterfuge, and it is always permissible to show that a transaction, ostensibly lawful, actually constituted a usurious loan and was made with intent to evade the statute. *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 616, 254 P. 956, 255 P. 805, 53 A. L. R. 725. Of course, the mere fact that defendant may have been required to enter into an unprofitable contract as a condition to a loan of money would not itself make the loan usurious. On the other hand, the law would be violated if the lender provided for a lawful rate of interest in the note itself, but required additional and excessive interest by the terms of a collateral agreement. Nor would it make any difference that the additional and excessive amounts of interest were designated as payments for services or mate-

rials furnished by the lender or his agent, if they were actually intended as interest. The test is whether there was the intent to evade the law, and the circumstances and negotiations which preceded the transaction may be material in determining such intent. *Lamb v. Herndon*, 97 Cal. App. 193, 275 P. 503; *Douglass v. Boulevard Co. et al.*, 91 Conn. 601, 100 A. 1067; *Lowenstein & Sons v. British-American Mfg. Co. (D. C.)* 300 F. 853; *Clemens v. Crane*, 234 Ill. 215, 84 N. E. 884; cases collected in notes, 21 A. L. R. 797, 812, 53 A. L. R. 746; *Coffin, Usury in California*, 16 Cal. L. Rev. 296, 415, 416, 422. It is said by the court in *Douglass v. Boulevard Co. et al.*, supra, 91 Conn. 601, 100 A. 1067, at page 1068, that: "Whether such an intention is present * * * is always a question of fact for the jury. No device can be invented and no disguise can be put on which will make a contract valid if behind or underneath an intent to evade the statute is found. It then must follow that every circumstance surrounding or connected with the transaction is material, if in any manner it will reveal the intention of the parties." And in *Clemens v. Crane*, supra, 234 Ill. 215, 84 N. E. 884, at page 889, the court said: "It is the constant practice of courts to resort to extrinsic evidence to determine the question of usury. 2 Jones on Evidence, § 441; 1 Elliott on Evidence, § 591; *Ferguson v. Sutphen*, 3 Gilman, 547; *Reeve v. Strawn*, 14 Ill. 94. Resort to parol evidence in such cases does not in any way depend upon the existence of an ambiguity in the written contract, but it is justified on the ground that the charge of usury raises a question of the legality of the instrument to the extent that usury, under the statute, renders contracts illegal or void." The authorities leave no doubt as to the right of defendant to have this issue tried. Of course, the burden, and a heavy one, rests upon him to establish the evasion. *Stark v. Bauer Cooperage Co. (C. C. A.)* 3 F.(2d) 214; *Friedman v. Wisconsin Acceptance Corp.*, 192 Wis. 58, 210 N. W. 831, 53 A. L. R. 758.

[7, 8] A question of conflict of laws is raised by plaintiff, the contention being made that the note recites its execution in New York and its validity is therefore to be governed by the law of New York, despite the fact that the place of payment is in California. There is some uncertainty under the pleadings as to where the note was actually made, and there is some confusion in the decisions as to whether the legality of the note is to be determined by the law of the place of execution, or that of the place of performance. See 6 Page on Contracts, 6217-6223, §§ 3596, 3597, 3598, 3598a; *Goodrich, Conflict of Laws*, p. 238, § 108. The question is not, however, really involved in this case. New York also has a usury law (*General Business Law*, art. 25, § 370 et seq., *Birdseye, Cummings & Gilbert's Consolidated Laws of New York* [2d Ed.], vol. 3, p.

2950), and our courts will take judicial notice of such law (*Code Civ. Proc.* § 1875, subd. 3). Moreover, usury as a defense need not be pleaded; the court will, as in other cases of illegality, deny the recovery of usurious interest on its own motion. *Wallace v. Zinman*, 200 Cal. 585, 589, 254 P. 946, 62 A. L. R. 1341. Since there is, therefore, no actual conflict of laws on this point, and no necessity of pleading usury, it would seem that the demurrer served no purpose, and should have been overruled.

[9, 10] Defendant sets up a claim for treble interest by way of cross-complaint. No point is made in the briefs as to which law governs the defendant's remedy, but since it appears that the New York law makes a usurious contract wholly void, there can be no objection to the choice of the less drastic relief sought by defendant under the law of California. Several contentions are made by plaintiff with respect to lack of compliance of this pleading with section 442 of the Code of Civil Procedure, on cross-complaint. We have heretofore held, however, that treble interest may be recovered by counterclaim under section 438 of the Code of Civil Procedure. *Rice v. Dunlap*, 205 Cal. 133, 270 P. 196. Our courts have on a number of occasions taken note of the uncertain line of division between counterclaim and cross-complaint under our statutes, and have held that the nature of the pleading will be determined from its allegations, regardless of improper designation. *Pickwick Stages v. Board of Trustees*, 189 Cal. 417, 208 P. 961; *Bledsoe v. Stuckey*, 47 Cal. App. 95, 190 P. 217; *Kirtley v. Perham*, 176 Cal. 333, 168 P. 351; *Pfister v. Wade*, 69 Cal. 133, 10 P. 369; 23 Cal. Jur. 273, § 43.

[11] The second part of defendant's case consists of the plea of breach of contract. In brief, it is alleged that the note was one of a series, executed pursuant to the contract of July 29, 1925; that the note was given in payment of printing motion picture positives in accordance with said contract; that the contract required plaintiff to print upon such stock as defendant might specify; that defendant specified Eastman stock; that plaintiff disregarded said specification and printed upon an inferior and unmerchantable type; and that by reason thereof defendant was damaged in the sum of \$10,000. These facts are pleaded as a "defense and counterclaim" in the answer, and also by way of cross-complaint.

As the third cause of action in his cross-complaint, defendant (cross-plaintiff) alleged that under the above-mentioned contract he borrowed the sum of \$51,000 from plaintiff (cross-defendant) and as security therefor assigned to plaintiff all of his interest in certain contracts with his customers, and the right to collect all moneys, receivable from said customers; that plaintiff was authorized

and instructed in accordance with the contract to credit defendant on his debt with such sums collected; that plaintiff has collected various sums, the exact amount of which is unknown to defendant; that defendant has demanded and has been refused an accounting. It is also alleged on information and belief that plaintiff has collected sums from such customers in excess of moneys which might be due it under the loans referred to in the contract. Accordingly, defendant prays for an accounting and judgment for such excess.

There can be no doubt but that the above allegations of breach of contract and necessity for an accounting sufficiently state a cause of action. The only questions are whether they may properly be pleaded in this action, and if so whether they should have been set up as counterclaims or by cross-complaint.

[12] Under the amendment to section 438 of the Code of Civil Procedure, adopted in 1927 and prior to the filing of the answer and cross-complaint herein, the sole requisites of a counterclaim are that it "must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." All of the other limitations were abolished by this amendment, and an intent on the part of the Legislature to avoid multiplicity of suits and to have all conflicting claims between the parties settled in a single action was most clearly manifested. In the instant case, obviously, both the claim for damages and the demand that plaintiff account for sums collected and not credited on defendant's obligation tend to diminish or defeat plaintiff's recovery. Under the amendment it is not necessary that there be any connection between the cause of action set up in the complaint and that which forms the basis of the counterclaim. Indeed, the statute contemplates the pleading of unrelated matters as counterclaims by providing that "the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff." Code Civ. Proc. § 438; McBaine, Recent Pleading Reforms in California, 16 Cal. L. Rev. 366.

Even prior to the amendment, both causes would have been valid counterclaims. Section 438 formerly read as follows: "The counterclaim mentioned in the last section (section four hundred and thirty-seven) must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; 2. In an action arising

upon contract; any other cause of action arising also upon contract and existing at the commencement of the action."

The counterclaim for damages for breach of contract is not only a "cause of action arising also upon contract," under subdivision 2, supra, but also, under the facts alleged by defendant, "arising out of the transaction set forth in the complaint," under subdivision 1, supra. The counterclaim for an accounting is set forth with allegations sufficient to bring it within subdivision 1. The courts have broadly interpreted the "transaction" clause. Thus, in *Story & Isham Commercial Co. v. Story*, 100 Cal. 31, 34 P. 671, 673, it is said:

"From an early day the tendency of judicial decisions has been to avoid circuity of action and multiplicity of suits, by permitting matters growing out of the same transaction, which might constitute an independent cause of action, to be given in evidence by way of defense; and the foregoing section of the Code of Civil Procedure is an additional legislative step in the direction of this judicial tendency. As a corollary therefrom, *it follows that the form in which the plaintiff may set out his cause of action ought not to be conclusive upon the right of the defendant to set forth his counterclaim in his answer.* The plaintiff is to set forth the facts which constitute his cause of action; but, if the other facts in the transaction are so connected with those set forth as to defeat their legal effect, the defendant is not precluded from setting them up by reason of the form which the plaintiff may have chosen for presenting his own side of the case. *Pom. Rem. & Rem. Rights, § 772; Gordon v. Bruner, 49 Mo. 570; Brady v. Brennan, 25 Minn. 210; Bitting v. Thaxton, 72 N. C. 549; Thompson v. Kessel, 30 N. Y. 383; Chandler v. Childs, 42 Mich. 128, 3 N. W. 297.*

"It is for the purpose of enabling the court to render a judgment by which the rights of the parties may be finally determined in the same action, rather than to compel another action, that the Code permits a defendant to set up in his answer any new matter arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim; and, if the plaintiff omits or fails to set forth in his complaint the entire transaction out of which his claim arose, the defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court. The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on this fact alone, if the fact is so connected with others that it forms only a portion of the transaction." (*Italics ours.*)

See, also, 1 Sutherland, Code Pleading 379, § 633; Pomeroy, Code Remedies (5th Ed.) p.

1054, § 650; Scott v. Waggoner, 48 Mont. 536, 139 P. 454, L. R. A. 1916C, 491; Advance Thresher Company v. Klein, 28 S. D. 177, 133 N. W. 51, L. R. A. 1916C, 514; and exhaustive annotation, L. R. A. 1916C, 445.

[13-15] It is, of course, no objection to the demand for an accounting that it is equitable in nature, and is asserted in an action on a note, which is an action "at law." It is well settled that under the system of Code pleading equitable defenses and equitable counterclaims may be set up in actions at law, as well as legal defenses and counterclaims in suits in equity. Roberts v. Donovan, 70 Cal. 108, 112, 9 P. 180, 11 P. 599; Fighiera v. Radis, 180 Cal. 660, 182 P. 418; 1 Sutherland, Code Pleading 376, § 631; Pomeroy, Code Remedies (5th Ed.) p. 1035, § 640, p. 1083, § 668; Weinheimer v. Ross, 205 N. Y. 518, 99 N. E. 145; Wasserman v. Taubin, 129 App. Div. 691, 114 N. Y. S. 447. Nor is it a valid objection to a counterclaim that it is based upon an unliquidated demand. Neither the old nor the new statute requires that the claim be liquidated. Wheelock v. Pacific Pneumatic Gas Co., 51 Cal. 223; 1 Sutherland, Code Pleading, 376, § 631; Clark on Code Pleading, p. 439, § 98. It is likewise perfectly proper to seek affirmative relief by way of counterclaim, which may not only defeat plaintiff's recovery but result in an affirmative judgment for defendant on his counterclaim. Such a judgment was rendered in the case of Story & Isham Commercial Co. v. Story, 100 Cal. 30, 34 P. 671, supra. See, also, Williams v. Pacific Surety Co., 66 Or. 151, 127 P. 145, 131 P. 1021, 132 P. 959, 133 P. 1186; Singer Sewing Mach. Co. v. Burger, 181 N. C. 241, 107 S. E. 14; Clark on Code Pleading, p. 439, § 98; p. 449, § 99.

[16] It is apparent, therefore, that the demurrers were improperly sustained as to these portions of defendant's case. As already pointed out, it is immaterial that the counterclaims were incorrectly designated as parts of a cross-complaint. Plaintiff contends that in a number of instances the allegations of the answer and so-called cross-complaint are lacking in clearness and detail. Doubtless these pleadings could be improved upon, but it can hardly be said that they fail to apprise plaintiff of the defenses and demands for affirmative relief which defendant makes. It is sometimes a difficult task for the pleader to state enough facts to establish his cause of action or defense, and also to avoid the inclusion of confusing evidentiary matter. The Code has provided adequate means for the correction of an error in either direction; the adverse party may move to strike out the evidentiary matter or demur specially to an inadequate statement of the facts on the ground of uncertainty or ambiguity. But to deny the party his right to a trial, there

must be an obvious failure of the pleadings to state a cause of action or defense. This is not the case here, and as against the general demurrers, they should stand. We are enjoined by statute to construe pleadings liberally (Code Civ. Proc. § 452), and such has been our practice. Mix v. Yoakum, 200 Cal. 681, 254 P. 557; Menefee v. Oxnam, 42 Cal. App. 81, 183 P. 379; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 155 P. 134, 136.

It follows that the general demurrers were not well taken, and the judgment is therefore reversed with directions to the trial court to overrule the same.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

210 Cal. 465

BRAY v. PAYNE, County Auditor.
S. F. 14052.

Supreme Court of California.
Oct. 14, 1930.

Rehearing Denied Oct. 30, 1930.

1. Municipal corporations ⇨35.

Where consolidation proceeding was completed and municipal franchise admittedly exercised, exercise of control over consolidated territory is de facto and questionable only in appropriate proceeding (St. 1913, p. 577; Code Civ. Proc. §§ 803-810).

2. Quo warranto ⇨54.

Question whether territory was incorporated held not involved in quo warranto proceeding against alleged municipality to oust it from exercise of municipal franchise (St. 1883, p. 93).

Only issue properly involved in quo warranto proceeding was whether city was usurping, intruding into, or unlawfully holding or exercising municipal franchise at time of commencement of action.

3. Quo warranto ⇨61.

Part of judgment in quo warranto proceeding against municipality assuming to declare status of territory upon ouster of municipal franchise, being beyond legitimate issues, held void.

4. Municipal corporations ⇨35.

Consolidated city after completion of consolidation proceedings did not assume jurisdiction over territory subject to final adjudi-

cation in quo warranto proceeding against territory consolidated, as municipality (St. 1913, p. 585, § 10, as amended by St. 1915, p. 313, § 3).

5. Quo warranto ☞61.

Final judgment of ouster in quo warranto proceedings against municipality held not retroactive and of no legal effect upon prior exercise of municipal functions.

6. Municipal corporations ☞17.

De facto municipal corporation may participate in consolidation proceeding (St. 1913, p. 577, as amended).

In Bank.

Original proceeding in mandamus by George A. Bray against H. A. Payne, as County Auditor of Los Angeles County.

Peremptory writ denied, and alternative writ discharged.

C. A. Lindeman, of Los Angeles, and Loris V. Cady, of Santa Monica, for petitioner.

Everett W. Mattoon, Co. Counsel, and Claude H. McFadden, Deputy Co. Counsel, Erwin B. Werner, City Atty., Sam H. Erwin, Deputy City Atty., Robert J. Stahl, and Arthur M. Ellis, all of Los Angeles, for respondent.

SHENK, J.

This is a proceeding in mandamus to compel the respondent, as county auditor of Los Angeles county, to extend on the appropriate assessment books of said county an assessment for county highway and county free library purposes. It is the obvious purpose of the petitioner by this form of proceeding to obtain an adjudication whether the territory embraced within the corporate limits of the former city of Barnes City in said county is incorporated or unincorporated territory. In response to the alternative writ the respondent has presented a general demurrer to the petition. Assuming, without deciding, that the problem presented may properly be determined in a proceeding in mandamus, we turn to a consideration of the merits.

Pursuant to an election held for that purpose in unincorporated territory of Los Angeles county, the board of supervisors of said county by resolution and order entered on its minutes on January 18, 1926, declared the territory described in the petition herein to be a municipal corporation of the sixth class under the name of the city of Barnes City, in accordance with the requirements of the General Municipal Incorporation Act (St. 1883, p. 93). Thereafter and on February 13, 1926,

a certificate of such incorporation was filed in the office of the secretary of state. From that time until April 11, 1927, said city of Barnes City functioned as a municipal corporation of this state. Some time prior to February 14, 1927, an election was held in said city pursuant to the Consolidation Act of 1913 (St. 1913, p. 577), to decide whether the city of Barnes City should consolidate with the city of Los Angeles. A favorable vote was cast. After the election and still prior to February 14, 1927, the city council of the city of Los Angeles adopted a resolution accepting, authorizing and approving the consolidation of the city of Barnes City and the city of Los Angeles. A certificate of said consolidation was filed in the office of the secretary of state on April 11, 1927, whereupon the city of Los Angeles assumed to be the successor of the city of Barnes City and has since exercised municipal functions over and upon the territory formerly embraced within its boundaries and the people residing therein. No attack has been made upon said consolidation proceedings and the territory formerly within the limits of the city of Barnes City is a part of the city of Los Angeles unless the proceedings hereinafter related and discussed compel a contrary conclusion.

On February 14, 1927, which was after the consolidation election was held but before the consolidation proceedings were completed, the Attorney General, upon the relation of the petitioner herein, instituted quo warranto proceedings against the city of Barnes City to have it adjudged that the proceedings to incorporate the city of Barnes City were illegal and void and to oust said city from the exercise of the municipal franchise. Process was duly served in that action and stipulations were entered into between the officers of Barnes City and the plaintiff in said action extending the time of the defendant to plead to May 2, 1927. In the meantime the consolidation proceedings had been completed and had become effective on April 11, 1927. On May 7, 1927, the default of the defendant in said quo warranto proceeding was entered. On August 3d, following, the plaintiff therein submitted his proof, and on August 9th a judgment was entered adjudging that the defendant city of Barnes City was guilty of usurping, intruding into, and unlawfully holding and exercising the rights, privileges, and franchise of a municipal corporation and ousting the defendant therefrom. In addition, the default judgment contained a clause decreeing and establishing the territory included within the boundaries of the former city of Barnes City to be unincorporated territory. On August 12, 1927, the city of Los Angeles entered a special appearance by its

city attorney and gave notice of two motions to be made on August 18th. One motion was for an order vacating the default and setting aside the judgment, upon the ground that the default and judgment were attempted to be taken against a defendant which by operation of law had prior thereto been dissolved and reincorporated and by reason whereof the court was without jurisdiction to entertain or pass upon any of the matters set forth in the complaint and upon the further ground that the judgment as entered directly affected lawfully incorporated territory of the city of Los Angeles over which that city had, since the completion of the consolidation proceeding, exercised municipal control and jurisdiction. The other motion sought to have the action dismissed on the ground that the issues tendered therein had become moot. Prior to the determination of either motion the plaintiff in said action, on November 4th, gave notice of motion to be made on November 10th for leave to substitute the city of Los Angeles as the party defendant in said action and for leave to file an amended and supplemental complaint. By stipulation the hearing on this motion was continued to November 29th. On November 9, 1927, the court entered an order vacating and setting aside the judgment. On December 30th the motion of the plaintiff for leave to substitute and to file an amended and supplemental complaint was denied. On January 7, 1928, the court dismissed the action. The plaintiff appealed from the order of November 9th vacating and setting aside the default judgment of August 9th, and from the judgment of January 7th dismissing the action. The order and judgment appealed from were reversed. *People v. City of Barnes City* (Cal. App.) 288 P. 442. A petition for hearing in this court was denied July 7, 1930, on the theory that, as matter of law, the provision in the judgment entered August 9th, declaring and establishing the territory formerly included within the boundaries of the city of Barnes City to be unincorporated territory, was not embraced within the issues properly tendered in the quo warranto proceeding and was void on its face; and that any statements made by the District Court of Appeal in its opinion which might be construed as an ouster of the city of Los Angeles in its then exercise of municipal functions over said territory were entirely without the scope of the action in quo warranto and involved in said appeals. This seemed especially to be true in view of the fact that the District Court of Appeal assumed in its opinion that the provision of the judgment entered August 9th, declaring and establishing said territory as unincorporated territory, was void and in its judgment affirmed the order of the trial court denying the motion of the plaintiff to substitute the city

of Los Angeles as the party defendant in said action. It was therefore thought that no prejudice would be suffered in permitting the judgment of ouster against the city of Barnes City to stand. But whatever construction may be placed on the decision of the District Court of Appeal, we are now confronted with the contention that the city of Los Angeles has been ousted of its jurisdiction, *de jure*, if it has any, and *de facto*, which it concededly has, by reason of the judgment of ouster against the city of Barnes City.

[1-3] It cannot be questioned that, by reason of the completion of the consolidation proceeding and the admitted exercise of the municipal franchise in said territory by the city of Los Angeles, the consolidated city is *de facto* as to its exercise of control over said territory. Whether its jurisdiction be *de facto* or *de jure* might have been questioned in an appropriate proceeding under sections 803-810 of the Code of Civil Procedure (*Coe v. City of Los Angeles*, 42 Cal. App. 479, 183 P. 822), but such a proceeding was not instituted. Petitioner's contention is that such an inquiry is now foreclosed for the reason, it is claimed, that the question of whether said territory is incorporated or unincorporated is *res judicata*. The argument is grounded on the postulate that the judgment of August 9th, wherein said territory was declared to be and established as "unincorporated territory of Los Angeles county," has become final and binding upon the city of Los Angeles as the successor in interest of the city of Barnes City. But the question whether said territory was incorporated or unincorporated was not within the issues which could be determined in said quo warranto proceeding. The only issue properly involved therein was whether the city of Barnes City was usurping, intruding into, or unlawfully holding or exercising the municipal franchise at the time of the commencement of the action, to wit, on February 14, 1927. *People v. Perrin*, 56 Cal. 345, 349. When the judgment of August 9th assumed to declare the status of the territory upon the completion of the ouster, it proceeded beyond the bounds of the legitimate issues of the complaint. That part of the judgment is void for all purposes. *Baar v. Smith*, 201 Cal. 87, 255 P. 827. It cannot operate as an adjudication of the status of the territory and must be disregarded.

[4] The petitioner further contends that the city of Los Angeles assumed jurisdiction over said territory following the completion of the consolidation proceedings subject to the final adjudication in the quo warranto proceeding. This contention involves a construction of certain provisions of section 10 of the Consolidation Act as amended in 1915 (St. 1915, p. 313). The pertinent provisions of

that section are as follows: "Except as in this act provided, any consolidation of municipal corporations *effected* under the provisions of this act shall not affect any *debts, demands, liabilities or obligations* of any kind existing in favor of or against any such municipal corporations *so consolidated, at the time of such consolidation*, or any action or proceeding then pending in any court in which any such *debt, demand, liability or obligation* of any kind may be involved, or any action or proceeding brought by or against any such municipal corporation *prior to such consolidation*; but all such proceedings shall be continued and concluded, by final judgment or otherwise, in all respects the same as if such *consolidation had not been effected*." The words which we have italicized indicate that the quoted portion of the statute contemplates beyond question that consolidation shall actually be effected as a prerequisite to the operation of the saving clause therein contained. If consolidation be not effected, the quoted provisions are not operative. The statute presupposes the power of each municipality to consolidate and by its terms preserves litigation appertaining to *debts, demands, liabilities, and obligations* of either municipal corporation unaffected and undisturbed by the *act of consolidation*. It would be going too far and beyond the intent of the statute to say that consolidation itself might be destroyed by the operation of the saving clause. Such self-destruction plainly was not contemplated.

[5, 6] As above stated, the favorable vote on consolidation in the city of Barnes City was recorded before the quo warranto proceeding was commenced and thereafter was carried to completion. The final judgment of ouster was not retroactive and had no legal effect upon the exercise of the municipal function prior to the entry of the judgment. Reclamation District No. 765 v. McPhee, 13 Cal. App. 382, 109 P. 1106. There is nothing in the Consolidation Act to prevent a de facto municipal corporation from effectually participating in an act of consolidation, and we are referred to no precedent to the effect that it may not.

There is therefore no duty enjoined by law upon the respondent county auditor to extend the assessment items as prayed for in the petition.

The peremptory writ is denied, and the alternative writ is discharged.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

Ex parte SHULER.

Cr. 3355.

Supreme Court of California.

Oct. 1, 1930.

1. Contempt ☞9.

Course of conduct creating atmosphere of distrust and suspicion in public mind, thereby influencing action of court and judges with respect to causes pending and undetermined, constitutes "contempt."

[Ed. Note.—For other definitions of "Contempt," see Words and Phrases.]

2. Contempt ☞30.

Court has inherent power to punish for contempt, though committed out of its presence, notwithstanding statute (Code Civ. Proc. § 1209, subd. 13).

Code Civ. Proc. § 1209, subd. 13, providing that no speech or publication reflecting upon or concerning any court shall be treated as a contempt unless made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings, in so far as attempt to deprive court of inherent power to punish for contempt, though not committed within its presence, has been held to be beyond power of Legislature.

3. Contempt ☞9.

Radio speeches by influential minister naturally tending and calculated to influence, control, and intimidate court and judges in certain causes pending and undetermined held to constitute "contempt."

While several criminal cases were pending and undetermined in superior court, influential minister broadcasted several radio speeches in which he commented expressly and by innuendo upon motives of named judge and upon his personal and political affiliations as affecting his past, present, and future acts and conduct with respect to such causes. Effect of radio speeches constituted threat of injurious consequences to be visited upon judge in event of his continuance to act and to maintain unchanged attitude with relation to conduct and disposition of cases.

4. Constitutional law ☞90.

Constitutional guaranty of freedom of speech does not protect citizen in making comment constituting attempted interference with orderly administration of justice.

It is only when expressions or utterances, in whatever form or forum, have for

their intent, purpose, and manifest tendency an interference with the orderly administration of justice in pending causes that they can be held to so far exceed the constitutional boundaries to freedom of speech and of the press as to constitute contempt of court.

5. Contempt ☞28(1).

Fact that numerous utterances of influential minister commenting on proceedings in pending causes were truth would not be defense to contempt proceedings.

6. Contempt ☞9.

Public utterances to constitute "contempt" need not have actually influenced actions of court or judge.

7. Contempt ☞14.

Whatever manifestly tends to constitute interference with proper exercise of duties and functions of grand jury would constitute "contempt of court."

Grand jury is instrumentality of court, and as such is charged with quasi judicial inquisition into the conduct of citizens and of public institutions and officials, and must be as fully protected in exercise of its powers and functions in that regard as the courts themselves.

8. Contempt ☞14.

Public utterances by influential minister in radio speeches regarding investigation of sheriff's office by grand jury held to constitute "contempt of court."

Substance of speech was to effect that there was understanding between grand jury and sheriff that grand jury would not proceed further with charges against sheriff. At time speeches were made grand jury was duly impaneled and acting as such and engaged in investigating criminal offenses and alleged misconduct on part of public officers committed within county.

9. Contempt ☞72.

Several utterances by influential minister in radio speeches commenting on causes pending and undetermined before court and judges thereof held to each constitute separate offense.

Several broadcasted speeches occurred upon different dates and were delivered to different audiences and dealt in main with different phases of proceedings then pending in courts and before judicial officers against which broadcaster's animadversions were in each instance directed.

10. Contempt ☞72.

Courts in contempt cases may impose consecutive sentences for separate contempts (Pen. Code, §§ 11, 669).

In Bank.

Original application by R. P. Shuler for a writ of habeas corpus prayed to be directed to William I. Traeger, as Sheriff of Los Angeles County, to secure release of petitioner from custody on commitment for contempt.

Writ discharged, and petitioner remanded.

Thomas S. Bunn and Schweitzer & Hutton, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

Alexander Macdonald and Allen W. Ashburn, both of Los Angeles, for W. I. Traeger, sheriff.

RICHARDS, J.

The applicant herein applied for a writ of habeas corpus and was granted a hearing thereon upon his averment that he was imprisoned, detained, confined, and restrained of his liberty by William I. Traeger, sheriff of Los Angeles county at Los Angeles in said county, and that said imprisonment, detention, confinement, and restraint were and are illegal, the alleged illegality of which arises out of the existence of certain facts which are set forth in his aforesaid petition, and which may be stated as follows: On or about the 28th day of April, 1930, one L. Vaillancourt made and filed in the superior court of the state of California in and for the county of Los Angeles an accusation in the form of several affidavits, verified by said Vaillancourt, charging the applicant herein with having made a series of addresses to the public over and by means of a certain radio station, which addresses are set forth in hæc verba and seriatim in said affidavits, and upon the statements and substance contained therein it is alleged by the affiant they were intended and were calculated and were spoken and broadcasted by the petitioner for the purpose and with the intent that they should and would interfere with, influence, sway, and control the proceedings in a certain action numbered Criminal No. 35227 then pending in said court and in the department thereof presided over and conducted by Superior Judge Marshall F. McComb, and interfere with, sway, control, embarrass, and influence the action and decision of said Judge McComb, acting as said judge of the superior court in said cause, and of any other judge who might be called upon to take any action or make any ruling or decision therein, and also to interfere with, influence, sway, and in-

timidate any person or persons who might be called upon to act as jurors in said action, and also to bring into disrepute the said Judge McComb and the court over which he was at said time and in the conduct of said cause presiding, and expose him and it with respect to said action then pending to public disfavor, distrust, suspicion, ridicule, and opprobrium, and impute to said Judge McComb dishonest, corrupt, and unlawful motives, purposes, and actions in connection with his rulings and decisions of said action, and by so doing interfere with the orderly and due administration of justice in said court in respect to said action. Coincidentally with the filing of the aforesaid accusation and affidavits of said Vaillancourt, there were also filed and presented to said court certain further affidavits made and sworn to by one Walter S. Cox, setting forth certain further facts with respect to certain other utterances of the petitioner herein, also publicly broadcast over and by means of said radio broadcasting station, and having reference to certain other actions and proceedings pending in said court and before said Judge McComb and other certain judges of said court, and also having reference to pending proceedings of a grand jury then in session and functioning as a part of said court, and which statements and utterances of the petitioner, as set forth in detail therein, were also alleged to have had a like tendency and purpose to interfere with the orderly proceeding of said court and of said grand jury and the due administration of justice in said county.

Upon the filing and presentation of the foregoing accusation and affidavits before said superior court that tribunal on the 29th day of April 1930, issued its order and direction to R. P. Shuler, the petitioner herein, requiring him to show cause on May 8, 1930, in department 45 of said superior court, why he should not be adjudged guilty of contempt of said court. Said affidavits and order were duly served upon said Shuler upon said last-named date, and thereafter and prior to the aforesaid date of hearing thereon the said R. P. Shuler, appeared and filed in said court his verified answer to the aforesaid accusation and the affidavits filed in support thereof. A hearing upon said accusation and the answer thereto was thereupon, upon the request of said Shuler, advanced and set for hearing for May 2, 1930, at which time the matter was heard and evidence for and against the accusation and the answer thereto was duly received and said matter was thereupon submitted for decision to the court in department 45 thereof, Clair S. Tappaan, judge of said court then and there presiding in and over the aforesaid department thereof. Thereafter and on the 5th day of May, 1930, the judgment and commitment of said

court and of the aforesaid judge thereof was given, made, and entered, adjudging that the petitioner herein by his aforesaid utterances, publishings, and broadcastings of the matters set forth in said affidavits, and each of them, had committed a contempt of said court and was thereby adjudged and declared to be in contempt of said court on account thereof, and should be punished therefor by such imprisonment and fines as were set forth and provided for in the aforesaid judgment and commitment, and that the terms of imprisonment set forth therein and designated as his punishment for the several and separate acts of contempt, as designated by the terms of said judgment, should run consecutively. Thereupon and upon the entry of the aforesaid judgment and commitment the petitioner was committed to the custody of the sheriff of Los Angeles for the execution thereof. Thereafter and pursuant thereto the petitioner was, as shown by his petition herein, imprisoned for the period of ten days immediately after the entry of said judgment, and in pursuance thereof, thereafter the petitioner having in the meantime offered to pay the portions of the several fines as specified in said judgment remaining due after such term of imprisonment, applied to this court for release upon habeas corpus upon the grounds hereinabove set forth. A writ of habeas corpus was thereupon issued out of this court and the petitioner was released upon bail pending the hearing thereon. Such hearing has been held, and the matters therein considered have been duly submitted to this court for decision. In order of such decision a more detailed statement of the facts and circumstances, as the same were presented to the superior court upon the aforesaid accusation and affidavits and the answer of the petitioner thereto, will be required. The facts about to be thus set forth, with sufficient of detail to form the basis of a correct conclusion thereon, are as follows:

On or about February 23, 1930, there was pending and undetermined in the superior court of the state of California, in and for the county of Los Angeles, a criminal action numbered "Criminal No. 35227," in which the people of the state of California were plaintiffs and one Ben Getzoff and one Jacob Berman, alias Jack Bennett, were defendants, and in which action said defendants were accused by indictment of the crime of bribery. The acts of bribery in which said defendants were implicated directly involved one Asa Keyes and one Harold L. Davis, the former having been at the time of the occurrence of said acts of bribery district attorney of the county of Los Angeles, and the latter having been chief deputy district attorney under said Keyes. The accusation presented against said two officials arose out of and was directly connected with two other cer-

tain criminal actions in said superior court and in which a number of persons, including one S. C. Lewis, E. H. Rosenberg, and Jacob Berman, alias Jack Bennett, were accused of the crime of conspiracy to obtain money by false pretenses through an alleged violation of the Corporate Securities Act (St. 1917, p. 673), otherwise known as the Blue Sky Law. Upon the trial of said two officials upon said charge, said Jacob Berman and said Ben Getzoff had been induced to appear and testify as to the part which they and each of them had taken in bribing said officials, with a view to procuring a dismissal of the charges against said S. C. Lewis and the others of said alleged conspirators, and it was doubtless by reason of their statements in the way of confessions as thus given and testified to that the said officials were convicted of their aforesaid crime. The immediate result of the accusation against these two officials was that of the appointment of Buron Fitts to succeed Asa Keyes as district attorney, with the consequent prosecution of said officials by said Buron Fitts. Following the conviction of said officials there remained upon the calendar of said court the cases of the several defendants who in the original actions had been accused of the crime of conspiracy to violate the Corporate Securities Act, and who, or some of whom, had been implicated in the aforesaid confessions of Berman and Getzoff in the alleged acts of receiving bribes of which said officials had been found guilty. During the considerable period of time following the exposure of the existence of the aforesaid conspiracy to violate the Corporate Securities Act, and in which the interests and fortunes of a very large number of people had become involved, there had come into existence a very acute and quite exasperated state of public opinion against the defendants who had been charged with said crime, and also against the officials who had been accused and convicted of corruption in office in respect to the prosecution of those who were charged with said conspiracy. The petitioner herein, who was, during said period and for some time prior thereto, the pastor of a certain church and congregation in the city of Los Angeles, became deeply and actively interested in the awakening, arousing, and in forming a state of public opinion with relation to the offenses with which the aforesaid persons had been charged and with respect to the proper prosecution of said offenses. The petitioner was accustomed during said period to make use of the radio, through one of its largest broadcasting stations in that region, in order to give widespread publicity to his opinions and utterances upon whatever subjects he sought by such means to discuss, particularly upon the subject of the public scandal which had arisen by reason of the alleged criminal acts of the defendants in said original actions and of said officials in

connection with the prosecution of the same; and it may not be denied that the petitioner herein had acquired and occupied a very large sphere of influence in the way of arousing, directing, and leading public opinion with respect to said conspiracy and with respect to said officials who had been charged and who have been convicted of accepting bribes with a view to defeating public justice in the pursuit and conviction of the persons charged with said conspiracy. It was while local public opinion was being thus aroused to a state of great tension that the proceedings took place out of which grew the accusation which was made against the petitioner herein, to the effect that he had committed one or several contempts of court with relation to certain actions which were still pending in said superior court, and which alleged acts of contempt had consisted in those certain public utterances which the petitioner had been making and broadcasting in the manner above set forth with relation to certain of the proceedings which had taken place and which were yet to take place in said court before and on the part of several judges thereof to whom had been committed in their respective departments the conduct of such pending causes, and whose acts and conduct in relation thereto formed the chief subject of the petitioner's aforesaid public and publicly broadcasted utterances.

The particular facts which formed the background for the petitioner's broadcasted statements made from the pulpit of his church on or about the 23d day of February, 1930, and which are correctly set forth in the first affidavit of Vaillancourt are the following: On and prior to February 21, 1930, Marshall F. McComb was one of the judges of the superior court in and for the county of Los Angeles, and was acting and presiding as such in department No. 45 of said court. Criminal action No. 35227, in which Ben Getzoff and Jacob Berman, alias Jack Bennett, were defendants, and as such were under indictment for the aforesaid crime of bribery, was called for trial; whereupon Buron Fitts, as district attorney of said county, rose to request a further continuance of the trial of these two defendants, and in so doing stated in substance that he was holding these two defendants with the expectation of using them and each of them as witnesses against certain of those persons who were under indictment upon the charge of conspiracy to violate the Corporate Securities Act, and that a present insistence upon the prosecution of these two defendants might have the effect of so far closing their lips that they would not repeat upon future trials their aforesaid confessions. Mr. Fitts did not state that he had promised these men immunity in order to secure their former testimony, but intimated that he had given them certain assurances in that direction which would be set at naught if

their cases were to be then tried. Judge McComb thereupon refused to continue said cases for trial and ordered the trial thereof to proceed; whereupon Mr. Fitts moved a dismissal of the charges against these two defendants, which motion Judge McComb denied, and thereupon continued the trial of said causes to a later nearby day. Thereupon and on February 23, 1930, the petitioner herein broadcasted the utterances which, as we have seen, are set forth in full in the first Vaillancourt affidavit. In the course of said utterances and after relating substantially the facts with relation to the proceeding in Judge McComb's court which are above summarized, after a heated commentary upon the attitude of certain newspapers in Los Angeles with relation to the trials of the several causes above referred to, and which had been either completed or were still pending in said court, the petitioner proceeded to state that he had information "before Judge McComb's court convened on last Friday morning that had assured me as to every step the judge would take at that time, * * * nor was I misled in my conclusion. In fact it was well known about the courthouse for several days preceding the court battle Friday morning that the outcome would be exactly what it was." In describing the attitude and action of Judge McComb upon that occasion the petitioner stated: "But Judge McComb was adamant. Though Buron Fitts plead at times almost tearfully and at other times quite indignantly, the judge sat on the bench like a sphinx and every ruling was squarely against the district attorney." The broadcaster then proceeded to commend the attitude and action of Mr. Fitts in the premises, and to state that by his rulings thereon the judge "seeks to make the district attorney break his personal word and the word of the district attorney's office and try two men whom he has used as state's witnesses and whose testimony undoubtedly resulted in the conviction of the worst official offender against the law and decency that we have had in this country within a generation. The judge demands that the district attorney try these men in spite of the universal custom in such cases and in spite of the fact that he has to all intents and purposes promised them immunity because they appeared as state's witnesses.

"If Mr. Fitts shall proceed to prosecute Beraman and Getzoff as per the order of Judge McComb, it will place the district attorney's office, as Mr. Fitts stated, where its word of honor given to men who give evidence by which corrupt public officials are prosecuted, would be worth nothing whatsoever. By such a course the district attorney's office would be forced to a position whereby and wherein it repudiates its own promises and stultifies its own word."

The broadcaster then returns to his heated assault upon the aforesaid newspapers, in the

course of which he charged that Judge McComb had been an appointee of Governor Young and that Governor Young was being supported in his effort to secure his re-election by the specific newspapers against which he was directing his passionate assault, while Buron Fitts was a candidate for governor in opposition to Governor Young. He asserts that said newspapers will gleefully welcome the decisions of Judge McComb, which, according to the statement of Mr. Fitts, in the event that the Keyes and Davis cases should be reversed, would leave him helpless in retrying those cases, and would result in Mr. Keyes and Mr. Davis both going free. He then proceeds to state: "We do not charge that Judge McComb is playing politics, but we do charge that the Los Angeles Record is playing politics and politics that is contemptible and vicious. We do not know the mind of Judge McComb. We have no way of understanding his processes of reasoning. He may or may not be honest in his decisions. That is between him and his own soul. It is also between him and the people who have a perfect right to scrutinize his official actions and pass upon them at the ballot box. We make no comment as to Judge McComb. The people can do their own thinking and reaching their own conclusions." He proceeds to say: "Affidavits have been filed charging the prejudice of Judge McComb and that must be passed upon before there can be further proceedings. In the meantime, the prosecution of a third public official hinges upon the outcome. These witnesses were to be used in this case, it being also a bribery case. The attorney for Getzoff arose in Judge McComb's court and stated that in view of the ruling of the judge he would advise his client not to testify, but to stand upon his constitutional rights. I understand that it will be impossible to convict without the evidence of this witness and that possibly Mr. Fitts will move the dismissal of the case rather than put the taxpayer to great expense with no possibility of a conviction. That much for what seems to have already resulted from the decision of Judge McComb. We doubt not that the Record is overjoyed that at least one bribe-taking public official may have been freed."

Regarding the discourse as a whole, it appears that the main burden of its criticism of Judge McComb would seem to have consisted in an attack upon certain of his rulings in the cases of the two defendants before him, which might be said to have reached such a point of finality as to form a proper subject of comment on the part of any citizen, under the broad terms of the provision of the Constitution guaranteeing liberty of speech, and of the press. The court is divided in opinion upon this subject and has, therefore, concluded that as to this first count in the charge and commitment herein it would give to the petitioner the benefit of the doubt, and hence ab-

solve him of contempt of court as to said first count in the accusation and as to the commitment based thereon.

The second affidavit presented by Vaillancourt embraces by recital, not only much of the material which is set forth in the affiant's first affidavit, but proceeds to further set forth in full a succeeding address, delivered from his said pulpit, broadcasted by the petitioner through the medium of the same radio station, wherein the broadcaster further proceeded to discourse upon the judicial action and conduct of Judge McComb with regard to the matter detailed in the first affidavit. He asserts: "If the case of Keyes and the case of Davis should be reversed and Judge McComb is successful in what he is enterprising, it means the turning loose of Asa Keyes and Buddy Davis on the streets of Los Angeles, free men. Some folks think that kind of a tragedy cannot come to pass, but it came to pass in San Diego county, and, by the way, I will just call your attention to the fact that thus our courts are functioning here, and not only here but as well all over the United States. No wonder a Supreme Court justice stated not long ago that such functioning of the courts of the land was a public disgrace, and that law-enforcement through our courts has become a matter of actual scandal, and he told why; because our judges dealt with technicalities, points of law, infinitesimal in their actual value to the public, and to the enforcement of the law, and let actual justice trail in the dust, and drag itself like some wounded thing along the streets." He further proceeds to say: "I don't for a moment doubt the authority of Judge McComb or the authority of any other judge. Undoubtedly they have it, but undoubtedly when that authority was granted them by the people it was supposed that they would use it to further the ends of justice and not to promote injustice. It was supposed they would use it to convict criminals and not to protect criminals. It was supposed they would use it for the bettering of the conditions of the citizens of the community who were sorely beset by lawless influences and not to embarrass and interfere with those who are righteously trying to put down crime in their community. Mark my words. It is high time that those who have the ballots in their hands decide that judges with all their power and authority must at least work for justice or else retire to the ranks of private life. I call your attention to the fact that with enough superior courts and municipal courts in session to make a flock, a bunch of bankers, brokers and usurers have been able to steal millions of dollars of the people's money and, by ruling after ruling of the courts, technical rulings, rulings as to insufficiency of evidence and all that kind of thing, these criminals now walk out gleefully, scot free." After some complimentary reference to Buron Fitts, the broad-

caster proceeds to say: "But it is a mighty poor bit of encouragement that he is having when a court deliberately gives him to understand that before he can go to work and gather his evidence he must come up and get on both knees, twine his fingers together and pray to the judge as if he were a god, and ask him whether or not he can do this, that or the other thing. A mighty poor policy!"

[1] Regarding this discourse also in its entirety we find that aside from its repetition of the former criticism of the rulings of Judge McComb with regard to the cases of Berman and Getzoff, the broadcaster goes much further than he had done in his previous discourse, to the extent of launching a general assault, both expressly and by innuendo, upon the court and judges of Los Angeles county, with the particular desire of influencing their attitude and conduct respecting the so-called Julian cases then pending and undetermined in said court and before certain judges thereof, including Judge McComb. We have no doubt that the manifest purpose and import of this address was that of creating such an atmosphere of distrust and suspicion in the public mind as would have the effect of influencing the mind, will, and eventual action of said court and the judges thereof with respect to said causes then pending and undetermined before them. That such a course of conduct and utterance on the part of this petitioner constituted contempt of court we entertain no doubt.

In the third of the affidavits of Vaillancourt filed upon the same date as the other two a somewhat different situation is presented. It appears therefrom that during the times mentioned therein, Walton J. Wood was the presiding judge of the master calendar department of the criminal division of said superior court, and that as such it was his duty to assign and reassign criminal cases for trial to the various criminal departments of said superior court, and from time to time as the occasion warrants or demands to transfer such causes from one criminal department to another; that on or about March 25, 1930, said Walton J. Wood as such presiding judge made and caused to be entered an order setting criminal actions numbered 40108, 40110, and 40111 for trial before Marshall F. McComb as judge of said superior court; that thereafter, and on March 27, 1930, said Walton J. Wood, as such presiding judge, made and caused to be entered an order transferring said actions and each of them from the department of said Marshall F. McComb to the department of Emmett H. Wilson, another judge of said court, for trial; that in the event said Emmett H. Wilson should not for any reason whatsoever be able to preside at the trial of said criminal actions, or any of them, it will become the duty of Walton J.

Wood as such presiding judge to reassign and retransfer for trial said actions, or any of them, which said Emmett H. Wilson might be unable to try to, himself, to Judge McComb, or to another judge of the superior court. The affidavit further proceeds to set forth that at the times mentioned therein there had been duly impaneled and acting in and as a part of said superior court a grand jury which was during said time continuously engaged in investigations of alleged criminal offenses committed within said county and had been holding periodical and almost daily sessions in such behalf. The affidavit proceeds to state that the petitioner herein on the evening of March 27, 1930, broadcasted another address dealing with Judge Marshall F. McComb and with the foregoing action of Judge Walton J. Wood with respect to said criminal cases, which cases, it may be said, were certain of the so-called "Julian" cases wherein certain defendants, indicted for the aforesaid conspiracy to violate the Corporate Securities Act, were to be put upon trial. It would seem that in the meantime Judge McComb had withdrawn voluntarily from trying any of the Julian cases, and that it was for that reason that Judge Wood had withdrawn said cases from Judge McComb's department and had, as above shown, transferred the same to the department presided over by Judge Wilson. The broadcaster proceeded to compliment Judge McComb in thus "voluntarily effacing himself as far as these cases are concerned. However, this does not excuse Judge Walton J. Wood at all, for Judge Wood took the position that had not Judge McComb voluntarily withdrawn, he would have stood pat on the placing of these cases in Judge McComb's court, knowing that Judge McComb was under grave suspicion of the things that happened a few days back." The broadcaster goes on to say: "I say that Judge Wood has taken a stand that is as full of holes as a sieve, for Judge Wood knows, as well as he knows his name, that no man with one iota of suspicion resting upon his official attitude should try the Julian cases." He proceeds to state: "The people are grim faced. They want justice done and they want the law vindicated, and they want men punished, big and little, high and low, and they don't want any judge or any court or anybody else throwing a monkey wrench into the machinery, and for Judge Wood to appoint Judge McComb, knowing the relationship between Judge McComb and the district attorney's office, that is working so hard now for the indictment of these big Julian wreckers and for their conviction; I say, knowing that relationship, knowing that Judge McComb is an appointee of Governor Young, knowing Judge McComb's relationship to the Hearst newspapers and to the Los Angeles Record and to Kemper Campbell and to others who have been very, very intensely interested all along the line, know-

ing these things, for Judge Wood to send these cases over to Judge McComb is almost unpardonable." The broadcaster concludes his rather long discourse with the statement: "Now, people, watch the courts; watch Judge Wood; keep your eye right on him; watch all of them. It is a pathetic day when all of a sudden we have to keep our eye on the courts for fear they play crooked and contemptible games in which criminals, big and vicious, are released and let to prey upon the public. It is a pitiful day, but we have sure got to do it; there is nothing else to do; we have got to do it. Keep your eye on the courts, watch them, and keep your eye on the district attorney's office."

The fourth affidavit in support of the accusation made against the petitioner was verified and filed by one Walter S. Cox, who, after repeating the preliminary averments made in said former affidavits, and after referring to the fact that the case of People v. Berman, alias Bennett, was on and after April 11, 1930, pending and undetermined in said superior court and in the department thereof over which Judge McComb presided, and after alleging that on or about April 11th Judge McComb, while acting as judge in said court, had remanded said Berman to the custody of the sheriff of Los Angeles county after fixing his bail at the sum of \$250,000, and after reciting an application for a writ of habeas corpus had been made to the District Court of Appeal of the state of California, in and for the Second Appellate District, Division 2, 287 P. 373, on behalf of said Berman and for the purpose of obtaining his release from said custody, which writ had been issued by said appellate tribunal and made returnable at a date thereafter, proceeded to allege that, while said matter was pending and undetermined in each of said tribunals, the petitioner had uttered and broadcasted over the aforesaid radio broadcasting station certain statements about and in relation to said action and to said court and to said Marshall F. McComb as judge thereon, of which the following are some of the utterances thus given publicity: "And the lawyers and newspaper men; and the judges! and the judges! and the judges! They are doing everything on earth they can to shield this bunch of felons. Without their assistance Lewis and Berman could not have gotten started on their program of robbery and thievery. * * * When the Los Angeles Examiner, when Judge McComb, or these attorneys, or when the rest of them undertake to interfere with the district attorney in his efforts to put men like Flint in the penitentiary, I tell you they are playing a game good American citizens will not stand for. * * * I am going to say something else. When Judge McComb went back into the records and got a case—a case that some newspaper boys had tipped

him off was there—when Judge McComb goes back and gets a case which arises out of a record they used for no purpose in the world except to get Jack Bennett back with it from France—a case they had no thought of ever trying—no proof of it if they had gone to trial, but simply did it, knowing that they were going to have a plan to send him over the road, and used it to get him back here—when they dig up that case and put it on the records without even notifying the district attorney's office to have a representative present, or to be present, and set a quarter of a million dollars bail against a man already under a bond of \$50,000 and making no effort to get out of the country, and nobody believing that he was going to get out—it is just as plain as the nose on a man's face as to why it was done, and who is behind it and as to the purpose of the doing of it? If there is anybody in this city who actually misunderstands it, I am fooled on the mentality of the people of this city. Now, if Judge McComb were one of these wild-eyed, hot-brained fellows who go so mad because Buron Fitts beat him on that other thing in the Supreme Court, and just was mad—if he did it just because he was mad, that would be one thing. But he isn't one of that kind. He is as cool headed and as clear visioned as any man who ever sat on the bench. What Judge McComb did the other day was premeditated, deliberate, studied and purposely done, and don't you forget it. When the courts of the country begin to interfere with the process of justice and the district attorneys who go to the bat to put men in the penitentiary where they belong, it is time that the taxpayers rose up and said something about it. Unfortunately, we did not have anything to say in the selection of Judge McComb. He is an appointee of Governor Young. There is a lot of politics mixed up in this thing, just as sure as you are sitting here tonight, and don't forget it—absolutely lots of it."

The fifth affidavit in support of said accusation was also made by Walter S. Cox. After repeating by reference those preliminary matters which are set forth in the earlier affidavits, it proceeds to state that on April 22, 1930, and prior thereto and up to the time of the making and broadcasting of the utterances to which said affidavit refers, there was pending and undetermined in the said superior court and in the department presided over by Judge McComb a certain criminal action entitled *People v. Charles H. Coffey*, in which action the defendant was accused in two counts of violations of the Motor Vehicle Act, and in two other counts of violent assaults upon two certain persons, the four counts apparently having reference to the same incident, and that, upon the appearance of Charles H. Coffey to answer to these charges before Judge McComb, he had first

entered a plea of not guilty as to all of said counts, but that later and on April 14, 1930, he withdrew his plea of not guilty as to count 2 and pleaded guilty as to said count, and thereupon made an oral application for probation as to count 2 in said information; that while said matter, and particularly said application for probation, was still pending and undetermined in said court and before said judge, the petitioner herein on April 22, 1930, broadcasted certain utterances with relation to said action, and also with reference to the rulings of Judge McComb in the matter of the fixation of bail in the Berman matter. Concerning the Coffey matter the broadcaster said: "I want to ask Judge McComb why he permitted this fellow Coffey, who was held on two counts of hit and run and one count of drunk driving by Judge Turney, to plead guilty to one count of hit and run and apply for probation and have the rest of the counts dismissed? I talked sometime ago on that question. One of the most terrible menaces we have out here in this city, I think, is this matter of the drunk driving charge. Judge McComb is a specialist on this proposition of bringing them to trial. He don't turn any of them loose, according to the record he is making. He don't want any immunity granted to anybody. He don't want any cases thrown out of court. He wants all of them tried by the law and evidence. I am going to ask Judge McComb whether or not it is true that this fellow Coffey came into court, and, without any evidence being brought in, pleaded guilty to a hit and run charge—the easiest one, you understand, to get by with from the standpoint of penalty—and he permitted him to escape trial on the second hit and run charge and a drunk driving charge. There is the real charge that we need to attend to in our courts. That is the thing that is imperiling these highways all over the city, with people being killed daily by drunk driving. I am going to ask Judge McComb whether or not he permitted that thing to happen in his court and then permitted this man to apply for probation and so forth. An officer called me this afternoon and told me that those were the facts. If they are, all these fine eulogies we have seen in the Los Angeles Record and in the Hearst papers concerning this marvelous man, Judge McComb, who don't allow any of them to get by him, who absolutely makes them stand up to meet the law, and who makes them toe the mark—No immunity favors granted in his court. He tries them all and puts the stuff to them—I say all these nice things they have all said about him are going to have to fall with a dull thud if he really did this thing. Of course, I don't know whether he did or not, but I would be mighty glad to turn this radio over to him and he can tell us next Thursday night whether or not he did. We are all interested.

Everybody is interested, because right now Judge McComb is before the public eye." Referring to the Berman matter the broadcaster said: "But there is this to say: That no more ludicrous thing ever happened in the superior court than when Judge McComb revived that old case, which I have already explained, and placed the bail at \$225,000 or \$250,000 against this fellow Bennett." The discourse proceeds at some length with the innuendo that the action of Judge McComb in the premises was inspired by the newspaper enemies of Buron Fitts.

The sixth affidavit, also made by Walter S. Cox, recites and realleges the preliminary matters which are set forth in the earlier affidavits, and then proceeds to set forth another broadcasted discourse of the petitioner on the evening of April 24, 1930, in which he takes up again the case of *People v. Coffey*, and, after certain sarcastic references to Judge McComb's disposition to hold drunk drivers strictly to account, proceeds to say: "Yet with this fellow Coffey, who, I understand, is a high Mason and a big Elk—and by the way that has nothing in the world to do with drunk driving, and I hope the judge will understand that, I hope he understands the fact that he is an Elk and a Mason does not keep bootleg liquor from making him drunk. Not at all. He is quite a wealthy man, I think, but that does not mitigate the offense in the least, as I see it. He takes those three offenses and on one of them, the least one, carrying the least sentence or penalty, he permits him to plead guilty and make an application for probation. Of course this probation business is up to him. I have no comment to make on that. That is the judge's funeral; it is not mine. Let me tell you this: Judge McComb is going to have to do some explaining. * * * Now, he stands up and takes this fellow with three crimes charged against him, forgets about the one that would carry the greatest punishment, the drunk driving, takes the least charge—dealing with this big Mason, this big Elk and influential man among us—and lets him plead guilty and apply for probation. That does not look very beautiful, and it doesn't smell good, either."

The seventh and last affidavit, also verified by Walter S. Cox, deals with a different situation. It proceeds to set forth that at the times mentioned therein there was a duly impaneled and acting grand jury, functioning as a part of the superior court of Los Angeles county, and engaged in investigating criminal offenses and alleged misconduct on the part of public officers, committed within said county, and holding protracted and almost daily sessions therein; that on or about April 24, 1930, the petitioner broadcasted a discourse with relation to certain matters which were either pending before or were about to

be brought to the attention of said grand jury. Among these was the investigation of certain acts and conduct of Sheriff William I. Traeger of said county. In dealing with this subject the petitioner proceeded to set forth certain matters alleged to have come to his personal attention and which, if true, would constitute grave personal improprieties amounting probably to official misconduct on the part of Sheriff Traeger, and in relation thereto stated that he had had a conversation with one of the members of the grand jury who had stated to him that there would be no investigation of Sheriff Traeger by the grand jury. The petitioner proceeded to state his understanding of the charges against Sheriff Traeger and to suggest that there was some sort of understanding between the sheriff and the grand jury by virtue of which its members would not proceed further with the charges against him, and, after referring to this matter at considerable length, he states: "Now, isn't it a pretty mess that we are in when we have a mutual treaty between the sheriff's office and the sheriff—I mean the sheriff and the grand jurors, by which the sheriff is not to drink any more, not to run for reelection, and therefore they will let him alone?"

In each of the affidavits above referred to there is embraced and reasserted the charge against the petitioner that the statements therein contained naturally tended and were calculated to and were spoken, announced, uttered, published, and broadcast by the said petitioner for the purpose and with the intent that they should and would interfere with, influence, sway, control, and intimidate the said superior court, the said grand jury, and also interfere with, influence, sway, control, and intimidate any persons who might be called upon to testify as witnesses in the certain specified matters pending before said court and said grand jury, and by so doing interfere with the orderly and due performance of duty on the part of said court and of its several judges and grand jurors, and with the orderly and due administration of justice.

When the foregoing matters, together with the answer thereto made and filed on behalf of the petitioner, came on for hearing before said superior court and before a department thereof presided over by Superior Judge Tappan, a hearing was upon May 2, 1930, had thereon, and, the matter having been submitted to the said court and the said judge thereof for decision, the said court on the 5th day of May, 1930, made and entered, as hereinabove stated, its judgment and commitment, adjudging the petitioner to be in contempt of court upon each of the aforesaid seven counts, and with respect thereto made and entered the following judgment: As to the first count the court adjudged that the petitioner be punished for the contempt specified therein by imprisonment in the county jail of the county

of Los Angeles for the period of five days. As to the second count, that the petitioner be punished for the contempt specified therein by fine in the sum of \$50 and in default of the payment of said fine that the petitioner stand committed to the sheriff of the county of Los Angeles until such fine is paid, and that he be imprisoned in the county jail of said county for a term which shall be one day for each \$2 of said fine or unpaid part thereof. As to the third count, that the petitioner be punished for the contempt specified therein by imprisonment in the county jail of the county of Los Angeles for the period of five days. As to the fourth count, that said petitioner be punished for the contempt set forth therein by a fine in the sum of \$50, with the same alternative as that provided for in the second count. As to the fifth count, that the petitioner be punished for the contempt specified therein by imprisonment in the county jail of the county of Los Angeles for the period of five days. As to the sixth and seventh counts, that the petitioner be punished for the contempt specified in the affidavits in support thereof by imprisonment in the county jail of the county of Los Angeles for the period of five days, and that said terms of imprisonment above referred to should run consecutively.

The petitioner, as we have seen, having served a portion of the terms of imprisonment provided for in the foregoing judgment and commitment, and having offered to pay into court the amount remaining due upon the fines therein imposed, made application for release upon habeas corpus, which having been granted and the matter coming on for hearing upon its merits and having been heard, the questions involved therein are submitted to this court for its decision.

[2] It is the first contention of the petitioner that the contempt or contempts complained of having been committed out of the presence of the court, consisting of a series of broadcasted utterances allegedly reflecting upon or concerning the court and one or more of its judges, it is beyond the power of the court reflected upon to punish him for contempt. This contention is predicated upon the provisions of subdivision 13 of section 1209 of the Code of Civil Procedure, which reads as follows: "But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." The foregoing contention of the petitioner requires but brief consideration, in view of the fact that, in the case of *In re Charles M. Shortridge*, 99 Cal. 526, 532, 34 P. 227, 230, 21 L. R. A. 755, 37 Am. St. Rep. 78, the foregoing subdivision of said section of the Code of Civil Procedure came before this court for

consideration as to the constitutionality of its provisions, and it was therein expressly held that courts of justice have the inherent right to punish as a contempt an act—whether committed in or out of its presence—which tends to impede, embarrass, or obstruct the court in the discharge of its duties; and that the Legislature had no power to enact the foregoing amendment (Stats. 1891, p. 7) to said section of said Code in so far as it was attempted thereby to deprive the court of power, in the exercise of its aforesaid inherent right to punish as a contempt any act, speech, or publication which had for its manifest purpose and obvious tendency an interference with the orderly administration of justice in causes pending before such courts. The foregoing decision of this court has been consistently followed and approved in later cases. *McClatchy v. Superior Court*, 119 Cal. 413, 51 P. 696, 39 L. R. A. 691; *Lamberson v. Superior Court*, 151 Cal. 458, 461, 91 P. 100, 11 L. R. A. (N. S.) 619; *In re Lindsley*, 75 Cal. App. 122, 124, 241 P. 934; *Lindsley v. Superior Court*, 76 Cal. App. 419, 245 P. 212; *In re Arnold*, 204 Cal. 175, 267 P. 316; *Blodgett v. Superior Court* (Cal. Sup.) 290 P. 293.

[3] The petitioner's second contention is to the effect that the matters and things set forth in the several affidavits, which formed the basis of the accusation that the petitioner upon the various and separate occasions as recited in said affidavits was guilty of acts and conduct constituting a contempt of court, do not amount, as to either the facts set forth therein or the law applicable thereto, to such contempt. We are unable to give our concurrence to this contention as to the several counts in said accusation other than the first count thereof. We have hereinbefore undertaken to set forth in detail the several judicial proceedings which at the time of the petitioner's aforesaid utterances were pending and undetermined in said superior court and in one or other of the departments presided over by the several judges whose acts and conduct with respect to such pending cases were animadverted upon by the petitioner in his several broadcasted utterances. The cases of *People v. Berman* and *People v. Getzoff*, at the time of the utterances of the petitioner set forth in the second of said affidavits under the title of count 2 of said accusation, were in the actual course of coming on for trial before Judge McComb in department 45 of said court. It is true that as to the content of the first count in said accusation the matters chiefly adverted to by the petitioner related to certain rulings already made by Judge McComb which may have been a proper subject of his animadversions. It is also true that the defendants in said action had each made application for release upon habeas corpus to the District Court of Appeal, which applications had at the time

of the petitioner's aforesaid utterances been undetermined in said court. But this fact did not interfere with the fact that each of said causes was pending before the superior court and that in each thereof the questions as to whether said defendants should presently be put upon trial and as to the rulings of the trial judge during the course thereof were each and all matters which the presiding judge of said department of said court was required to consider and pass upon in the orderly course of administration of justice as to these causes and the questions involved therein at the very time that the petitioner's utterances, as set forth in detail in count 2 of said accusation, were made. We entertain no doubt that the utterances of the petitioner, under the circumstances above detailed, had for their obvious intent and purpose that of causing said court and the judge to adopt the attitude which the broadcaster was insisting upon with relation to the present and future conduct of said causes before said court; and that the petitioner, in order to accomplish this result, was making use of his position as a minister and of his opportunity as a broadcaster and of his influence as an orator and of his access, through his aforesaid position and powers, to the public mind, to compel said court and the judge thereof to a course of action and conduct with respect to such pending causes in accord with the petitioner's views. In seeking to achieve this result the petitioner commingled in his aforesaid utterances, as set forth in count 2 of said accusation, a severe arraignment of said court and the judge thereof, as to rulings already made, and to be thereafter made, with respect to the conduct of said causes during the impending trial thereof, together with an assault, both expressly and by innuendo, upon the motives of Judge McComb and upon his personal and political affiliations as affecting his past, present, and future acts and conduct with respect to said pending causes and to other interlocked judicial proceedings which were also in a state of pendency in said court. The foregoing animadversions were coupled with both the expressed and covert threat of injurious consequences to be visited upon Judge McComb in the event of his continuance to act as the trial judge in said pending causes and to maintain unchanged his attitude with relation to the conduct and disposition thereof. These consequences were to become operative through the creation of an adverse and inflamed public opinion which petitioner by his aforesaid utterances was plainly seeking to arouse and intensify.

With respect to the utterances of the petitioner as set forth in the third count of said accusation, and as affecting the aforesaid pending causes, and also these other and more or less interlocked criminal actions also at said time pending in said court, and as affect-

ing the judicial attitude not only of Judge McComb with relation thereto, but also of Judge Walton J. Wood, at that time presiding judge of the master calendar department of the criminal division of said court, and Judge Emmett H. Wilson, as one of the judges of said court, what we have heretofore said with respect to the obvious intent and purposes of the petitioner, as manifested in his aforesaid utterances, as detailed in counts 1 and 2 of said accusation, has full and precise application. The purpose of the broadcaster, as shown both expressly and by innuendo, was that of involving the several departments of the superior court then actually engaged in this or that phase of the judicial consideration of said pending causes, in such an atmosphere of suspicion as to the affiliations and attitude of the judges mentioned as would have the effect of compelling them and each of them to conform their rulings to the demands of the petitioner, or to suffer the results of an inflamed public opinion injuriously affecting them and each of them in the event of a noncompliance with the petitioner's demands.

With respect to the matters set forth in the affidavit of Walter S. Cox embraced in the fourth count of said accusation, a like conclusion seems irresistible. The assault upon Judge McComb, both by direct charge and covert innuendo, becomes increasingly intensive. When the broadcaster states that, "What Judge McComb did the other day was premeditated, deliberate, studied and purposely done, and don't you forget it. When the courts of the country begin to interfere with the process of justice and the district attorneys who go to the bat to put men in the penitentiary where they belong, it is time that the taxpayers rose up and said something about it," it is idle to argue that the intent and purpose of such an utterance as this was not precisely that set forth in the charging part of said accusation.

In the affidavit of Walter S. Cox, which forms the foundation for the fifth count in said accusation, another criminal proceeding, namely, that of *People v. Coffey*, pending in the department of the superior court over which Judge McComb presided, is made the subject of the broadcaster's animadversions. This cause at the time thereof was pending in said department and before Judge McComb, the immediate matter before said court being the question as to the propriety of the admission of the said defendant to probation upon his application therefor, which had not yet been determined before said judge and court. The petitioner, in his extended comment upon the situation in said cause, still pending, proceeded to discuss at length and from a most partisan viewpoint the nature of the case against the defendant and the conduct thereof under the direct administration of Judge McComb, the innuendo of

the broadcaster's commentary being that Judge McComb, contrary to his past custom of treating with severity violators of the Motor Vehicle Act, was acting with deliberate partiality in the Coffey case, and that his action in that regard was of the same unworthy quality as that which had already characterized his theretofore criticized conduct in the case of Berman and Getzoff.

In the sixth count of said accusation the petitioner is shown in a subsequent broadcast to have again referred to the Coffey case, and in the course of such reference, and while said cause was still pending upon the defendant's application for probation before Judge McComb, to make the direct charge that the judicial action and attitude of Judge McComb with respect to the case against Coffey is being influenced by the fact that the defendant is a high Mason, a big Elk, and a wealthy man, and that, by reason thereof, "Judge McComb is going to have to do some explaining."

We have thus far been dealing with the several broadcasted utterances of the petitioner having chiefly to do with the course of pending proceedings in the superior court in the several criminal causes committed to the department thereof over which Judge Marshall F. McComb presides, and with respect to which those certain other judges referred to by the petitioner in his aforesaid utterances have been and may yet be called upon to exercise judicial functions.

[4] We are entirely satisfied that the broadcasted utterances of the petitioner with respect to the foregoing matters involved in pending proceedings in said court and before the said judges thereof, disclose throughout the existence on the part of the petitioner a persistent and intentional purpose to impose his own will and views with respect to said causes, and the facts, the law, and the conduct thereof, upon the said superior court, and not only the judges thereof particularly mentioned, but all of the judges thereof, and that such result was contemplated and intended to be achieved by the petitioner through his aforesaid public utterances, embodying his strenuous and repeated asseverations as to the facts and the law relative to these several causes, commingled with assaults, both express and by innuendo, upon the motives and integrity of the several judges having these matters in charge, and with threats of the injurious consequences to them of an adverse public opinion which, by means of his reiterated utterances, he was seeking to create. That such acts and conduct on the part of this petitioner constituted contempt of court we entertain no doubt. The constitutional guaranties of freedom of speech and of the press do not, in our opinion, and in the light of the authorities which we are about to cite, go so far as to protect the citi-

zen in making such comment by either spoken or printed utterance with respect to causes pending before courts of justice, as have for their purpose and manifest tendency an attempted interference with the orderly administration of justice before such tribunals and in respect to causes pending and in course of conduct therein. No difference can be discerned between the rights of the citizen and the proper limitation thereof under his aforesaid constitutional guaranty, whether that citizen be a minister speaking from his pulpit, or a broadcaster through the radio, or an editor through his newspaper, or a curbstone orator from his soap box, or an anarchist from whatever forum he may find for the exploitation of his doctrines, the right and the limitation thereof being the same when the matter involved in the utterances of all or any of these affects or manifestly tends to affect the orderly administration of justice in pending causes before judicial tribunals and the judges thereof.

In the case of *In re Shortridge*, supra, this court epitomized the foregoing conclusions in the following apt words: "Liberty of the press must not be confounded with mere license. Liberty of the press stops where a further exercise would invade the rights of others. This provision of the constitution does not authorize a usurpation of the functions of the courts. Under the plea of the liberty of the press, a newspaper has no right to assail litigants during the progress of a trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases which are on trial. As stated before, what may be spoken may be written; and the converse of the proposition is true, that what may not be spoken under such circumstances may not be written." In the case of *People v. Durrant*, 116 Cal. 179, 209, 48 P. 75, 82, this court again put into apt and terse language its views upon this subject as follows: "A publication during the course of a trial which reflects on the court, or assails the litigants, or seeks to intimidate witnesses, or spreads before the jury an opinion upon the merits of the controversy, or threatens them with public odium, or attempts to dictate the decision, or in any improper way endeavors to influence the determination, is unquestionably a contempt of court." In the case of *Patterson v. Colorado*, 205 U. S. 454, 27 S. Ct. 556, 558, 51 L. Ed. 879, 10 Ann. Cas. 689, Mr. Justice Holmes says: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with reference to a court. * * * Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the

law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."

[5] It is one of the contentions of the petitioner that this contempt proceeding must fail for the reason that it is nowhere stated or found therein that the public utterances of the petitioner with respect to the several causes and proceedings and to the judicial officers engaged therein were not the truth. To this contention Mr. Justice Holmes, in the case last above cited, furnishes a complete reply when he states: "In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

We do not intend to state or intimate in this opinion that the acts and conduct of courts with respect to matters in which they have performed their functions or exercised their judgments are not subject to the laws touching libel and slander, to be freely and fully subjected to both private and public comment and criticism on the part of every person or group of persons, whatever may be their station or instrumentalities of expression in our body politic, and whatever effect the comments, utterances, and expressions of these or any of these may have in the formation of either a friendly or an adverse public opinion. It is only when such expressions or utterances, in whatever form or forum, have for their intent, purpose, and manifest tendency an interference with the orderly administration of justice in pending causes that they can be held to so far exceed the constitutional boundaries to freedom of speech and of the press as to constitute contempt of court under the statutes of this state defining the same.

[6] It is not essential, in order to constitute such contempt, to show that the actions of the court or of the judge thereof were actually influenced by the public utterances of the petitioner herein complained of. In the case of *Sinclair v. United States*, 279 U. S. 749, 764, 49 S. Ct. 471, 476, 73 L. Ed. 938, 63 A. L. R. 1258, it was aptly stated by Mr. Justice McReynolds, in delivering the opinion of the

court, that "It is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications and, therefore, there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

We have thus far dealt with the acts, utterances, and conduct of the petitioner as the same are set forth in the first six counts of the accusation against him and in the findings, conclusions, and commitment of the trial court with relation thereto.

[7, 8] With respect to the seventh count in the accusation, but brief comment is required. The grand jury is an instrumentality of the courts of this state, and as such is charged with a quasi judicial inquisition into the conduct of citizens and of public institutions and officials, and is to be as fully protected in the exercise of its powers and functions in that regard as the courts themselves. Whatever, therefore, manifestly tends and is intended to constitute an interference with the proper exercise of the duties and functions of a grand jury while engaged in the consideration of such matters as may properly come before it would obviously amount to a contempt of court. We entertain no doubt that the broadcasted utterances of the petitioner as set forth in count 7 of said accusation, and as above recited with sufficient of detail, amounted to such contempt as would have subjected him to the pains and penalties thereof provided by law. In view of the fact, however, that the broadcasted utterances of petitioner in the foregoing regard formed a portion of a single address delivered by him, as hereinabove set forth, the trial court saw fit to consider such address as constituting a single act of contempt and to fix the penalty therefor accordingly.

[9, 10] It is the contention of the petitioner that the trial court in passing upon the accusation made against him ought to have treated the entire contempt of all of his several utterances as constituting but one contempt, and subject, as such, to but the single, or at most double, penalty provided and limited by law for the punishment of a contempt of court. We are unable to accede to the peti-

tioner's contention in the foregoing regard. The several broadcasted addresses of the petitioner occurred upon different dates and were delivered, of necessity, therefore to different audiences, and dealt in the main with different phases of the proceedings then pending in the courts and before the judicial officers against which his animadversions were in each instance directed. They therefore, in our opinion, each constituted a separate offense and were properly dealt with as such by the trial court. The petitioner makes the final contention that, conceding this to be true, the trial court was still in error in making its judgment and commitment, and the punishment prescribed thereby, run consecutively instead of concurrently, in conformity to what it is insisted the law relative to such judgments and commitments intends. In making this contention, counsel for the petitioner concedes that section 669 of the Penal Code relative to concurrent penalties does not apply to cases of contempt, in view of the provisions of section 11 of the Penal Code. It is, however, insisted that, in the light of these provisions of the Penal Code, there is no law in California permitting consecutive sentences in contempt cases. No authorities, however, are cited on behalf of the petitioner in support of this contention. But from the briefs and arguments of counsel for the respondent herein it appears that from an early date in our judicial history courts have claimed and exercised the right to impose consecutive sentences in contempt cases, and have been upheld in that regard by the court of last resort. *People v. Forbes*, 22 Cal. 135, is the earliest, and *Lindsley v. Superior Court*, 76 Cal. App. 419, 245 P. 212, is the latest, decision of our appellate tribunals upholding this power and its exercise on the part of trial courts. The case last cited is instructive in its practical identity with the instant proceeding and in its exhaustive citation of authority in support of its conclusions. The case of *Solano Aquatic Club v. Superior Court*, 165 Cal. 278, 131 P. 874, is also instructive in its statement of what we deem to be the settled law with respect to the separate and consecutive penalties to be imposed upon several, though consecutive, acts, each amounting to a contempt of court.

The record herein discloses that the petitioner, prior to his application to this court for a writ of habeas corpus and to the granting of said writ, with the consequent release of the petitioner pending a hearing thereon, had been imprisoned for a period of the fifteen days covered by the four terms of five days each provided for in the aforesaid judgment and commitment, and that in addition thereto the petitioner in his application for said writ had offered to pay whatever portions of the fines imposed upon him should be found to remain due under his contention that

but a single penalty for a single contempt should have been imposed. It appears, therefore, that, eliminating the penalty imposed under the first count in said accusation, he has served the periods of imprisonment lawfully imposed under said commitment, but that the fines imposed by the consecutive penalties thereof remain unpaid.

It is, therefore, ordered that the proceedings under and in conformity with the writ of habeas corpus heretofore issued herein be and the same are hereby discharged, and that the petitioner be and he is hereby remanded to the custody of the respondent herein.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

210 Cal. 472

PACIFIC STATES CORPORATION v. PAN AMERICAN BANK OF CALIFORNIA.

L. A. 12433.

Supreme Court of California.

Oct. 15, 1930.

Appeal and error ☞756.

Brief setting forth, in substance, complaint and demurrers, calling court's attention to paragraphs of lease involved, and asking for declaration of plaintiff's rights and duties, together with citation of authorities, held sufficient (Code Civ. Proc. § 953a; Rules of Supreme Court, rule 8).

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the Pacific States Corporation against the Pan American Bank of California and others. From a judgment of dismissal, plaintiff appeals. On motion to dismiss appeal.

Motion denied.

Russell & Heid, of Tulare, and Robert Brennan, of Los Angeles, for appellant.

Alfred L. Armstrong, of Los Angeles, for respondent American Safe Deposit Co.

O'Melveny, Tuller & Myers, of Los Angeles, and Elbert W. Davis, J. H. Hoffman, and Albert A. Rosenshine, all of San Francisco, for respondent Ewing, Sp. Deputy Superintendent of Banks.

Chandler, Wright & Ward, of Los Angeles, for respondent Stockholders' Auxiliary Corporation, etc.

PER CURIAM.

Appellant filed in the court below a complaint styled "Complaint for Declaratory Relief and Injunction." General demurrers thereto were sustained without leave to amend and judgment of dismissal was duly entered and an appeal taken to this court. Respondents move for an order dismissing the appeal, and/or an order affirming judgment, on a number of grounds, the substance of which is that appellant has not printed in its opening brief or in any supplement thereto such portions of the record as it desires to call to the attention of the court, as required by section 953a of the Code of Civil Procedure, in support of its plea for a reversal of the judgment; and has not complied with rule 8 of this court relating to the same matters.

Appellant's short brief may be subject to some of the criticisms advanced by respondents, but the substance of the complaint and demurrers does quite clearly appear, and the court's attention is "attracted" to paragraphs 11, 13, and 18 of the long lease between the parties. It is stated in the brief "that there was an actual controversy relating to the legal rights and duties of the respective parties and the prayer of the complaint asked for a declaration of plaintiff's rights and duties in the premises, including a question of construction arising under such written instrument or contract." The brief concludes with a citation of authorities: *Oldham v. Moodie*, 94 Cal. App. 88, 270 P. 688, and *McIntyre v. Cons. Water Co.*, 205 Cal. 231, 270 P. 444, which seem to support the contention of appellant that the complaint contains a sufficient statement of a cause of action to withstand a general demurrer.

The motion is denied.

210 Cal. 323

BERG v. TRAEGER.

L. A. 12238.

Supreme Court of California.

Sept. 26, 1930.

1. Appeal and error ⇨32.

Statutes amending act authorizing establishment of municipal court deprived District Courts of Appeal of jurisdiction over appeals from superior courts in action within jurisdiction of municipal courts (St. 1929, p. 837).

2. Statutes ⇨276(1).

Generally, action dependent on statute falls with repeal of statute, even after action thereon is pending, in absence of saving clause.

3. Statutes ⇨263.

Every statute will be construed to operate prospectively, unless intention that it should have retroactive effect is clearly expressed.

4. Appeal and error ⇨2.

Statute depriving District Courts of Appeal of jurisdiction over appeal from superior courts in any action within jurisdiction of municipal court did not take from appellate court jurisdiction of appeal vested at time amendment became effective (St. 1929, p. 837).

5. Sheriffs and constables ⇨138(3).

Findings in seller's action against sheriff for conversion of automobile sold under conditional contract *held* supported by evidence.

The findings were to the effect that the plaintiff sold the automobile under a conditional sale contract, that the sheriff levied attachment on the automobile in action commenced by a third party against the purchaser, and that the sheriff, notwithstanding notice of conditional sale contract, sold the automobile at execution sale, disregarding seller's notice of third party claim, served under Code Civ. Proc. §§ 549, 689.

6. Sheriffs and constables ⇨140.

Findings in seller's action against sheriff for conversion of automobile sold under conditional sale contract *held* to support judgment for seller.

7. Trial ⇨165.

Entry of judgment for plaintiff works as denial of defendant's motion for nonsuit.

8. Trover and conversion ⇨53.

Allowance of interest from August 28, 1924, *held* not error, where evidence established that conversion of automobile occurred between August 20 and August 28, as alleged in complaint.

9. Evidence ⇨489.

In seller's action for conversion of automobile sold under conditional contract, seller *held* properly permitted to testify as to automobile's value.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Enoch Berg against William I. Traeger. From a judgment of the superior court of Los Angeles county affirming a judgment of the municipal court, the defendant appeals.

Affirmed.

Nathan M. Dicker and Abe Richman, both of Los Angeles, for appellant.

A. E. McManus, of Los Angeles, for respondent.

C. E. Spencer, of Beverly Hills, amicus curiæ.

WASTE, C. J.

[1] This action, to recover the sum of \$999 and interest as damages arising out of the alleged wrongful conversion of an automobile by the sheriff of Los Angeles county, was commenced and prosecuted to judgment for the plaintiff in the municipal court of the city of Los Angeles. Defendant appealed to the superior court of Los Angeles county, and, from the judgment of affirmance therein entered, he perfected an appeal to the District Court of Appeal on March 30, 1927. That court, of its own motion, has dismissed the appeal (285 P. 332; 286 P. 469) on the ground that an amendment to the Municipal Court Act, effective August 14, 1929, deprived the court of jurisdiction. St. 1929, p. 837. The cause of action arose outside the city, but within Los Angeles county. Prior to the 1929 amendment, supra, a distinction was made between cases arising within a city, and those arising outside the city, in which a municipal court is established, but within the county. In the former class of cases no appeal lay from the superior court to the District Courts of Appeal, while in the latter class of cases such appeal did lie. *Johnston v. Wolf*, 208 Cal. 286, 280 P. 980. The amendment had the effect of depriving the District Courts of Appeal of jurisdiction over appeals from the superior courts in any action within the jurisdiction of the municipal courts; but, at the time the amendment became effective, there were pending and undetermined before the several divisions of the District Courts of Appeal many appeals from judgments of the municipal courts, and it therefore became necessary to determine what effect, if any, the change of jurisdiction resulting from said amendment had upon appeals duly perfected prior thereto. Upon this jurisdictional question the several divisions of the District Courts of Appeal were unable to agree, with the result that this cause, among others, was transferred to this court.

[2-4] While it is the general rule that a cause of action or remedy dependent on statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute (*Callet v. Alioto* [Cal. Sup.] 290 P. 438; *Moss v. Smith*, 171 Cal. 777, 155 P. 90; *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, 37 L. R. A. [N. S.] 934, Ann. Cas. 1912B, 1148), it is equally well settled and is a fundamental rule of statutory construction that every statute will be construed to operate

prospectively, and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed (*Callet v. Alioto*, supra; *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48; *Montecito County Water Dist. v. Doulton*, 193 Cal. 398, 224 P. 747). There is nothing in the 1929 amendment of section 29 of the Municipal Court Act, supra, indicating that it was intended to have a retroactive operation. The better reasoned cases, we believe, are those that support the view that the change in the appellate jurisdiction of the District Courts of Appeal, in so far as appeals from judgments of municipal courts are concerned, was not intended to apply retroactively, and hence does not take from the appellate courts jurisdiction of appeals perfected at the time the amendment became effective. In this connection, see the cases of *Jones v. Summers* (Cal. App.) 286 P. 1093, and *Harris v. Moore* (Cal. App.) 283 P. 76.

It is therefore necessary that we consider this appeal on its merits. The action is one for the conversion of an automobile. The findings establish the material facts. Plaintiff was the owner of the automobile involved. On April 11, 1924, he entered into a conditional contract of sale of the automobile with one V. H. Worl, under the terms of which the purchaser agreed to pay therefor \$650 in stated installments. By the terms of the agreement, title remained in the seller until the purchaser fully complied with all the covenants and conditions of the contract. The pink certificate of ownership issued by the motor vehicle department and showing plaintiff to be the registered legal owner of said automobile, remained in the possession and under the control of the plaintiff, and no assignment or transfer thereof was made. On August 28, 1924, and for some time prior thereto, the purchaser, Worl, was in default, and had forfeited his rights under the contract, by the terms of which plaintiff was entitled to take immediate possession of the automobile. On or about that date the defendant, as sheriff of Los Angeles county, levied an attachment on the automobile in an action commenced by a third party against Worl, and took possession of the automobile from Worl without plaintiff's consent, and thereafter sold it at execution sale. Prior to such sale, the plaintiff, as provided by sections 549 and 689 of the Code of Civil Procedure, executed and caused to be served upon the defendant a notice of third party claim, notifying defendant of his ownership of the automobile, and demanding its immediate possession, but, notwithstanding such notice and claim of ownership and demand for possession, the defendant wrongfully sold and converted it.

[5-7] The findings are amply supported by the evidence and support the judgment for the plaintiff. There is no merit in appel-

lant's contention that the trial court erred in failing to pass upon his motion for a nonsuit. The entry of judgment for the respondent worked a denial of the motion.

[8] It was not error to allow interest from August 28, 1924. The testimony is somewhat uncertain as to the actual date of the conversion, but a reading of the entire record, including the exhibits, satisfactorily establishes that it occurred between the dates fixed in the complaint, viz., August 20 and 28, 1924.

[9] It was not error to permit plaintiff to testify to the value of the automobile. The owner of personal property may properly testify as to its value. *Willard v. Valley G. & F. Co.*, 171 Cal. 9, 14, 151 P. 286.

The judgment is affirmed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

Action by the D. Q. Service Corporation against the Securities Loan & Discount Company. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Pacht, Pelton & Warne, William W. Leavitt, and Clore Warne, all of Los Angeles, for appellant.

Henry G. Bodkin, of Los Angeles, for respondent.

WASTE, C. J.

[1] This cause was originally and properly appealed to the District Court of Appeal (285 P. 335; 286 P. 470), prior to the amendment of the "act authorizing the establishment of municipal courts," etc., effective August 14, 1929 (St. 1929, p. 837). That court, however, of its own motion, made and entered an order dismissing the appeal for lack of jurisdiction on the ground that the amendment should be given a retroactive effect, thereby working a dismissal of this and other pending appeals which had been perfected before the effective date of the change in the law. Our views upon the jurisdictional question involved are fully set forth in the case of *Berg v. Traeger*, 292 P. 495, this day filed. We need only direct our attention, therefore, to the merits of the appeal in this cause.

Plaintiff seeks to recover \$430.10 as damages for the alleged conversion of two automobile truck tires. The answer denies the material allegations of the complaint, and by way of affirmative defense alleges that defendant's assignor, as lessor, had entered into a lease or conditional sales contract with one Lockhart, as lessee, for the sale and purchase of a five-ton autotruck; that, among other things, the contract provided that any accessories added to the property or improvements made thereon should become part of the property, and in event of the termination of the lease for default of lessee should not be removed from the property, but should belong to the lessor; that during the lessee's possession of the truck, and prior to his performance of the conditions of the contract, the plaintiff, at the lessee's request and with full knowledge of the terms of the contract, removed from the truck, without the defendant's consent, two tires then attached thereto, and placed thereon the two tires here in dispute, which thereupon became a part and parcel of the truck, and became the property of the defendant. The trial court's findings follow closely the allegations of defendant's affirmative defense, with the addition of a finding to the effect that the two tires in dispute cannot be removed without detriment to the truck. Judgment was entered for the defendant.

210 Cal. 327

D. Q. SERVICE CORPORATION v. SECURITIES LOAN & DISCOUNT CO.

L. A. 12239.

Supreme Court of California.

Sept. 26, 1930.

Rehearing Denied Oct. 23, 1930.

1. Appeal and error ⇐2.

Statute depriving District Courts of Appeal of jurisdiction over appeal from superior courts in any action within jurisdiction of municipal court did not take from appellate court jurisdiction of appeal vested at time amendment became effective (St. 1929, p. 837).

2. Accession ⇐1.

Conditional seller, with knowledge of lease contract, *held* not estopped to claim tires attached to leased truck repossessed by lessor.

No estoppel existed where it was not alleged, proved, or found that lessor was injured by any act of conditional seller of tires; finding that tires could not be removed without detriment to truck failing to show estoppel, where uncontroverted evidence disclosed that removal of tires furnished by conditional seller would leave truck in substantially same condition that it was prior to their attachment.

In Bank.

Appeal from Superior Court, Los Angeles County; Michael J. Roche, Judge.

The plaintiff appeals and urges, in substance, that it had sold the two tires to the lessee, Lockhart, under a conditional sales contract, retaining title to the tires in itself until full payment had been made therefor, and that, at the time defendant repossessed itself of the truck and "converted" the tires, Lockhart had not fully paid for them. From this premise appellant argues that it is still the owner of the tires and cannot be divested of title thereto by the provisions of the lease contract between defendant and Lockhart to which it is not a party, citing, among others, *Meister, etc., Co. v. Harrison*, 56 Cal. App. 679, 206 P. 106, *Clarke v. Johnson*, 43 Nev. 359, 187 P. 510, and *Berry on Automobiles* (5th Ed.) § 1593. These authorities support the contention of appellant as a general rule of law applicable in cases in which the title to the accessories and replacements had not passed to the purchaser of the automobile, but are not strictly applicable to the situation here presented. If the appellant had placed the tires on the truck in ignorance of the provisions of the auto lease contract, there would be no doubt as to its immediate right to recover in this action; but, in support of the findings, it appears from the evidence that, before attaching the tires to the truck, the appellant was told by Lockhart that the truck was not paid for, but was being bought under a lease contract with the defendant, to whom appellant was referred; and there is evidence that appellant sought to have the respondent finance the sale of the tires to Lockhart, but was refused, and that appellant was also notified by the respondent that the tires put on the truck would be claimed by respondent and would not be allowed to be removed.

[2] The allegations of the respondent's affirmative defense and the findings apparently proceed upon the theory of an estoppel, but it is not alleged, proved, or found that the respondent was in any way injured by any act of appellant. The finding that the tires cannot be removed without detriment to the truck fails to supply one element essential to support an estoppel. There is uncontroverted evidence to the effect that, at the time the appellant attached its tires to the truck wheels, the vehicle was in need of new tires, the old ones having "worn out." Therefore the removal of the tires furnished by the appellant will leave the truck in substantially the same condition that it was prior to their attachment, and the respondent will not suffer any injury. The cause must therefore go back for a second trial in order to permit the trial court to determine, upon competent evidence, whether or not the respondent in any way altered its position to its detriment in relying upon the appellant's apparent abandonment of title.

The judgment is reversed, with directions to the court below to proceed as herein outlined.

We concur: PRESTON, J.; SEAWELL, J.; RICHARDS, J.; SIENK, J.; CURTIS, J.; LANGDON, J.

108 Cal. App. 739

FLEMING et al. v. DOLFIN et al.

Civ. 5829.

District Court of Appeal, Second District,
Division 2, California.

Oct. 3, 1930.

Appeal and error ⇐2.

District Court of Appeal had jurisdiction of case originating in municipal court, where appeal from superior court was perfected prior to date constitutional provision became effective (Const. art. 6, § 4b).

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by R. C. Fleming and another, doing business under the firm name and style of Fleming & Davidson against Jessie Dolfin and another. Judgment for plaintiffs, and named defendant appeals. On motion to dismiss appeal.

Motion denied.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant.

D. A. Knapp, of Los Angeles, for respondents.

CRAIG, J.

This action having been decided in the municipal court of the city of Los Angeles, an appeal was taken to the superior court, wherein judgment was rendered in favor of the plaintiffs, and the defendant Dolfin thereafter appealed to this court from said judgment. The respondents moved to dismiss this appeal upon the ground that under the provisions of section 4b, article 6, of the Constitution, effective November 6, 1928, the superior court became the tribunal of final jurisdiction in such cases. However, the appeal last mentioned was perfected prior to said date; hence the motion is without foundation. *Harris v. Moore* (Cal. App.) 283 P. 76; *Jones v. Summers* (Cal. App.) 286 P. 1093; *Berg v. Traeger* (Cal. Sup.) 292 P. 495; *D. Q. Service*

Corp. v. Securities Loan & D. Co. (Cal. Sup.)
292 P. 497.

The motion to dismiss the appeal is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

108 Cal. App. 702

WHEATON v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.
Civ. 7501.

District Court of Appeal, Second District,
Division 2, California.
Oct. 1, 1930.

108 Cal. App. 740

FLEMING et al. v. DOLFIN et al.
Civ. 5831.

District Court of Appeal, Second District,
Division 2, California.
Oct. 3, 1930.

Appeal and error ⇨2.

District Court of Appeal had jurisdiction of case originating in municipal court, where appeal from superior court was perfected prior to date constitutional provision became effective (Const. art. 6, § 4b).

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by R. C. Fleming and another, doing business under the firm name and style of Fleming & Davidson, against Jessie Dolfin and another. Judgment for defendants, and plaintiffs appeal. On motion to dismiss appeal.

Motion denied.

D. A. Knapp, of Los Angeles, for appellants.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for respondents.

CRAIG, J.

This action having been decided in the municipal court of the city of Los Angeles, an appeal was taken to the superior court, wherein judgment was rendered in favor of the defendants, and the plaintiffs thereafter appealed to this court from said judgment. The respondents moved to dismiss this appeal upon the ground that under the provisions of section 4b, article 6, of the Constitution, effective August 14, 1929, the superior court became the tribunal of final jurisdiction in such cases. However, the appeal last mentioned was perfected prior to said date; hence the motion is without foundation. *Harris v. Moore* (Cal. App.) 283 P. 76; *Jones v. Summers* (Cal. App.) 286 P. 1093; *Berg v. Traeger* (Cal. Sup.) 292 P. 495; *D. Q. Service Corp. v. Securities Loan & D. Co.* (Cal. Sup.) 292 P. 497.

The motion to dismiss the appeal is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

1. Courts ⇨160.

Statute changing jurisdiction of municipal court did not deprive superior court of jurisdiction to continue action to foreclose mechanic's lien commenced before statute became effective (St. 1929, p. 837).

2. Statutes ⇨163.

Generally, statutes should not be construed retroactively unless it is clear that such was legislative intention.

3. Mandamus ⇨3(3).

On application for writ of mandate, court could not consider error at law, if any, in form of judgment as rendered.

Application for writ of mandate by Maude Wheaton, prayed to be directed to the Superior Court in and for Los Angeles County, Joseph P. Sproul, Judge, to compel respondent to vacate judgment and to vacate foreclosure sale.

Writ denied.

Joseph Mayer, of San Francisco, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

SCHMIDT, Justice pro tem.

On April 24, 1929, one John C. Flick filed in the superior court of Los Angeles county his action against one Maude Wheaton, petitioner herein, to foreclose a mechanic's lien in the sum of \$917.20. On April 22, 1930, said petitioner herein moved the respondent court to dismiss the action on the ground that the property against which the lien was attempted to be foreclosed was within the city of Los Angeles and that by reason of the change in jurisdiction of the municipal court, as provided by act of the 1929 legislature (*Deering's Gen. Laws*, 1929, p. 3527), the superior court had lost jurisdiction of the action. The motion was denied. Subsequently the case was tried and judgment rendered in favor of the plaintiff, against petitioner, in the sum of \$917.20, plus interest and costs, and provided that same be adjudged a lien against the land described in plaintiff's complaint. Subsequently an order of court was made appointing a commissioner to sell the real property described in the judgment; ex-

ecution issued thereon, and the commissioner, pursuant to the execution, sold the property. Subsequently an order was issued to show cause why the judgment should not be vacated and set aside and why the commissioner should not be permanently restrained from selling the premises referred to in the judgment. The motions to vacate and set aside and to restrain the commissioner from selling were denied, and the order to show cause dismissed. Petitioner thereupon filed her petition in this court, asking for a writ of mandate compelling the respondent superior court to vacate said judgment and set aside the sale of the property by the commissioner.

[1, 2] Petitioner contends by reason of the change in the jurisdiction of the municipal court by the act of the 1929 Legislature that the superior court was deprived of jurisdiction to continue with the action. If this contention is correct, then the action should have been dismissed in the superior court and a new action would have to be filed in the municipal court. This would have become a useless act, for by the terms of section 1190, Code of Civil Procedure, the lien theretofore filed under section 1183, Code of Civil Procedure, would have become ineffective, inasmuch as more than ninety days had elapsed from the filing of the lien to the bringing of the new action. Article 20, § 15, of the Constitution of the state of California, provides: "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens." This makes it mandatory upon the Legislature to provide a remedy for the foreclosure of a lien.

The amendments of the 1929 Legislature changing the jurisdiction contained no saving clause; nor was any method provided for transfer to the municipal court of actions then pending in the superior court. This shows an entire absence of intent upon the part of the Legislature that the act should operate retrospectively upon the many cases then pending in the superior court. Surely, the Legislature, in changing the jurisdiction, must have had in mind the constitutional provision providing for liens, and, if it had intended that cases then pending in the superior court should be transferred to the municipal court, it without doubt would have provided the means for such transfer. As was said in *Estate of Frees*, 187 Cal. 150, at page 156, 201 P. 112, 114, "It is also a general rule of statutory construction that statutes should not be construed retrospectively unless it is clear that such was the legislative intention."

We conclude, therefore, that the amendment could apply only to new cases filed involving liens.

In *Architectural Tile Co. v. Superior Court* (Cal. App.) 291 P. 586, recently decided by this court but not yet final, and in *Berg v. Traeger* (Cal. Sup.) 292 P. 495, similar questions were involved, and the reasoning in each case reached the same conclusion.

[3] Attack is made upon the form of judgment as rendered. We cannot consider same in this proceeding. The matter to which complaint is directed is at best an error at law, and, if an error at law, must be corrected upon appeal.

Petition for writ of mandate denied; respondent to recover his costs in this proceeding.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

PEOPLE v. PANTAGES.*
Cr. 1922.

District Court of Appeal, Second District,
Division 1, California.

Sept. 26, 1930.

Rehearing Denied Oct. 10, 1930.

Hearing Granted by Supreme Court Oct. 24,
1930.

1. Criminal law ⇨719(1).

In criminal case, argument of counsel should be based solely upon evidence.

2. Criminal law ⇨704.

Opening statement by defendant's counsel does not constitute evidence and is not binding, and therefore, in absence of bad faith, failure to make good such statement should not be argued.

3. Criminal law ⇨713.

Conviction should not rest even slightly upon dereliction of counsel, but should ordinarily be grounded upon acts committed by defendant.

4. Criminal law ⇨704.

District attorney may in argument direct jury's attention to defendant's failure to substantiate counsel's opening statement.

5. Criminal law ⇨1171(1).

In prosecution for statutory rape, prosecutors' argument, in effect, charging defend-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 297 P. 890.

ant's counsel with grossest bad faith in failing to substantiate part of opening statement, *held* prejudicial error.

Defendant's counsel, in opening statement, pointed out what defendant expected to prove in his defense. Defendant repeatedly but unsuccessfully attempted to introduce certain evidence to substantiate part of opening statement, whereupon district attorney and deputy in argument to jury pointed out that defendant's attorneys failed to make good fulfillment of their promise which represented only bunch of "unredeemed pledges" and in effect charged defendant's attorneys with the grossest bad faith.

6. Criminal law $\Rightarrow$ 730(1).

Instruction to disregard improper argument does not cure error, where it appears reasonably clear that harmful result could not have been remedied.

7. Criminal law $\Rightarrow$ 730(8).

In prosecution for statutory rape, prosecutors' argument giving their personal opinion with reference to witnesses' character or credibility *held* prejudicial error, notwithstanding instruction to disregard.

District attorney in substance told jury during argument that as long as he was district attorney he would not put named doctor on witness stand, and that wife of another witness appeared in desperation to support her husband's testimony. As to another witness prosecutor stated that he "is as clean as a hound's tooth and there isn't a thing against him," and as to still another that "he stands without the possibility of impeachment."

8. Criminal law $\Rightarrow$ 730(8).

In prosecution for statutory rape, district attorney's argument based on assumption that prosecutrix was a virgin *held* prejudicial error, notwithstanding cautionary instruction.

Based on assumption that prosecuting witness was a virgin, district attorney made dramatic appeal to jury. At close of case, trial court instructed jury that if counsel upon either side made any statements concerning facts of case "you must be careful not to regard such statements as evidence and must look entirely to the proofs in ascertaining what the facts are."

9. Witnesses $\Rightarrow$ 372(1).

Questions on cross-examination of witness, tending to show bias, are competent, and great latitude should be allowed in developing existence of bias (Code Civ. Proc. §§ 1847, 2051).

If witness, directly or indirectly, be induced either to give false testimony or

to color truth of sworn statements, jury should be placed not merely in possession of affirmative ultimate fact of bias or denial thereof, but, if necessary, should hear basic facts, if any, upon which such conclusion is founded.

10. Witnesses $\Rightarrow$ 372(2), 374(1).

Fact that witness may have received some favorable consideration from district attorney for favorable testimony may be disclosed by cross-examination or other evidence.

11. Witnesses $\Rightarrow$ 372(2).

In prosecution for statutory rape, refusing to permit cross-examination of state's witness, regarding motives or state of mind, *held* error (Code Civ. Proc. §§ 1847, 2051).

Proposed cross-examination sought to inquire of witness whether he knew that he had been indicted in another state on various criminal charges, and whether any arrangement or promise had been held out to him by district attorney or police department or sheriff, whereby if witness should testify favorable to prosecution in instant case he might receive leniency or more favorable action in case of possible extradition.

12. Rape $\Rightarrow$ 40(2).

In prosecution for statutory rape, evidence showing previous acts of unchastity is inadmissible for sole purpose of attacking prosecutrix's character.

13. Rape $\Rightarrow$ 40(2).

In prosecution for rape, accomplished by force or violence, testimony showing prior unchaste acts of prosecutrix is admissible.

Evidence under such circumstances is admissible, not for direct purpose of impeaching prosecutrix's character, but for purpose of discrediting her testimony relating to use of force or violence by defendant in accomplishing his purpose.

14. Rape $\Rightarrow$ 40(2).

In prosecution for statutory rape, where prosecutrix testified defendant used force and violence, defendant's testimony showing prosecutrix was not virgin on date of alleged attack *held* admissible (Code Civ. Proc. § 2061, subd. 3).

Testimony complained of and excluded was admissible as supporting theory that prosecutrix prior to alleged attack was lacking in virtue, and that therefore her testimony relating to force and violence exerted by defendant was not to be believed, and consequently either that no crime was committed or that, if committed, prosecutrix consented thereto.

15. Rape *Pen. Code* § 264(2).

Testimony showing previous unchastity of prosecutrix *held* admissible as bearing on place of imprisonment to be recommended by jury (*Pen. Code*, § 264).

16. Rape *Pen. Code* § 264(2).

In prosecution for statutory rape, testimony showing prosecutrix was not virgin on date of alleged attack *held* admissible as bearing on question of penetration.

If from the evidence the jury believed that no penetration took place, defendant at most could have been convicted of no greater offense than attempt to commit rape.

17. Indictment and Information *Pen. Code* § 164.

Issue of fact in criminal cases arises from allegation of ultimate fact made by one of parties which is denied by other.

Generally only manner recognizable in court of law for determination of issue of fact is introduction of evidence made acceptable by statute or by established legal practice.

18. Criminal law *Pen. Code* § 857(1).

Jury in determining ultimate fact of either guilt or innocence should not be influenced by either pity or sympathy.

19. Rape *Pen. Code* § 13.

Generally in prosecution for statutory rape, consent of prosecutrix is not an issue.

Where prosecutrix, though under age of 18 years, testifies that rape was accomplished by force or violence exerted by defendant, evidence of consent becomes admissible, not only for purpose of impeachment as to manner in which act was accomplished, but also for purpose of laying foundation for impeachment as to whether crime was committed at all.

20. Rape *Pen. Code* § 59(8).

In prosecution for statutory rape, instruction that prosecutrix's consent was wholly immaterial *held* prejudicial error, where evidence showing consent was admissible for impeachment purposes.

21. Rape *Pen. Code* § 60.

Jury's recommendation, in rape case, as to place of imprisonment, is essential, inseparable part of verdict, and therefore binding upon trial court (*Pen. Code*, § 264).

22. Rape *Pen. Code* § 38(1).

In prosecution for statutory rape, testimony showing facts and circumstances attending commission of offense *held* admissible

for jury's consideration on question of place of imprisonment (*Pen. Code*, §§ 17, 264).

Facts and circumstances surrounding offense, admissible, include degree of force or violence exercised by defendant, consent of prosecutrix, and any other circumstances throwing relevant and material light upon true situation of defendant and prosecutrix at and reasonably preceding time offense was alleged to have been committed.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Alexander Pantages was convicted of the crime of rape of a female person under the age of 18 years, and he appeals.

Reversed, and cause remanded for a new trial.

See, also, 286 P. 467, 469; 291 P. 831.

Le Compte Davis, Jerry Giesler, W. I. Gilbert and Earle M. Daniels, all of Los Angeles, and Louis Titus, of Washington, D. C., for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Robert P. Stewart, Chief Deputy Dist. Atty., and Harold Jones, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

Defendant appeals from a judgment of conviction of the crime of rape of "a female person under the age of eighteen years." He also appeals from each of three several orders by which was denied respectively his motion for a new trial, his motion in arrest of judgment, and his motion for leave to file application for probation.

It is first contended by appellant that the evidence adduced on the trial of the action was legally insufficient to support the verdict. It would serve no useful purpose to herein set forth the facts which were presented by the prosecution in substantiation of the charge made against defendant. In that regard it may suffice to state that after careful consideration of the evidence, even viewed in the light as presented by appellant, this court is of the opinion that the contention as to its legal insufficiency cannot prevail.

[1-5] Misconduct of the district attorney and of his chief deputy is urged by appellant as a reason for the reversal of the judgment and the order by which the motion for a new trial was denied. In that connection, the first specification relates to comments made by the district attorney in his argument to the jury, particularly with reference to the failure of defendant to produce evidence in support of a statement made by one of the attorneys representing defendant in his opening statement

to the jury as to what defendant expected to prove in defense of the accusation of the crime, for the alleged commission of which he was then on trial. The history of such several errors of which appellant first complains is that in his argument to the jury the chief deputy district attorney made the remark that defendant's attorneys had "failed to make good the fulfillment of their promise," which represented only "a bunch of unredeemed pledges"; and that "you saw how the court repeatedly called for an offer to make competent these innuendoes—" After objection thereto by defendant, the court instructed the jury to disregard "any remarks of counsel about offers of proof." Thereafter, in presenting his argument to the jury, the district attorney referred to the same matter as that which theretofore had been commented upon by the chief deputy district attorney, to which remarks defendant again objected. Thereupon the trial court ruled that "the district attorney may call attention to the opening statement and may mention the fact that that was not sustained by evidence, and that there was no evidence to that effect." On each of several other occasions following an objection by counsel for defendant to statements contained in argument presented by either the district attorney or his chief deputy, which statement injuriously reflected upon and criticized counsel for defendant for their failure to produce evidence in substantiation of designated portions of their opening statement to the jury, the judge of the trial court not only failed to rebuke the district attorney or his chief deputy, but indicated his approval of the remark in question. An illustration of objectionable remarks made by the district attorney is the following:

"Now, ladies and gentlemen, the only reason why I am stating this thing to this jury is this: They knew in their hearts they could not prove it, they knew they had no evidence and they knew in their hearts that there was no such evidence. They had to get something before this jury. They had intimated to you, they had insinuated it to you, they had to plant a seed in your mind, and the only way in God's green world that they could get it in front of you, in the absence of some testimony, was to say it to you in their opening statement, hoping that we would overlook it in closing argument. * * * They knew in their hearts they could not prove it, for they knew it was not true, but they had to get something of that type, they had to throw up a smoke screen, and that opening statement, ladies and gentlemen of this jury, is just about in keeping with the whole character of the insinuation, the innuendoes, the aspersions on the character of that old Mrs. Pringle as she sat on the witness stand here. * * * His whole conduct, the whole conduct of the defendant, from the moment that W. I. Gil-

bert stood in front of this jury, has been the protection of a defense based on insinuation and innuendo and indirection without one single effort, or one single word of testimony coming from the lips of any human being to this jury to back up their insinuations. They could not do it and they knew it, any more than when Mr. Gilbert said, as a positive fact, in the same statement, that the spots on her clothing will be accounted for by her own physical condition—by her own physical condition! Where is your testimony? * * *

Has there been produced before this jury one single word that would account for the presence of spermatozoan upon a dress of that girl other than from the organs of the defendant himself, Alexander Pantages? I say to you, with all the earnestness and all the candor that God has put in me, that they had no evidence, and they knew before they came here that they had no evidence as to anything of that sort. They had to implant it in your minds. They had to have it there in your mind when you heard the State's case come in, instead of waiting, as they usually do in these cases, for their opening statement at the beginning of their case they implanted the seeds of innuendo and indirection into your mind, all through the case. They have not lived up to their promise to you. They could not and they knew in their hearts that it was not true and they could not have lived up to it, and they knew when they stood here and made a positive statement of fact to this jury, and to this court, that they could not prove the things that they told you they were going to prove. * * *

In *People v. Stoll*, 143 Cal. 689, 77 P. 818, the rule is stated that the only purpose of an opening statement by counsel is to apprise the jury in a general way of what is expected to be proved; but that it has no binding force as against the party in whose behalf it is made; nor can it be considered as evidence of any fact. In each of several cases where no evidence was offered in support of an opening statement made by a district attorney, the court held that, in the absence of a showing of "bad faith" on the part of the district attorney in making such statement, no reversible error was present. *People v. Wong Hing*, 176 Cal. 699, 169 P. 357; *People v. Lewis*, 124 Cal. 551, 57 P. 470, 45 L. R. A. 783; *People v. Donaldson*, 36 Cal. App. 63, 171 P. 442; *People v. Davis*, 26 Cal. App. 647, 147 P. 1184.

In the instant case the record discloses the fact that on numerous occasions occurring during the trial, owing to objections which were interposed by the district attorney and which were sustained by the trial court, unsuccessful efforts were made in behalf of defendant to introduce evidence in support of the alleged facts which, in his opening statement to the jury, the attorney for defendant had said he expected to prove, and which state-

ment was the subject of criticism and argument by the district attorney, from which it follows that, at least legally speaking, defendant may not be said to have presented his opening statement in "bad faith."

It is clear that in the trial of an action, proper argument should be based solely on the evidence, and that if the opening statement to the jury does not constitute evidence and is not binding upon the party making it, then, in the absence of "bad faith," his failure to "make good" should not be argued by the opposite party as a reason for a verdict. The conviction of a defendant of the crime of which he is accused should rest not even slightly upon the dereliction (if any) of his counsel, but ordinarily should be grounded upon acts committed by the defendant either actually or by law imputed to him. As ruled by the trial judge, and as indicated in *State v. Boyce*, 24 Wash. 514, 64 P. 719, the district attorney and his chief deputy were within their legal rights in plainly and simply directing the attention of the jury to the fact that, although counsel for defendant had stated to the jury that he expected to prove certain specified facts on behalf of defendant, nevertheless no evidence had been received by the court in substantiation thereof; but when, in substance, the district attorney and his chief deputy had thus far proceeded, the limit of legitimate quasi argument in that regard had been reached. To go further (and in the face of the fact that defendant had repeatedly, but unsuccessfully, attempted to introduce evidence relating to the situation which he had stated that he expected to develop) and to charge the attorney or attorneys who represented defendant with the grossest of "bad faith" in the matter, and thereupon, impliedly at least, to predicate an impassioned and compelling argument demanding the conviction of defendant, constituted an error which was prejudicial to the substantial rights of defendant. It is a well-known fact that intemperate and inflammatory language coming from the lips of a high officer of the county claims an attention from the ordinary juror which, if similarly given voice by the defense, it does not receive. When it is considered that what was said by the district attorney was apparently with the sanction and approval of the judge of the trial court, the prejudicial effect on the substantial rights of the defendant becomes apparent.

[6, 7] The next specifications of alleged misconduct by the district attorney relate to his argument to the jury wherein he either indicated, or by his language expressly stated, his personal opinion with reference to the personal character or reliability of each of two witnesses. The several remarks to which attention herein is directed were as follows:

(a) " * * * Doctor Beatty came on the witness stand here. I did not put Doctor

Beatty on, and I say to this jury right now, as long as I am district attorney of this county I will never put Doctor Beatty on the witness stand."

(b) " * * * What does Mrs. Biffle say? Mrs. Biffle, ladies and gentlemen. I feel sorry for her. She is here trying desperately to do what any wife would do, to support her husband. Mrs. Biffle never appeared in this picture. She testified that she read Mr. Biffle's testimony in the newspaper at home and that out of desperation she came down here to support her husband, but she didn't quite support him for, listen,—"

(With reference to the statement that "out of desperation she came down here to support her husband," it is contended by appellant, and not denied by respondent, that "a careful review of the testimony of Mrs. Biffle, * * * will not disclose even a remote basis" for the inference drawn by the district attorney.)

In addition to the foregoing, appellant complains of remarks made on each of two separate occasions in argument by the chief deputy district attorney, wherein he said:

(c) " * * * How about Mr. Gilbert (one of the attorneys who represented defendant), just as skilful as any of them, and a little bit worse. You know what he did in your presence. He actually asked that man Hale, who is as clean as a hound's tooth and there isn't a thing against him, 'Don't you know there are ten felony charges pending against you, or were pending against you on August 9th?'"

(d) " * * * Then I recall another which is symbolic of the fairness of these three experts engaged in this arduous defense and simply speak of the innuendo when Mr. Gordon, who otherwise stands, and who stands without the possibility of impeachment, they asked him questions about his visit to Reno. It was ruled out; it is not in the case."

In the case of *People v. Alpine*, 81 Cal. App. 456, 254 P. 281, 286, the record shows that the deputy district attorney in charge of the prosecution of the action made various remarks which reflected upon each of several witnesses who had testified in behalf of the defendant. On appeal, in considering the question generally, among other things, the appellate court said:

"The remarks of the deputy district attorney to which appellant took exception constituted misconduct of an extreme type, and the trial judge erred in not instructing the jury to disregard them. They did not present a legitimate argument upon the evidence before the jury, and, moreover, they constituted an impeachment of appellant's witnesses in a manner not contemplated by the law."

In *State v. Heaton*, 149 Wash. 452, 271 P. 89, 91, a situation similar to that involved

herein was given consideration by the court. It was there said:

"The declarations of counsel for the state in his argument to the jury (above quoted), referring to the credibility of certain of the state's witnesses, to the effect that he had worked with them long and was in a position to know their character, transcended the bounds of legitimate argument and amounted to an attempt on the part of counsel to testify as to the witnesses' good character. Such a statement as this cannot be met by any answering argument, and it is vain to attempt to do away with the prejudicial effect of such assertions by an instruction of the court to the effect that argument of counsel is not to be regarded as evidence." (Citing authorities.)

In the case of Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081, 1084, 58 L. R. A. 744, wherein it appeared that in his closing argument to the jury, in referring to one of the witnesses, the attorney for the prosecution had personally impeached the integrity of such witness, the conduct of the attorney was denounced and the conclusion reached that the error was so prejudicial as to necessitate a reversal of the judgment. The following excerpts from the opinion of the court will serve to illustrate the view which is generally taken with reference to such conduct:

"* * * That the statement objected to, upon its face, is improper, as an attempt to state facts to the jury as of the knowledge of the counsel, and not by way of inference from the evidence which they had a right to consider, is obvious. * * * Counsel have no right to avail themselves of the opportunity of addressing the jury in argument to make assertions upon their own knowledge, which, if admissible at all, could be so only under the sanction of a witness' oath. * * * That solemn statements of fact, not by way of argument and deduction from the evidence, but as of the counsel's own knowledge, are likely to have weight with juries, cannot be doubted. The respectability and standing of counsel only serve to enhance the peril. * * *"

In *People v. Lieska*, 161 Mich. 630, 126 N. W. 636, 639, where on appeal error arising from a similar situation was specified, among other things, the court said:

"* * * It has been repeatedly held by this court that, * * * it is reversible error for the prosecuting attorney to make unwarranted attacks upon respondent's witnesses calculated to arouse in the jury an unjust suspicion of their character and truthfulness. * * * Juries very properly regard the prosecuting attorney as unprejudiced, impartial, and nonpartisan, and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the respondent. As was said in *People v. Cahoon* [88 Mich. 456,

50 N. W. 384], supra, these questions and insinuations reflected upon the character of the witnesses. The prosecuting attorney has no right to discredit the witness by innuendo."

And in *People v. Huff*, 173 Mich. 620, 139 N. W. 1033, 1036, in which the record disclosed the fact that the prosecuting attorney adopted methods not unlike those presented for consideration in the instant case, the Supreme Court of Michigan made the statement that witnesses were entitled to respectful consideration, and not only was it the duty of the trial court to protect witnesses from insinuation and unjust and unwarranted attacks of counsel, but that: "* * * It was highly improper and reversible error for the prosecuting attorney, in the absence of testimony on the subject, to thus praise and extol the skill and standing of a witness for the people. Juries are apt to consider the prosecuting attorney as unprejudiced and impartial, and statements of fact made by him are apt to have great weight. This court has held that it is improper for the trial court to call attention to the high character of a witness in the charge. *Wisner v. Bardwell*, 38 Mich. 278. It is equally improper for the prosecuting attorney to go outside the testimony and make such statements."

The record herein shows that as to each of the several remarks hereinbefore set forth timely objection thereto was made by an attorney representing defendant on the trial of the action, and that in each instance the judge of the trial court instructed the jury to disregard it. It is now urged by respondent that in such circumstances any erroneous conduct in the premises committed by the district attorney, or by the chief deputy, must be deemed to have been corrected and the error thus voided. Although authorities are not lacking in their declaration of the law in substance that the effect of such prejudicial misconduct may be cured by an instruction to the jury to disregard the remark of counsel, nevertheless an exception to such general rule is noted where the misconduct is of such a character that it is reasonably clear that its harmful result could not have been obviated or remedied by an instruction to the jury to disregard it. *People v. Simon*, 80 Cal. App. 675, 679, 252 P. 758, and cases there cited. It is apparent that repeated acts of misconduct of the same tenor may present a situation radically different from a single isolated transgression of the same general nature; also, that a stern rebuke by the judge of the trial court to the violator of the rule which forbids conduct of the nature of that here under consideration might possibly remove the impression initiated by the misconduct in question. But, to the contrary, that a mild suggestion from such judge as to the impropriety of several separated acts of misconduct, each of the same variety as the others,

might produce no result other than a possible accentuation in the minds of the members of the jury of the specific remarks which constituted the several acts of misconduct and carry with them the conviction that in their essence, aside from technical rules of legal practice, the assumed misconduct was in fact praiseworthy and in reality should be considered as entirely proper and wholly exempt from just, adverse, judicial censure, or other criticism.

[8] Another specification of error presented by appellant relates to misconduct on the part of the district attorney in that in addressing the jury he prejudicially assumed the existence in the evidence of the fact that the prosecuting witness was a virgin; and thereafter, based wholly on such assumption, made a dramatic appeal to the passion and prejudice of the jury. An illustration of each of several of the remarks made by the district attorney are the following:

(a) " * * * What did that telephone call show you or this court, or show in this case, whether or not this man raped (the prosecutrix) on the night of August 9th? They put it there to do nothing more in God's world than to blame that girl's mother, to assassinate and destroy the character as that man destroyed her virginity and her body on the afternoon of August 9th, by insinuation, by indirection, by—under that guise and that camouflage. * * * "

(b) " * * * The girl sat there and finally, drive, drive, drive, when she came to the fact of the great moment of her life, and all that any woman holds dear is taken from her, not under the vows of the marriage bed, not under the vows of love given to her, but by brute force, at the hands of a fiend that afternoon, she finally broke down, and there wasn't a man, or woman in this courtroom whose heart did not know that that girl broke down honestly and sincerely because of what had happened to her at the hands of this man with the polluted body and polluted soul on the afternoon of August 9th. * * * "

(c) " * * * This is the insanity that lurked in that man's polluted mind, that is the insanity, and that is the thought that was harbored by his filthy body as he struck that girl down from her girlhood and placed upon her brow, or attempted to place upon her brow, the crown of infamy by branding her a blackmailer. What do you want him to do? Are the American jurors of today, are men and women of this country, going to stand here and let that man with all of his power or authority in America cover up and brand with infamy, by reason of the very power and wealth and strength that he has, after taking this girl's virginity, after destroying her character, then to brand her with the in-

famy of being a blackmailer by reason of the very position he holds? That is the insanity that lurked in that man's mind that afternoon, and this jury knows in your hearts that that is the insanity that lurked in this man's mind that afternoon as he took that girl's body."

However, in connection therewith it should be noted that at the close of the case, the trial court instructed the jury that:

" * * * If counsel, upon either side, or the court have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are."

In the case of *People v. Fong Sing*, 38 Cal. App. 253, 266, 175 P. 911, 916, in dealing with an analogous situation, in part, the court used the following language:

"There is nothing we can add to what has been said in the former opinion filed herein, except to express hearty concurrence in the general animadversion of the learned lawyer upon the practice too often resorted to in criminal cases by public prosecutors of lugging into their cases in argument matters having vital bearing upon the case which have not been brought in by evidence and which are calculated to deprive an accused of that fair and impartial trial which is guaranteed to him by the Constitution and the statute laws of the state. * * * And it is equally a mistake for such an officer to suppose that it is proper for him to present to the jury anything but strictly legal evidence in support of the charge, or that it is within the sphere of legitimate argument to prejudice the standing of the accused in the minds of those who are to determine an issue so serious to him by insinuating in the course of his address that some fact bearing strongly against the accused which has not been proved by proper evidence in reality exists."

The language of the Supreme Court of this state, used by it in the case of *People v. Lee Chuck*, 78 Cal. 317, 328, 20 P. 719, 723, is indicative of the general view held by the several courts of last resort throughout the United States with reference to the duty of the district attorney in the prosecution of a criminal action. It is as follows:

"We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position

to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it."

Without citing further authority, it may suffice to state that, particularly in criminal actions, the practice of indulging in inflammatory remarks to the jury, especially where, as here, they are founded upon facts not in evidence, is universally condemned by reviewing courts and frequently assigned as the sole cause for reversal of judgments and the award of new trials to defendants. In this connection it may be noted that the case of *People v. Hail*, 25 Cal. App. 342, 143 P. 803, although following a well-beaten path with reference to misconduct of the district attorney in the particular here in question, contains many appropriate comments and suggestions which well might be the subject of careful consideration. For further illustrations of the judicial attitude toward infractions of the rule, see *People v. Clayton*, 89 Cal. App. 405, 413, 264 P. 1105; *People v. Alpine*, 81 Cal. App. 456, 467, 254 P. 281; *People v. Adams*, 92 Cal. App. 6, 10, 267 P. 906, and cases there cited.

Although great allowance should be and universally is made by the courts for the zeal of the district attorney, especially as may be displayed by him in the heat of argument, and although, as is stated in the case of *People v. Branch*, 77 Cal. App. 384, 246 P. 811, 814, the remarks ordinarily made by a district attorney may be considered by the jury as "argumentative rather than evidentiary in their nature," nevertheless such an assumption regarding the effect of any and every remark made by a district attorney in his argument to the jury, wherein, either directly or by insinuation, he personally testifies to some vital fact in the case, should neither escape deserved adverse criticism from the bench as well as from the bar, nor be universally cured either by regarding it as "argumentative, rather than evidentiary," or by a general and all-inclusive instruction to the jury to disregard it.

Appellant specifies several other alleged acts of misconduct by the district attorney, or by his chief deputy, but as in principle they are more or less covered by what heretofore has been stated herein, it becomes unnecessary to devote the attention to them which otherwise they might well deserve.

[9-11] Prejudicial error is urged by appellant in that the trial court refused to permit defendant to cross-examine a witness produced by the prosecution relative to the motives or "state of mind" of such witness. It

appears that the testimony given by such witness was of extreme importance to the prosecution, in that to a great extent it was corroboratory of the testimony given by the prosecutrix. In connection with the question thus presented, the record discloses that, as was indicated by admissions or statements of counsel representing defendant, and which were developed in argument had in the absence of the jury, defendant proposed to inquire of the witness whether he knew, or had information to the effect, or suspected that he had been indicted in the state of Texas on ten separate criminal charges, or on any such charge or charges; and assuming the existence of such fact or facts, what arrangements, or promises, if any, had been either expressly or impliedly made or held out to him, especially by the district attorney of the county of Los Angeles, or by any of his deputies, or by any member of the police department of the city of Los Angeles, or by the sheriff of the county of Los Angeles, or by any of his deputies, by or through which he was either told directly, or was given to understand, that by testifying in any respect favorable to the prosecution in the instant case he might expect some leniency, or at least more favorable action from the district attorney with reference to the possible extradition of the witness on the Texas indictments against him, than though his testimony were not so favorable to the prosecution. Furthermore, that in and by such proposed cross-examination, even in the total absence of any substantial foundation for the existence of any such anticipated action by the district attorney, defendant claimed the right to ascertain whether the witness had then, or ever had, a belief, or hope, or "state of mind," that by reason of his giving testimony favorable to the prosecution in the instant action he would secure, or might be likely to obtain, any favor or advantage whatsoever at the hands of the district attorney.

It should require neither argument nor authority as the basis for an assertion that if it be established as a fact that by the use of direct or even by veiled threats, or through insinuations, or innuendo, or intimidation, or menace of any sort, or by means of promises of assistance, or of influence to be exerted in his behalf, expressly made, or but ambiguously suggested by or through any one either actually or assumedly in authority in the premises, or even by an utter stranger or interloper in the proceedings, or by any way, method, or manner whatsoever, a witness be thereby induced either to give false testimony, or to color the truth of his sworn statements, the jury should be placed not merely in possession of the affirmative ultimate fact of the bias of the witness, or his denial thereof, but, if necessary, should hear the basic facts, if any, upon which such conclusion be founded. In connection with the question of law pre-

sented for consideration by this court, it appears that the only material questions which defendant was permitted to ask of and to have answered by the witness were as to whether, on the day on which the offense of which defendant was charged was committed, the witness knew that ten felony charges were pending against the witness in the state of Texas; also as to whether, prior to such date, he was aware of that fact. Each of such questions was answered by the witness in the negative. All other questions proposed to be asked of the witness by counsel representing defendant, which had any direct bearing on the motive, or "state of mind" of the witness, at the time he was giving his testimony, were excluded by the trial court. Illustrative of the questions propounded to the witness, and to which objections thereto presented by the prosecution were sustained by the trial court, is the following:

"Did you discuss with any member of the district attorney's staff, or of the police department who were connected with this case, the question as to whether or not there were ten felony charges pending against you in Texas?"

In claiming the right to cross-examine the witness concerning the alleged indictments which were then or had been pending against him in the state of Texas, defendant relied, not upon the provisions of section 2051 of the Code of Civil Procedure, which relate particularly to the impeachment of a witness, but rather upon that portion of section 1847 of the Code of Civil Procedure, which, in effect, provides that, notwithstanding the rule of law that a witness is presumed to speak the truth, such presumption may be repelled by evidence affecting "his motives" in giving his testimony.

As relates to the impeachment of a witness in such manner as is provided by section 2051 of the Code of Civil Procedure, authorities emanating from various jurisdictions throughout the United States are not in harmony, one with the other; but as concerns the situation hereinbefore outlined, where the motive or "state of mind" of the witness is the objective of the cross-examination, the several authorities in this state are unanimous in the declaration that questions which would have a tendency to show bias of a witness are not only competent, but that great latitude in cross-examination should be allowed in developing its existence. A situation analogous to, if not identical with, that which is presented by the record herein has heretofore received consideration in each of several cases decided by the appellate courts of this state.

In perhaps what may be termed the leading case of *People v. Dillwood*, 4 Cal. Unrep. Cas. 973, 39 P. 438, 439, it appears that a witness for the prosecution "admitted that he had

"pleaded guilty to stealing the Johnson cow," and had been sent to the Whittier Reform School." Thereupon he was asked if felony charges were not then pending against him and were not pending against him before he was sentenced to the reform school. In passing upon the admissibility of the questioned evidence, the Supreme Court said:

"* * * Before the enactment of section 2051, Code Civ. Proc., the conviction of a felony could only be proved by the production of the record, if objections were made. That it may now be shown by the admission of the witness upon the stand is an exception to the general rule that the record, being the best evidence, must be produced. It is competent to show the fact that other criminal charges are pending in the same court against the witness at the time he testifies, not, however, as evidence of particular wrongful acts, for as to these he is presumed to be innocent, but as a circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant. These charges should, however, be proved by the record if objection is made to oral evidence of them."

In the case of *People v. Bennett*, 79 Cal. App. 76, 94, 249 P. 20, 27, the defendant was charged with the crime of murder. Touching the question of the admissibility of evidence regarding the pendency of criminal charges against a witness testifying in the case on trial, the following appears in the opinion of the court:

"The next assignment under this head arose as follows: Against the prosecution's witness Penning, there had previously been filed and were pending in the superior court of Butte county, at the time the instant case was called for trial, two criminal charges based, respectively, upon the sale and upon the possession of intoxicating liquor. Counsel for the defendant sought to bring out by the cross-examination of said witness that such charges were pending against him, and that one had been set for trial for a date some 2 weeks prior to the date fixed for the trial of the present case, but was postponed, on motion of the district attorney, to a date 2 weeks subsequent to the date fixed for the trial of the instant case. An objection by the district attorney to this proposed cross-examination was sustained by the court. The cross-examination, as the attorney explained, was designed to disclose a circumstance tending to show that the testimony of Penning for the people was or might be influenced by a hope on his part that he would or might be leniently treated by the prosecuting officers in the criminal case or cases pending against him by giving testimony which would contribute to the conviction of the defendant. We think the proposed inquiry involved a

proper subject of cross-examination for the reasons stated by the Supreme Court as follows, in *People v. Dillwood*, 4 Cal. Unrep. Cas. 974, 39 P. 438, and that the defendant would be entitled to prove the fact by the record if the witness denied it. 'It is competent to show the fact that other criminal charges are pending in the same court against the witness at the time he testifies, not, however, as evidence of particular wrongful acts, for as to these he is presumed to be innocent, but as a circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant.' [Citing cases.] Such testimony goes to the question of the credibility of the witness. * * *

A similar situation was involved in the case of *People v. Blackwell*, 81 Cal. App. 418, 253 P. 964, 965. There the court said: " * * * The fact that a criminal charge against the witness was then pending in the same court was competent evidence, not of the truth thereof, but as tending to show that the testimony of the witness was influenced by a desire to gain the favor of the district attorney by aiding in the conviction of the defendant and thereby escaping prosecution in her own case." (Citing cases.)

The principle is also recognized in the case of *People v. Hoffman*, 195 Cal. 295, 303, 232 P. 974. However, it was there held not error to refuse to admit evidence to the effect that a felony charge was pending against the witness in a county in the same state other than that in which he was giving testimony; the reason assigned therefor being that the fact that he gave "testimony for the prosecution" in one county could not have led him to expect favor or leniency from any official in the county in which the charge was pending against him. It is manifest that with reference to any possible "leniency" to the witness, such a situation as was presented in the Hoffman Case does not obtain in the instant case. On the trial of the action herein, in the course of the argument among respective counsel with reference to the admissibility of the questioned evidence, it was admitted by the prosecution in the absence of the jury that, although some time preceding the date of the trial of the instant action the witness had been placed under arrest by the Los Angeles police on suspicion of the commission by the witness of the crime of robbery, and although it was known to such police officers that several indictments were then pending against the witness in the state of Texas, regarding which some telegraphic correspondence had passed between the Texas officials and the police department of the city of Los Angeles shortly following the date of his arrest, the witness was released from custody and no "fugitive" or other complaint was ever filed against him, as might

have been done in accordance with the provisions of law thereunto applicable. It is clear that if extradition of the accused witness had been sought or obtained by the Texas officials, many opportunities to extend "favor or leniency" to the accused would have been possible at the hands of the district attorney of this county.

But aside from what for convenience may be termed the assumed fact that, in exchange for favorable testimony by the witness, some one in actual or presumed authority in the premises had either directly promised some sort of advantage to the witness, or had led or permitted him to expect or hope that he would be the recipient of unidentified or unspecified favors, or material advantages, from the district attorney, authorities are not lacking in the view that however ungrounded in fact, or even if the "state of mind" of a witness be based upon pure delusion, nevertheless if such "state of mind" amount to an expectation, or even a lingering or forlorn hope, that in the event that his testimony, far from being distinctly favorable to the prosecution, be evasive, or never so slightly strained or colored in favor of the prosecution, he will or may receive some favorable consideration from the district attorney, such fact may and should be disclosed to the jury through either the channel of cross-examination, or by means of the introduction of other evidence. Indicative of such assertion of the law is the following excerpt taken from the case of *People v. Thomson*, 92 Cal. 506, 509, 28 P. 589:

"It is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interests involved, his hostility or friendship towards the parties, are always proper matters for investigation, in order that truth may prevail and falsehood find its proper level. If the inner workings of a witness' mind are actuating his testimony, and the workings of that mind are brought forth to the light and held up in full view before the jury, results will be obtained much more in accord with truth and justice than though the witness' testimony is weighed and measured by his words alone. * * *

And in *Farkas v. United States* (C. C. A.) 2 F.(2d) 644, 647, it is said:

"The prosecuting witnesses, before the time of the trial, had pleaded guilty to an indictment in the federal court; the verdict of guilt or innocence in the instant case depended primarily upon their credibility as against that of defendant who testified in denial of the demands and threats. As bearing upon their credibility, motive for false accusations, as well as bias, was vitally relevant, and testimony tending to show such motive was entirely competent. Concededly promises of immunity are admissible; they are, however, rarely made. Inasmuch as

the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witnesses, the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope. The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief."

See, also, *People v. Lee Ah Chuck*, 66 Cal. 662, 607, 6 P. 859, and authorities there cited; *People v. Homan*, (Cal. App.) 284 P. 252; 27 Cal. Jur. 124, and cases there cited. It may also be noted that in volume 23 of *American Digest* (2d Dec. Ed.), and in volume 28, *Third Decennial Digest*, under key numbers 363, 372, and 374 of the title of "Witnesses," may be found references to many authorities which sustain the conclusion reached as to the question here under consideration.

[12-14] Further complaint is made by appellant in that the trial court refused to permit the introduction of evidence offered by defendant for the purpose of tending to show that on the date of the alleged attack herein the prosecutrix was not a virgin.

It is the contention of appellant that because the effect of all the evidence introduced by the prosecution, and especially the testimony given by the prosecutrix, was that the offense was committed, not by consent of the victim of the alleged outrage, but by force and violence used and exerted upon her person, and because the prosecutrix personally testified in great detail concerning the circumstances which, according to her testimony, surrounded the commission of the crime, and which testimony, among other things, included the statement that the last thing she remembered was the "pain" and that she "fainted," in the face of such circumstances, defendant was entitled to introduce evidence which would tend to establish the fact that on the date of the commission of the alleged offense the prosecutrix was not a virgin; from which facts appellant further contends that the jury would have the right to infer that the prosecutrix neither "fainted" nor suffered "pain" in the course of the claimed assault upon her; but, to the contrary, that her entire story of the alleged occurrence was false, and consequently that no crime was committed by defendant; or, failing in that conclusion, that if a so-called

"statutory" rape of the person of the prosecutrix was committed by defendant on the date charged in the information, the act of defendant was had by consent of the prosecutrix; and which latter fact (in case the jury so found) became of great importance to defendant for the reason that by the provisions of section 264 of the Penal Code, in the event of a verdict of guilt of the defendant, the jury is charged with the duty of "recommending" to the trial court the place wherein the defendant shall be imprisoned.

Included within the corroboratory evidence which related to the commission of the offense of which defendant was accused was the testimony given by a policewoman who made statements concerning the physical appearance of the prosecutrix at a time supposedly within approximately one and one-half hours after the alleged crime had been committed. Among other things, she testified that on undressing the girl at that time, she noticed that there were spots on her dress and that as to "the appearance of her private parts, * * * the skin showed red through the hair; the hair was moist and sticky." A chemist testified that on four of the spots on the dress worn by the prosecutrix at the time when the alleged attack was made, he found "male sperm, known as spermatozoon."

Although the trial court admitted the testimony of one physician produced by defendant to the effect that a physical examination of the prosecutrix made by him within seventeen hours after the alleged attack had occurred disclosed the fact that the hymen of the prosecutrix was ruptured; that he found no "abrasions or irritations of the vagina—irritable spots"; that he saw no "signs of her (the prosecutrix) having had sexual intercourse during the preceding twenty-four hours"; that he found no "recent tear of the hymen"; nor any "tear of the perineum"—the trial court refused to permit that physician to answer either or any of the following questions which were propounded to him by counsel representing defendant, to wit: "Q. Was that a recent rupture or an old rupture? Q. Did you see any signs of any recent rupture? Q. Just describe the nature of the rupture you saw. Q. On the vagina, did you examine the vagina either before, in front of or anterior to the hymen or behind the hymen to discover whether or not there was any abrasions of any character? Q. Was there anything in your examination to indicate to you as a physician and surgeon whether or not that girl had had sexual intercourse with anybody 17 hours before or approximately 17 hours before you made your examination? Q. Are you able to tell whether a young girl of 17 years of age has been deflowered within 24 hours of a vaginal examination? Q. Describe this hymen that you discovered in this girl on the 10th day of August."

A second physician, who also had made a physical examination of prosecutrix, testified that in so doing he had used both a speculum and "two fingers." Thereupon he was asked by counsel for defendant each of the following questions, none of which, by order of the trial court, was he permitted to answer, to wit: "Q. Was there any pain or discomfort (referring to the digital examination and instrumental examination)? Q. How large size a speculum did you use, medium or small? Q. Did you find any new or any old ruptures of any kind? Q. Did you find any old ruptures of any kind?"

Similarly, by order of the trial court, a third physician, who likewise had made a physical examination of the prosecutrix, was not permitted to answer either of the following questions which were propounded to him by counsel for defendant: "Q. Did you discover any conditions, scars or broken hymen or anything that had been broken in your opinion within the last week preceding the examination? Q. Did you find any evidence that she had had intercourse within a month before? Q. Did you find any evidence that she had had intercourse before? Q. Did you find any old scars on the hymen? Q. Did you find any recent scars on the hymen? Q. What was the condition of the vagina?"

The authorities in this state appear to fairly establish the rule that on a charge of rape of a female person under the age of eighteen years, where the act is alleged to have been accomplished with the consent of the victim of the assault, evidence of previous acts of unchastity is inadmissible for the sole purpose of attacking her character. *People v. Wilmot*, 139 Cal. 103, 72 P. 838; *People v. Johnson*, 106 Cal. 289, 39 P. 622. But equally well established is the principle that where the defendant is charged with the crime of rape alleged to have been committed on the person of a woman over the age of eighteen years, accomplished by means of force or violence, it is error to exclude evidence which tends to show prior unchaste acts of the prosecutrix either with the defendant or with other men. *People v. Shea*, 125 Cal. 151, 57 P. 885; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Degnen*, 70 Cal. App. 567, 590, 234 P. 129; *People v. Biescar*, 97 Cal. App. 205, 275 P. 851. See, also, *Lusty v. State*, 97 Tex. Cr. R. 167, 261 S. W. 775; *Weaver v. United States*, 55 App. D. C. 26, 299 F. 893; *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771. The distinguishing principle between the two lines of authorities is that, as to a minor female child under the age of eighteen years, she is legally incapable of giving her consent to the act; while as to a woman over the age of eighteen years no such legal restriction obtains; and as to the latter, the evidence is admissible, not for the direct purpose of impeaching her character, but for the purpose of discrediting her testi-

mony relating to the use of force or violence by the defendant in accomplishing his purpose. As is said in *People v. Johnson*, 106 Cal. 289, 293, 39 P. 622, 623, and repeated in *People v. Shea*, 125 Cal. 151, 152, 57 P. 885; "This class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed. * * *

It is easily perceivable that if previous acts of unchastity on the part of a woman over the age of eighteen years tend to discredit her testimony to the effect that force was used by the defendant in the commission of the act, likewise would evidence of previous acts of unchastity by a girl under the age of eighteen years tend to discredit her testimony that in accomplishing his purpose the defendant exerted force and violence.

But, as is indicated in the opinion rendered by the Supreme Court of this state in denying a petition for hearing in that court after judgment rendered by the District Court of Appeal in the case of *People v. Jones*, 76 Cal. App. 144, 157, 244 P. 101, 106, evidence of consent on the part of the victim of the assault, even though she be under the age of eighteen years, if she claim that the act was committed by force and violence, is admissible not only for the purpose of "impeachment as to the manner in which the act was accomplished," but as well for the purpose of laying a foundation "for impeachment as to whether the crime was committed at all." In that case, the defendant was convicted of the crime of rape of the person of his stepdaughter, of the age of fifteen years. On the trial of the action, by order of the trial court, the defendant was precluded from ascertaining by cross-examination of the prosecutrix whether the act of which complaint was made was accomplished with her consent. On appeal, the District Court of Appeal upheld the ruling thereon made by the trial court. Thereafter, in ruling on a petition for hearing of the appeal by the Supreme Court, in part the latter court used the following language:

"As a matter of law, however, we would be constrained to hold as error the ruling of the trial court sustaining objections to the cross-examination of the prosecutrix as to whether she consented to the act of sexual intercourse or whether it was committed by fear or force and against her will. We can well understand that, if she had claimed the act was committed by force, how her claim might have laid the foundation, not only for impeachment as to the manner in which the act was accomplished, but also

under certain circumstances it might have laid the foundation for impeachment as to whether the crime was committed at all. * * * As an abstract question of law, however, we cannot approve of the court's ruling in sustaining the objections to the questions asked as to whether she resisted the defendant's acts, for the reason that the evidence sought to be elicited tended to disclose the circumstances of the crime, and it could not properly be excluded on the theory that the prosecutrix, being under the statutory age, all inquiry as to the circumstances of the crime was therefore cut off. This evidence was not offered as a justification or excuse for the commission of the offense, but was offered as constituting a part of the crime charged. * * * See, also, *People v. Fultz*, 109 Cal. 258, 41 P. 1040.

In the instant case, the prosecutrix having testified to the effect that the alleged crime was accomplished by defendant by means of force and violence, this court is constrained to follow the suggestion made by the Supreme Court in the case last cited, in substance that evidence of consent on the part of the prosecutrix was admissible "not only for impeachment as to the manner in which the act was accomplished, but also * * * for impeachment as to whether the crime was committed at all." Although not conclusive evidence of unchastity, it is manifest that one of the items of evidence which would tend toward a conclusion that, prior to the date on which it was charged that defendant had committed the crime, the prosecutrix had been guilty of unchaste acts, would be that her hymen was ruptured, and that the scars, if any, were not of recent origin. But if with such and other evidence, which might possibly be introduced on the trial of the action, the jury should believe that preceding the alleged attack the prosecutrix was lacking in virtue, a conclusion that the testimony of the prosecutrix relating to the force and violence exerted by defendant was not to be believed, and consequently either that no crime was committed by defendant, or that, if committed, the prosecutrix consented thereto, might readily result. * * * For it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed." *People v. Johnson*, 106 Cal. 289, 293, 39 P. 622, 623; *People v. Shea*, 125 Cal. 151, 152, 57 P. 885.

[15] Assuming that the jury should so far discredit the story of the alleged attack as narrated by the prosecutrix as to produce the conviction in the "mind" of the jury that such testimony was wholly unworthy of belief, the acquittal of the defendant would naturally follow. On the other hand, if from

the evidence in the case the jury should believe that under the provisions of the statute the person of the prosecutrix had been raped by defendant, but that the act was committed with the consent (in fact, if not in law) of the prosecutrix, in view of the provision of section 264 of the Penal Code that the crime of rape of the character of that here under consideration is punishable "either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years," and that "the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison," evidence of the former unchastity of the prosecutrix became and was of vital importance to the defendant for the purpose, if possible, of ameliorating the punishment which the jury might recommend that defendant be obliged to suffer, that is, primarily, whether in the state prison or in the county jail. Furthermore, it will be remembered that the prosecutrix testified that when the act was being committed by defendant the last thing she remembered was the "pain" and that she "fainted." It is manifest that if evidence had been admitted which would have had a tendency to establish the fact not only that prior to the date of her alleged rape by defendant her hymen had been ruptured, but that therefore she had been guilty of acts of unchastity, the question of whether on the occasion here under discussion she suffered any considerable pain, or that she fainted, would have demanded the careful consideration of the jury; and if the jury had disbelieved her statement as to the pain which she said she suffered, or that she fainted, under the provisions of subdivision 3 of section 2061 of the Code of Civil Procedure that "a witness false in one part of his testimony is to be distrusted in others," the jury might have cast aside her entire story, or adopted that part of it, if any, which from other evidence in the case it believed to be true, with a result or results similar to that hereinbefore indicated.

Adverting to the combined testimony given by the policewoman and the chemist, who were introduced by the prosecution, to the effect that four certain spots found on the dress of the prosecutrix contained "male sperm, known as spermatozoon," together with the further assumed fact, as later appears from the testimony of the same chemist, that such sperm came from the person of one about the age of defendant, it becomes plain that a third reason exists for the legal admission of the evidence proposed to be elicited by defendant with reference to the virginity of the prosecutrix. It should be apparent that defendant was not bound or concluded by the whole or any part of such testimony. Nor should his negations or disavowals, if any, necessarily be limited to a personal gen-

eral denial on his part either of the commission by him of the offense of which he was accused, or to a specific denial that the "male sperm, known as spermatozoon," which assumedly were found on the dress of the prosecutrix came from the defendant. In other words, defendant was entitled to combat and refute the effect of the evidence against him in any legitimate manner—either by direct or by circumstantial evidence—which, in its logical conclusion, either might or would imply either a direct contradiction of the damaging evidence, or amount to a denial thereof by way of inference. And so, if by establishing, if he could, that the ruptured hymen of the prosecutrix was not of recent origin; that the prosecutrix was not a virgin; and that circumstances existed in the comparatively recent life of the prosecutrix from which it legally might have been inferred that she had indulged in acts of unchastity with some person other than defendant—possibly the jury might have doubted that the questioned spots on the dress of the prosecutrix resulted from the alleged rape of the prosecutrix by defendant—which conclusion necessarily would have resulted in the destruction of an important link in the chain of circumstances tending to prove the guilt of defendant.

[16] It is also apparent that several of the questions to which reference hereinbefore has been had, which were asked of the physicians who were called as witnesses by defendant, and which questions, by order of the trial court, were not permitted to be answered, were proper for the reason that on the answers thereto might have depended a conclusion by the jury as to whether any penetration in fact had resulted from the alleged attack by defendant on the prosecutrix. If, from the evidence, the jury had believed that no penetration took place, at most, defendant could have been convicted of no greater offense than attempt to commit rape.

Several different specifications of error presented by appellant which are closely related to the question last hereinbefore given consideration by this court may be grouped together. They concern, first, the giving of several instructions which are to the effect that in trying issues of fact in the case, the jury should not be influenced by sympathy or pity for defendant; and that whether the victim of the alleged assault consent to the act, or resist the attack made upon her, is wholly immaterial; secondly, the question is presented whether, in the event of a verdict of guilty, for the purpose of enabling the jury to determine either the place where the defendant should be imprisoned, or, in effect, the extent of the punishment which he should suffer, the court erred in excluding evidence from which the jury would have had the right to infer that the act was not committed by or through the use of force and violence, but, to

the contrary, was accomplished by and with the consent of the prosecutrix.

[17, 18] In considering whether sympathy or pity of the jurors for defendant should be legally declared to have no part in a determination of the "issues of fact," in order that a better understanding of the situation may be had, it becomes advisable to more clearly define what is meant by the expression "issues of fact." Having reference to legal practice, an issue of fact arises from an allegation of an ultimate fact made by one of the parties to the controversy which is denied by the other. Ordinarily, the only manner recognizable in a court of law for the determination of an issue of fact is by the introduction of evidence made acceptable by the statutes or by established legal practice. Nowhere, at least in civilized countries, is a solution of the ultimate facts or the "issues of fact" upon which a judgment may rest made dependable upon human emotions, or particularly upon the sympathy or the pity for either of the litigants by any person who may be called upon to judicially decide the controversy. If such were the case, no necessity would exist for, nor convenience or social protection require, laws, rules, or regulations of any sort. The more needy or distressed the litigant, the more certain would be the assurance of a judgment in his favor; and the more affluent or powerful suitor would be an easy financial prey to his impecunious or afflicted legal antagonist. From a legal standpoint, it would appear plain that in performing the duty of determining the ultimate fact of either the guilt or the innocence of a defendant, the jury should be uninfluenced by, and unmindful of, either pity or sympathy.

[19, 20] The relevancy of whether in the instant case the prosecutrix consented to the accomplishment of the act for which defendant herein went to trial in the lower court has hereinbefore received some attention. It is well settled that on the trial of a so-called "statutory" rape case, ordinarily the consent of the prosecutrix is not an issue; but, as was decided by the Supreme Court in its order denying a hearing therein in the case of *People v. Jones*, 76 Cal. App. 144, 157, 244 P. 101, 106, where the prosecutrix, although under the age of eighteen years, testifies that the rape of her person was accomplished by force or violence exerted upon her by the defendant, evidence of consent becomes admissible not only for the purpose of "impeachment as to the manner in which the act was accomplished," but also for the purpose of laying a foundation "for impeachment as to whether the crime was committed at all." It would follow that, at least as far as concerns "impeachment" in those respects to which attention has been particularly directed, it is not true, as stated in the instruction, that whether the prosecutrix "consented" to the accomplishment of the alleged act of which defend-

ant was accused was "wholly immaterial"; and at least to that extent, the instruction in question was erroneous and prejudicial.

With reference to the point that, assuming a situation where, under the evidence relating strictly to whether the offense was committed by the defendant, the jury has unanimously agreed upon a verdict of "guilty," the question of whether thereafter, for the purpose of reaching a conclusion as to the place where the defendant shall be imprisoned, or, in effect, the extent of the punishment which shall be imposed upon him, the jury has the right to consider the circumstances which surrounded the commission of the act, remains for consideration.

[21, 22] On examination of the language of section 264 of the Penal Code, it will appear that a defendant who is convicted of the crime of rape is punishable either by imprisonment in the county jail or by imprisonment in the state prison; that the term of imprisonment in each place is indeterminate, in that if it be in the county jail, it may be for any length of time not more than one year; and if in the state prison, it may be for any period of time not exceeding fifty years. Furthermore, that it becomes the duty of the jury to "recommend" by its verdict whether the imprisonment shall be in the county jail or in the state prison.

In considering the provisions of the statute, perhaps the first question which suggests itself is whether the "recommendation" is in fact a part of the verdict of the jury and as such is binding on the trial court. In a rape case, as far as concerns the exercise of discretion by the jury in its determination as to the place of punishment of the defendant, it is not unlike the "discretion" which is likewise conferred upon the jury where a verdict of "guilty in the first degree" has been reached in a murder case. Among other things, section 190 of the Penal Code provides that "every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of jury trying the same. * * *

On the trial of the action in the case of *People v. Hall*, 199 Cal. 451, 249 P. 859, the jury returned a verdict by which it found the defendant guilty of the crime of murder, but that it could not "come to an unanimous agreement as to degree of punishment." On appeal, it was held by the Supreme Court that, as returned, the verdict was incomplete; that necessarily a proper verdict in the premises should embrace two constituent elements, "first, a finding that the accused is guilty of murder in the first degree; and, secondly, legal evidence that the jury has fixed the penalty in the exercise of its discretion."

In the case of *People v. Sachau*, 78 Cal. App. 702, 248 P. 960, in returning a verdict

of "guilty" against a defendant who was charged with the crime of rape, the jury failed to make any "recommendation" as to the place where the defendant was to be imprisoned. Held, that the verdict was so defective as to constitute it a nullity and that a new trial should be granted. To the same effect, see *Weatherford v. State*, 43 Ala. 320.

And in *People v. Pratt*, 67 Cal. App. 606, 228 P. 47, 48, in which it appeared that the appeal was taken from a judgment which followed a conviction of the crime of rape, in commenting on the language employed in section 264 of the Penal Code, it was remarked that "it will be observed that under this section a minimum sentence may be imposed by the jury"; also, that the last amendment by the Legislature of the statute "emasculated" from the former statute "the age of the female, leaving it discretionary with the jury to determine by their verdict whether in any case * * * an offense charged under subdivision 1 of section 261 was a misdemeanor or a felony."

That in a prosecution of a defendant for the commission by him of the crime of rape, the jury has power to "recommend" the punishment which shall be inflicted, and that such "recommendation" must be carried into execution, is decided in the case of *People v. Rambaud*, 78 Cal. App. 685, 248 P. 954.

From the foregoing authorities it may safely be deduced that in a prosecution of a defendant on the charge of rape, in the event of a verdict of guilty, the "recommendation" by the jury as to the place where defendant shall be imprisoned is an essential, inseparable part of the verdict and as such is conclusive and binding upon the trial court as far as the pronouncement by it of the ensuing judgment is concerned.

As hereinbefore indicated, the provisions of section 190 of the Penal Code which deal particularly with the discretion of the jury in determining the penalty which shall be inflicted upon a person found guilty of murder in the first degree, are not unlike those terms of the statute here under consideration which provide that "by their verdict" the jury shall recommend whether the punishment of a guilty defendant shall be by imprisonment in the county jail or in the state prison. In that connection it becomes relevant to consider the view taken by the courts of appeal of this state where the question submitted has had to do with murder cases.

In *People v. Atherton*, 51 Cal. 495, following a statement in substance that it is the duty of the jury to determine whether the defendant shall suffer the extreme penalty of the law, or imprisonment in the penitentiary, it is asserted in the opinion that in reaching a conclusion as to what penalty shall be inflicted the jury should be influenced by "a consideration of the degree of atrocity with

which the particular murder has been attended."

The case of *People v. Hong Ah Duck*, 61 Cal. 387, among other questions, involved that of the admissibility of evidence of the fact that at the time the murder was committed the defendant was an inmate of the state prison where he was already serving a "life sentence." It was ruled that, in order that the jury might exercise the discretion vested in it by the statute "in a wise and intelligent manner, the jury should be put in possession of all the facts of the case," which included the particular evidence in question.

In the murder case of *People v. Perry*, 195 Cal. 623, 639, 234 P. 890, 897, in which was involved the question of the materiality of the assumed mental deficiency of a defendant on the punishment which, under the provisions of section 190 of the Penal Code, the jury was authorized to prescribe, among other things, the court said: "* * * It is the jury's right and duty to consider and weigh all the facts and circumstances attending the commission of the offense, and from these and such reasons as may appear to it upon a consideration of the whole situation, determine whether or not, in the exercise of its discretion, life imprisonment should be imposed rather than the infliction of the death penalty. * * *"

However, in *People v. Troche*, 206 Cal. 35, 47, 273 P. 767, 772, the rule is declared to be that the insanity of a defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree; and in *People v. Golsh*, 63 Cal. App. 609, 219 P. 456, evidence of sunstroke of the defendant, which rendered him subject to "blinding fits of passion," was held inadmissible for the purpose of enabling the jury to determine what punishment the defendant should be compelled to suffer for the commission by him of the crime of murder; it being substantially declared in each case that if the defendant was mentally responsible, he should suffer the same penalty which any sane person would be obliged to suffer, and, if mentally irresponsible, he should be acquitted. But in the *Troche* Case the court repeated and affirmed the general rule that "the only evidence admissible for the purpose of enabling the jury to determine whether the death penalty or life imprisonment should be imposed in the event the defendant should be found guilty of murder in the first degree was the evidence which the court did admit, and which concerned 'the circumstances connected with the offense.' * * *"

In the case of *People v. Dice*, 120 Cal. 189, 202, 52 P. 477, 483, it appeared that in instructing the jury upon the two several degrees of murder, as well as upon the crime of manslaughter, the trial court stated to the jury the punishment which, upon a verdict of

guilty as to either of such offenses, it would be the duty of the court to impose in pronouncing judgment. In commenting upon such practice, the Supreme Court said in part that "to do so is, of course, necessary in instructing the jury upon their power and duty in the event that they should render a verdict of guilty of murder in the first degree. * * *"

The only cases to which the attention of this court has been directed which in any manner militate against the rule that for the purpose of determining the extent of punishment which should be prescribed for a guilty defendant the jury should "be put in possession of all the facts in the case" are those of *People v. Witt*, 170 Cal. 104, 148 P. 928, 930, and *People v. Clayberg*, 26 Cal. App. 614, 147 P. 994. On examination of each of such cases it will be disclosed that the situation therein differs somewhat from that in the instant case, and that the principle of law therein announced may be distinguished from that announced in the authorities hereinbefore cited. On the trial of the action in the former case, in mitigation of any possible punishment for the commission of the offense, the defendant claimed the right to introduce evidence relative to his character and habits. It was not contended by the defendant that the offered evidence was relevant or material on an issue of either the guilt of the defendant, or the degree of the crime, but that it was offered on the theory that it was competent because the jury had the right "to assess the punishment." The ruling was that: "* * * We are of the opinion that our law does not contemplate any such independent inquiry on a trial for murder, and that the determination of the jury, under the provisions of section 190, Penal Code, as to death or life imprisonment, is necessarily to be based solely on such evidence as is admissible on the issues made by the indictment or information and the plea of the defendant. * * *"

In the instant case, the issues of the virginity of the prosecutrix, as well as of her consent to the act of which she complained, as hereinbefore has been declared, were particularly before the court by reason of the fact that the prosecutrix testified that the offense was committed by defendant by means of force and violence. (*People v. Jones*, 76 Cal. App. 144, 157, 244 P. 101); from which circumstance it would follow that the case of *People v. Witt*, 170 Cal. 104, 148 P. 928, far from being an authority against the rule by which the questioned evidence became admissible for the purpose of determining the punishment to be inflicted upon the defendant, is at least a negative statement of affirmance of the rule. In the latter case (*People v. Clayberg*, 26 Cal. App. 614, 147 P. 994, 997), which was a prosecution for "statutory" rape, the decision related to an instruction requested by the defendant to be given to the jury, but

which was refused by the trial court. With reference thereto the following excerpt from the opinion of the appellate court will disclose several objectionable features which appear upon the face of the requested instruction, and which alone should have justified its refusal by the trial court, to wit: " * * * Said instruction related to the power vested in juries by section 264 of the Penal Code (Stats. 1913, p. 212), in cases arising under subdivision 1 of section 261 of said Code, to determine practically the nature and extent of the punishment which may be inflicted. By the terms of the former section, it is incumbent upon the jury, where the prosecution is based upon subdivision 1 of section 261, to determine whether the defendant, if convicted, shall be punished by imprisonment in the county jail or the state prison. The rejected instruction explained the law as it is declared in those sections of the Code, and proceeded to declare that it was the duty of the jury to consider all the circumstances of the present case with a view to a just determination of which mode of punishment authorized by said section 261 'will best conserve the interest of society and the interest of the defendant,' in the event that they found the defendant guilty. The instruction also had something to say about the policy of the law being opposed to the infliction of 'unusual or severe punishment,' etc., which statement could have no just place in the court's charge; it being argumentative in character. The instruction was properly refused. * * *

However, after having decided that the defendant was not entitled to have the instruction, as offered, given to the jury, the appellate court made the following comment:

" * * * The court, in its charge, told the jury of the power and duty resting upon them by virtue of the provisions of section 264 of the Penal Code in the matter of designating the prison in which the defendant should be incarcerated in case of his conviction of the crime charged (the crime charged here being based on subdivision 1 of said section 261), and the jury, heeding that instruction, by their verdict, designated the state prison as the place of punishment. * * *

It will thus be noted that the opinion contains no limitation upon the principle announced in *People v. Hong Ah Duck*, 61 Cal. 387, to the effect that (syllabus) "in order to exercise the discretion vested in them as to the penalty in a wise and intelligent manner, the jury should be put in possession of all the facts in the case. * * *

Upon further examination of the language of section 264 of the Penal Code, it will appear that it provides that if a defendant should plead guilty to the accusation, the punishment for the commission of the offense "shall be in the discretion of the trial court"; similarly as the punishment therefor is vest-

ed in the jury where the defendant has been found guilty after trial by jury. It also may be remembered that under the provisions of section 7 of article 1 of the Constitution, "a trial by jury may be waived in all criminal cases." Assuming that a defendant charged with the crime of "statutory" rape should either plead guilty, or that he should waive a jury, and after trial by the court without a jury, should be found "guilty," it would seem unlikely that it would be seriously contended that for the purpose of determining the place where the defendant should be incarcerated, the trial judge would be powerless to inquire into "the degree of atrocity with which the particular (rape) had been attended" (*People v. Atherton*, 51 Cal. 495), or that in order to exercise the discretion vested in the trial court "in a wise and intelligent manner, the (trial court) should (not) be put in possession of all the facts of the case" (*People v. Hong Ah Duck*, 61 Cal. 387). If, in a murder case, in determining the penalty which should be imposed for the commission of the crime "the jury should be influenced by the degree of atrocity with which the particular murder has been attended," it is difficult to understand why in a rape case the same rule should not obtain; that is, why the jury in determining the place or extent of confinement should not be influenced by the degree of brutality, if any, which was exerted by defendant in the commission of the offense; or if there was no brutality, but, to the contrary, the "rape" was accomplished either by the consent of the prosecutrix, or by her solicitation, or by her insistence, or by her procurement in any way, why the jury should not properly be influenced by such a circumstance. It is apparent that in order that the jury may determine the matter "in a wise and intelligent manner," it should "be put in possession of all the facts of the case." *People v. Hong Ah Duck*, 61 Cal. 387. It is but reasonable that, if in the administration of justice it be desirable or essential that in determining the punishment which a defendant should suffer, the trial court should inquire into all the facts in the case, just so should the jury be likewise enlightened in order that its quasi-judgment be just to the defendant. Neither the judge nor the jury, acting in his or its several judicial capacity, should be either required or expected to act blindly in the premises. No relevant light, however small or apparently insignificant, which might aid the tribunal or the judicial arm of the court in the conscientious discharge of its respective duty should be withheld or denied. To the contrary, everything relevant and material to the inquiry should be placed before the judge or the jury in order that the proper judicial discretion may be wisely, fairly and intelligently exercised. Because no exact words may be found in the particular statute by which such a power is conferred on the

judge or the jury, does not constitute a barrier or a sufficient reason why a reasonable and humane view should not be taken of the intent of the Legislature in enacting the statute. To say that with no knowledge of attendant circumstances the jury should be called upon to nominate the place, only, where the defendant should expiate his crime, would be not only unjust to the defendant, but would amount to the recognition of a principle in the administration of justice that would be founded upon pure conjecture.

Even though in length of time a county jail sentence, following a conviction for the commission of a given crime, might be equal to or even exceed a sentence in the state prison rendered in pursuance of conviction of a like offense, as a matter of statutory provision the one would amount to a misdemeanor only, while the other would be a felony. Section 17, Pen. Code. Nor aside from its lack of knowledge of the duration of the sentence which must follow its "recommendation" as to the place of imprisonment, and the consequent statutory effect thereof on the social standing of the defendant, is the jury presumed to be cognizant of the condition, treatment, or hardships to which such convicted person may be subjected in either place of confinement. Although as to possible length of service, by the terms of the statute the county jail sentence is much less severe than is the state prison sentence, it is manifest that, in the wisdom of the Legislature, the term in the respective places of confinement of a defendant might have been made just the reverse of what the statute now provides in that regard. It is inconceivable that as far as concerns the consequence or the effect of the "recommendation" by the jury, the intention of the Legislature was to keep the jury in ignorance and thus compel it to act blindly, unjustly, and unreasonably. The record in the instant case discloses the fact that the evidence introduced by the prosecution tended to prove that the act of which defendant was accused was accomplished by means of force and violence. In the "statutory" rape case of *Lusty v. State*, 97 Tex. Cr. R. 167, 261 S.W. 775, 776, in the course of the opinion it is remarked that "the proof of force tends to cause the jury to assess a high penalty, and when it is relied on by the state the accused should be permitted to combat by the evidence usual in force cases." In the murder case of *Fields v. State*, 47 Ala. 603, 11 Am.Rep. 771, the question of the admissibility of evidence for the purpose of enabling the jury to properly determine what punishment the defendant should be required to suffer received careful consideration by the Supreme Court. Among other things, it was there said: "* * * Testimony is as necessary and important, to enable the jury to exercise this discretion prudently and properly, as to enable them to determine the

guilt or innocence of the defendant. The jury have two important duties to perform, and both are to be governed and controlled by the evidence, and neither can be wisely or rightly discharged without evidence. As these duties are different, the evidence must necessarily be different. After the guilt of the defendant is settled, the proper evidence, to determine the degree of his crime, and what should be the extent and severity of his punishment, must, in great measure, depend upon a careful examination of the circumstances, not those only immediately attendant on the killing, but those also which may reasonably be supposed to have led to it. * * *

As in effect is announced by the provisions of section 26 of the Penal Code, a boy of fourteen years of age is capable of committing the crime of "statutory rape." An illustration of what might be the result to a defendant were the rule adopted that no evidence is admissible for the purpose of reducing the punishment which under the statute may be inflicted, may be shown by considering the assumed situation of a young woman just under the age of eighteen years, who is a notorious prostitute and who has lured or enticed the boy of fourteen years into an act of sexual intercourse with her. In accordance with the letter of the law, on a trial of the criminal action in which the boy might be prosecuted for the crime of rape, if the fact of the notorious unchastity of the prosecutrix, or all the circumstances connected with the commission of the offense could not be brought to the attention of the jury, it would not be impossible that the "recommendation" of the jury would be that for the commission of the offense the boy should be punished by imprisonment in the state prison, which "recommendation" would carry with it a sentence "for not more than fifty years." Section 264, Pen. Code. Would any sane, fair-minded person contend that such a result was in accord with the true intent and spirit of the law? Would it seem reasonable that the purpose of the law was that all the disgrace, humiliation, and hardships coincident with and necessarily attendant upon the sentence and service of a defendant in the penitentiary "for not more than fifty years" might follow the conviction of the defendant of the crime of "statutory" rape, without reference to the situation of the parties thereto and the circumstances connected with the commission of the offense?

This court is of the opinion that in enacting section 264 of the Penal Code the intent of the Legislature was that after a jury has passed upon the evidence relating to the commission of the offense and has found the defendant "guilty," thereafter for the purpose of determining whether the defendant shall be imprisoned in the county jail or in the state prison the jury shall be entitled "to consider and weigh all the facts and circum-

stances attending the commission of the offense," together with any other evidence which will throw relevant and material light upon the true situation of the defendant and the prosecutrix at and reasonably preceding the time when the alleged offense was committed.

Because of the errors to which attention hereinbefore has been directed, it becomes unnecessary for this court to give consideration to either of several other specifications of error which it is claimed by appellant was committed in the course of the trial and was prejudicial to his substantial rights in the premises.

The judgment and the order denying the motion for a new trial are reversed and the cause remanded for a new trial. The appeal from the order denying the motion in arrest of judgment and the appeal from the order denying defendant leave to file an application for probation are and each of them is dismissed.

We concur: CONREY, P. J.; YORK, J.

109 Cal. App. 8

DANIEL v. SISNERO et al.
Civ. 240.

District Court of Appeal, Fourth District,
California.
Oct. 7, 1930.

1. Trusts $\S$ 89(1).

Direct testimony of interested parties that no gift or advancement was intended by father to son, though competent, is not conclusive.

2. Trusts $\S$ 86.

There is presumption of law that, where father pays consideration, and title to property is taken in name of son, gift, advancement, or bounty is intended.

3. Trusts $\S$ 86.

Presumption that no gift or advancement was intended by father paying consideration for property purchased by son was sufficient to sustain finding that son was owner thereof.

4. Appeal and error $\S$ 1011(1).

Appellate court will not disturb finding based on presumption that no gift or advancement was intended, where opposing evidence merely raises conflict.

5. Fraudulent conveyances $\S$ 299(13).

Evidence sustained finding that son was owner of property on date of conveyance to father without consideration.

6. Fraudulent conveyances $\S$ 298(2).

Evidence sustained finding that conveyance of property by son to father was for purpose of defrauding judgment creditor (Civ. Code, $\S$ 3442).

In addition to facts properly found by court that property belonged to son and not to his father, it was admitted by the son that transfer complained of rendered him insolvent, and he himself testified that he received no consideration for the deed to his father.

7. Trusts $\S$ 373.

Court's finding in double negative, in addition to positive finding, sustained conclusion of law that no resulting trust was created.

The finding in the double negative was: "It is not true that Simon Sisnero did not intend a gift, advancement or bounty in paying said consideration." While the additional finding in the positive was: "And it is true that the defendant Jose Sisnero did not take title to said property as trustee for the defendant Simon Sisnero."

Appeal from Superior Court, Riverside County; James L. Allen, Judge.

Action by Jesus Daniel against Jose Sisnero and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

George R. Nichols, of Riverside, for appellants.

Sarau & Thompson and Robert E. Nelson, all of Riverside, for respondent.

BARNARD, J.

This is an appeal from a judgment declaring void and of no effect a deed dated February 15, 1927, whereby Jose Sisnero conveyed certain real property to his father, Simon Sisnero. The plaintiff herein, on July 13, 1927, obtained a judgment against the said Jose Sisnero in a tort action for \$6,151.25. That action was begun January 3, 1927, and before judgment therein was rendered the conveyance referred to took place. The judgment in that action was partially satisfied on August 12, 1927, leaving a balance due thereon of \$6,082. Thereafter, this action was filed against both parties to the conveyance mentioned, seeking to have said transfer of real property set aside as fraudulent. The answer of defendants admitted the relationship of father and son; the existence of the other judgment; that the same was only partially satisfied; that the defendant Jose Sisnero

had not sufficient property out of which the judgment could be satisfied; and that the conveyance sought to be set aside had been made on February 15, 1927. The answer denied, however, that Jose Sisnero had ever been the owner of the real estate in question, it being alleged that Simon Sisnero, the father, had furnished the money with which said real estate was purchased; that he had always been the owner thereof, and that the son had always held the same as trustee for his father; and that in giving said deed the son was not attempting to render himself insolvent, but was only performing an act which he was legally bound to perform. After a trial the court found that at the time the original action was begun on January 3, 1927, Jose Sisnero was the owner of the property in question; that on February 15, 1927, he conveyed the same to his father, Simon Sisnero; that this transfer was made without any consideration, and that by virtue thereof the said Jose Sisnero intended to and did become insolvent; that after said transfer was made he had no property out of which said judgment could be satisfied; that the plaintiff was thereby defrauded of the sum of \$6,082; and that the whole of said property does not exceed in value the sum of \$6,082. From the judgment that followed this appeal is taken.

[1-3] The principal question raised is whether there is sufficient support for the findings of the trial court to the effect that the appellant Jose Sisnero was the owner of the property in question on January 3, 1927; that it is not true that said defendant never had any interest in said real property; that it is not true that the equitable ownership in said property was always or ever that of Simon Sisnero; that it is true that the consideration for the transfer of said real property to Jose Sisnero was paid in advance by Simon Sisnero, but that it is not true that the defendant Simon Sisnero did not intend a gift or bounty in paying said consideration; and that it is true that Jose Sisnero did not take title to said real property as trustee for Simon Sisnero. It is true that the record shows that both the father and the son testified that the several pieces of property in question were purchased by the son with money furnished by the father, for the purpose of having property purchased for himself. While this direct testimony that no gift or advancement was intended was competent, it was not conclusive. *Gilmour v. North Pasadena Land, etc., Co.*, 178 Cal. 6, 171 P. 1066. On the other hand, there is a presumption of law that, where a father pays the consideration, and title to property is taken in the name of the son, a gift, advancement, or bounty is intended. *Quinn v. Reilly*, 198 Cal. 465, 245 P. 1091; *Lezinsky v. Mason Malt W. D. Co.*, 185 Cal. 240, 196 P. 884. This presumption was, in the instant case, sufficient to sustain the action of the trial court. In *Miller v. Miller*, 82 Cal.

App. 657, 255 P. 1099, it is said: "On the other hand, aside from the oral testimony given by defendant's witnesses, the deeds themselves, which were introduced in evidence, together with the relationship of mother and son is sufficient to warrant the conclusion of the court." See, also, *Motor Investment Co. v. Breslauer*, 64 Cal. App. 230, 221 P. 700.

[4] Nor will an appellate court disturb the finding of a trial court, based upon such a presumption, where the opposing evidence, in effect, goes no farther than raising a conflict in the evidence. In *Cox v. Schnerr*, 172 Cal. 371, 156 P. 509, 513, the court said: "The presumption arising from the confidential relations of the parties to the purported conveyance might of itself, and in spite of the evidence offered by plaintiff, be sufficient to justify the court's findings of fraud. There may have been in the manner of the witnesses or the circumstances attending the giving of their testimony that which justified the court in disregarding it. It is within the province of the trial court to determine what weight and credit shall be given to the testimony of any witness and this court may not control the conclusion or finding of the superior court denying credence to the testimony unless it appears that there is nothing which at all impairs its accuracy. *Blanc v. Connor*, 167 Cal. 719-722, 141 P. 217; *Davis v. Judson*, 159 Cal. 121-128, 113 P. 147."

[5] Not only are the findings supported by the presumption referred to, but additional support is found in the unconvincing character of some of appellants' evidence. Among other things, the son testified to the following effect: That in 1913 he got \$500 from his father at Clifton, Ariz., telling him that Blythe was a good town; and that he returned to Blythe and bought the first pair of lots for \$250. When asked if this \$500 was a gift, he replied: "He gave me that to put into business for himself, to buy properties for him." The lots had two small shacks on them. When asked if he ever paid his father interest, he replied: "No, I just sent him money to live on, is all." He then built three more houses on the lots, which he says he paid for from the rents received. Two or three years later he bought another pair of lots for \$200, paying for them out of the original \$500 given him by his father "and the rent money." When asked if there were any buildings on those last two lots, he replied: "No sir, I put everything in there." Two or three years later he bought another lot for \$150, paying for it out of the rents from the rest of the property. He further testified that in 1918 or 1919 his father gave him an additional \$2,000 at Clifton, Ariz.; that he did this because the witness told him the town of Blythe was a good business town. When asked if he paid any interest on this money he replied: "No, we did not take no accounts

that way at all." When asked if it was a gift, he replied: "It was a gift for himself, his own business, not for myself." When asked if he had told his father about buying any property, he replied: "About the first ones I bought, yes sir, he knew about it." When asked what he did with the last \$2,000 he stated that he went to Ely and then to El Paso, carrying the money on his person; that he spent \$250 of the money at Ely, and sent \$900 to Blythe; that when he returned to Blythe he built a pool room building on the last lot purchased, putting about \$1,500 into this building. He then stated that his father came to Blythe in 1925, and, when he told him there was \$800 left, his father requested him to buy another lot adjoining the pool room, which he did. Again, in 1926, he bought two more lots for \$150, and improved them until there were four houses thereon. When asked where he got this money he replied: "From the business." He further testified that during all these years he occupied the property, rented the houses, and paid the taxes, and that throughout these same years he sent money to his father on which to live.

The father testified that he gave the money to his son to buy property for him, but could not remember the dates, and did not know whether it was one year or ten years ago; that he had the money in a grip and gave it to his son in bills; that he had never been in Blythe previous to giving his son the money; that no one was present when the gift was made; that he never asked his son what rents he was getting; and that he did not know the town of Blythe, nor what was to be bought with the money. In this connection he stated: "I know he had a couple of lots there and when I came over there to see them, then I seen what Blythe was and the property that they had."

We have read the entire transcript and feel that the findings of the court are amply sustained, not only by the presumption of law referred to, but by the unsatisfactory character of appellants' own evidence. The reading of the evidence leaves little doubt that the property in question belonged to the son, and was transferred to avoid the impending judgment. While appellants testified to the contrary, their entire evidence is not so convincing as to justify setting aside the findings of the trial court.

[6] The next point raised is that the evidence is not sufficient to support the court's finding that the conveyance of the real property in question was made for the purpose of defrauding the plaintiff, in order to prevent the plaintiff from collecting the judgment, and that the plaintiff herein was defrauded out of \$6,082 by said transfer. The defendant Jose Sisnero admitted that the transfer complained of rendered him insolvent, and he

himself testified that he received no consideration for the deed to his father. These circumstances, together with the fact, as properly found by the court, that the property in question belonged to him and not to his father, sufficiently show fraud under section 3442 of the Civil Code. *Knox v. Blanckenburg*, 28 Cal. App. 298, 152 P. 59.

[7] The point is raised that the court's finding, "It is not true that Simon Sisnero did not intend a gift, advancement or bounty in paying said consideration," is a negative pregnant, and, therefore, not sufficient to sustain the judgment. Not only is this a double negative rather than a negative pregnant, but the additional finding, "And it is true that the defendant Jose Sisnero did not take title to said real property as trustee for the defendant Simon Sisnero," in connection with the other findings, was a sufficient finding to sustain the conclusion of law that no resulting trust was created. We have already held that these other findings are supported by the evidence and by a presumption of law.

It is not necessary to consider an objection that the court erred in refusing to permit certain conversation to be brought out, for the reason that the error complained of was later cured and the conversations in question given in full and without hindrance.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; WARNER, Justice pro tem.

109 Cal. App. 33

**Ex parte CRAWFORD.
Cr. 1591.**

District Court of Appeal, First District,
Division 1, California.

Oct. 10, 1930.

Rehearing Denied Oct. 24, 1930.

Hearing Denied by Supreme Court Nov. 3, 1930.

1. Criminal law ☞1216(2).

Where sentences under different counts were not ordered to run concurrently, sentences operated consecutively (Pen. Code, § 669).

2. Criminal law ☞878(1).

Information in two counts, one charging possession of still and the other operation, held to charge but one offense, namely, that of operation of still, precluding double sentence (St. 1927, p. 497).

Information under St. 1927, p. 497, in first count, alleged that defendant, on or about the 10th day of January, 1929, did wilfully, unlawfully, knowingly, and feloniously have in his possession and under his control one still, and in count 2 alleged that defendant, on or about January 10, 1929, and for a period of about three weeks continuously next prior thereto, did wilfully, unlawfully, and feloniously operate or cause to be operated a certain still.

3. Criminal law ☞1209.

Habeas corpus ☞4.

If two separate acts constitute but single crime, double sentence cannot be imposed, and sentence may be attacked on habeas corpus.

4. Prisons ☞9.

Sentence for offense embodied in another offense charged in same indictment being void proceeding by prison board fixing maximum statutory penalty thereon was invalid.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Habeas corpus proceeding by E. B. Crawford to secure release of petitioner from custody. From an order discharging petitioner, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

Thomas P. Boyd, of San Rafael, for petitioner.

KNIGHT, J.

The petitioner, E. B. Crawford, a prisoner in the state prison at San Quentin, was ordered discharged therefrom on a writ of habeas corpus granted by the superior court in and for the county of Marin. From the order made in that behalf, the people have taken this appeal. Pen. Code, § 1506.

[1] At the time the order for the writ was granted, the prisoner was serving two consecutive sentences imposed by the superior court in and for San Bernardino county, after having entered pleas of guilty to two counts of an information charging him jointly with one Woody with having had possession of, and with having operated, a still. On the first count the sentence was that he pay a fine of \$1,000 and be imprisoned in the state prison for the term prescribed by law, and a like sentence was imposed on the second count. He entered the prison on March 6, 1929, and thereafter the prison board fixed the period of his sentence on the first count at three years and the period of his sentence on the second count at one year. No order was made by the supe-

rior court that the sentences should run concurrently, and consequently they operated consecutively. Pen. Code, § 669.

[2] Both charges were founded on a statute enacted by the Legislature in 1927, declaring it to be a felony for any person to "operate or cause to be operated or knowingly have in his possession or control, any still," etc., used or intended to be for the manufacture or production of intoxicating liquor for beverage purposes (St. 1927, p. 497), and the legal ground upon which the writ was obtained was that the act of operating the still charged in the second count necessarily included the act of having possession of it, as charged in the first count; in other words, that the acts charged in both counts related to the same transaction and constituted but one offense, and that therefore the superior court was without jurisdiction to impose a double sentence for the one offense.

Briefly stated, the first point urged for reversal is that the matters set forth in the judgment roll are legally insufficient to warrant the conclusion reached by the trial court that the acts charged in the two counts related to the same transaction. We are of the opinion that the case of *People v. Clemett* (Cal. Sup.) 280 P. 681, 682, is decisive of this point. There the defendant was charged by an information, containing two counts, with the same offenses here charged, and the allegations of the two counts were identical in form, except as to dates, with those set forth in the two counts of the information in the present case, and it was held that the information charged but a single offense; that is to say, by count 1, in the present case it is alleged that the defendants "on or about the 10th day of January, 1929, * * * did wilfully, unlawfully, knowingly, and feloniously have in their possession and under their control one still," etc., and by count 2 it is alleged that the defendants "on or about the 10th day of January, 1929, and for a period of about three weeks continuously next prior thereto * * * did wilfully, unlawfully, and feloniously operate or cause to be operated a certain still," etc. "By count one" in that case, says the court in its opinion, "it is alleged that the defendants on or about the 3d day of January, 1928, and prior thereto (not stating whether it was one day or more prior to January 3, 1928), did wilfully, unlawfully, and feloniously have in their possession and under their control one still, etc. By the second count it is charged that said defendants on or about the 3d day of January, 1928, and for a period of about five months continuously next prior thereto, did wilfully, etc., operate and cause to be operated one certain still," etc. And in holding that the foregoing allegations related to the same transaction, and therefore constituted but one offense, the court says: "If he operated and

caused to be operated said still, it was indisputably in his possession and under his control. The operation of the still includes a longer period than is included within the averment that the still was under his control. It is alleged that he operated it for about five months prior to January 3, 1928, a definite fixed period, while it is alleged in the other count that he had it in his possession and under his control on or about January 3, 1928, and prior thereto. Under the rule of pleading, the possession and control clause may be limited to one day prior to January 3, 1928, or at most a reasonable time prior thereto, and could under no rule of construction be extended backward beyond the period of five months, during which time it is alleged the defendant was operating the same still. Clearly the possession and control period is covered by the period during which the defendant operated said still. The defendant may have had a still in his possession or under his control without operating the same, but he could not have operated it without having it under his control and in his constructive possession. The possession and control period is included in the period of operation, inasmuch as possession and control were incidental to operation."

True, as pointed out by the people, the question in that case was raised and decided on an appeal by the defendant from the judgment, which admittedly included a transcript of the evidence; and it is also true that, after giving its reasons for holding that the two counts of the information stated but one offense, the court said that the conclusion it had reached thereon was "confirmed" by a reading of the evidence; but, as will be noted from the portion of the court's opinion hereinabove quoted, its decision on the point at issue was not based on the evidence, but was founded on a construction of the allegations of the information; and therefore, aside from the court's brief reference to the confirmatory effect of the evidence, that portion of its decision dealing exclusively with the question of construction of the allegations of the information, which as shown are identical with those found in the information in the present case, is manifestly controlling here. In further support of the trial court's conclusion that the acts of possession and operation as charged in the two counts related to the same transaction, the petition for the writ in substance so alleged, and no denial thereof was made in the return to the writ; nor is it anywhere claimed on this appeal that the two counts do in fact relate to separate transactions; merely that

it cannot be so determined from the matter set forth in the judgment roll. The form of the judgment also indicates that but one transaction is involved, for it is therein recited that the defendant was duly informed by the court of the nature of the information filed against him "for the *crime* of possession of a still or distilling device and operating a still," etc. (*Italics ours.*) For the reasons stated, we believe that the trial court was justified in holding that the act charged in the first count was merged in the act charged in the second count, and that therefore the judgment of sentence pronounced on the first count was and is void. *People v. Clemett supra.*

[3, 4] The people further contend, however, that, even assuming that the two counts do relate to the same transaction, the limited effect thereof is that one portion of the judgment is erroneous, and that, while such erroneous portion might have been corrected by a reversal, if an appeal had been taken, it cannot be declared void on habeas corpus; also that, since the prison board might have fixed the maximum statutory penalty of five years for each offense, but fixed a period of four years only for both, which was within the maximum for one, the prisoner is not entitled to his discharge until he has served the equivalent of a four-year sentence. The case of *In re Mann*, 192 Cal. 165, 219 P. 71, is cited in support of this latter contention.

We are unable to sustain either of the foregoing contentions, for it is fundamental that, if two separate acts constitute but a single crime, a double sentence therefor cannot be imposed. If it is, one of the sentences must necessarily be void; and there is no law to compel a person to serve a void sentence. We find nothing in the case of *In re Mann, supra*, at variance with this fundamental rule. In the present case the void sentence is obviously the one relating to the possession of the still because the act of possession is included in the act of operation (*People v. Clemett, supra*); and, the sentence being void, the proceeding taken by the prison board pursuant thereto in fixing the term of such sentence is likewise void. Therefore the only valid judgment of sentence pronounced was the one based on the second count, and, since the prisoner has already served more than the full term of one year, fixed by the prison board as a punishment therefor, he is entitled to his discharge.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

109 Cal. App. 26

PACKER v. WAGNER (two cases).
Civ. 233.

District Court of Appeal, Fourth District,
California.
Oct. 9, 1930.

1. Automobiles ⇨244(35).

Testimony automobile was going 22 miles an hour 30 feet from intersection, and crossed intersection at speed less than 20 miles, warranted finding speed was not, as plaintiff testified, 15 miles.

2. Appeal and error ⇨907(4).

Map or blackboard used at trial, but not reproduced in record, must be assumed to have guided court to some extent in determining responsibility for accident.

3. Appeal and error ⇨931(1).

On appeal, every substantial conflict must be resolved in favor of finding.

4. Negligence ⇨136(8, 10).

When evidence is conflicting, or reasonable men might differ respecting inferences from undisputed evidence, negligence or contributory negligence is question of fact.

5. Appeal and error ⇨1010(1).

Reviewing court may not disturb judgment unless there is no sufficient substantial evidence, upon any hypothesis, to support it.

6. Appeal and error ⇨996.

Court may not review finding based on reasonable inference, although believing opposite inference is more probable.

7. Automobiles ⇨245(80).

Whether motorist, seeing automobile 200 or 300, and then 100 feet away, apparently increasing speed, justifiably crossed intersection, *held* for court, in trial without jury.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Separate actions by Armenia B. Packer, and by Hartley C. Packer, against John Wagner. While the second action was pending, plaintiff died, and by stipulation, Armenia B. Packer, administratrix of the estate of Hartley C. Packer, deceased, was substituted as party plaintiff, and the actions were consolidated for trial. Judgments for defendant, and plaintiff appeals.

Affirmed.

Leonard Evans, of Anaheim, and Fred W. Heath, of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondent.

WARMER, Justice pro tem.

The court ordered the above-entitled actions consolidated for the purposes of trial, after a stipulation of counsel that the court might make such order, and both causes come here on the same record. The plaintiff in each action charges negligence. The answer denies the allegations of negligence and sets up a plea of contributory negligence. During the pendency of the action entitled Hartley C. Packer v. John E. Wagner, plaintiff Hartley C. Packer died, and by stipulation of counsel Armenia B. Packer, administratrix of the estate of Hartley B. Packer, deceased, was substituted as a party plaintiff in said action. Both causes of action arose out of a collision between automobiles at the intersection of Lemon street and Broadway in the city of Anaheim, Orange county, Cal. Lemon street runs north and south; Broadway east and west, said streets crossing at right angles. On May 26, 1926, plaintiffs were driving an automobile south on said Lemon street and the defendant Wagner was driving a Cadillac 59 roadster east on Broadway. A stranger to this action was driving a Franklin automobile north on said Lemon street. Plaintiffs were proceeding south on Lemon street at a rate of speed of 22 miles per hour when they were 30 feet from the intersection and the defendant was traveling east at about 30 miles per hour. Defendant saw the Franklin car and observed that it was going to stop on the south side of Broadway, and as he said when he saw the Franklin car was going to stop: "I stepped on it. You know what a Cad will do." Defendant did not see plaintiff's car until it was right in front of him, too close to stop or avoid collision. The plaintiff Armenia B. Packer testified that she first saw the Cadillac automobile between 200 and 300 feet west of Broadway as they approached the intersection. As to what was done by plaintiffs after beginning to cross said intersection, plaintiff testified as follows:

"We gave the car that was so well to the west no further consideration because it was too far away to be considered and continued across, and as we reached slightly south of the center of the button I realized this car approaching was coming at a great rate of speed, and instead of slowing as one would suppose a car would do, as it approached the intersection it seemed suddenly to leap in speed,—at least it was coming toward me at a great rate of speed and I thought 'If that car doesn't stop quick he is going to come very close to us,' and before another thought could formulate itself this car with a big blue hood on it was coming closer as though he were going to crumple the fenders, and that is the last I knew was seeing the great big blue hood coming straight for presumably our hood. * * *

"As you saw the car approaching you as you were crossing Broadway and when you saw this car approaching near to you would you be able to form any estimate of the speed?"

"A. Not miles, no,—but at that point it seemed the Cadillac then was as far back as the westerly line of the Huddle property, the Undertaking corner,—it was that far back when I was conscious and instead of slowing as he should have done he was coming very fast at that point.

"Q. That would be in feet about how far?"

"A. I presume in the neighborhood of 100 feet."

The car of the defendant collided with the car of plaintiff, striking plaintiff's car almost in the middle. Plaintiff's car rolled over, striking on the radiator of the Franklin car, which was stopped a little south of a white line extending across Lemon street on the south side of Broadway and somewhat easterly from the center line of Lemon street. The plaintiffs were injured as a result of the collision.

[1] The plaintiff, Armenia B. Packer testified that they proceeded across the intersection at from 10 to 15 miles an hour. Another witness testified that they were proceeding south on Lemon street in the usual lane of traffic at about 22 miles an hour when 30 feet from the intersection. Another witness testified that they had proceeded across the intersection at less than 20 miles an hour. From the above statement of facts we are of the opinion that there was substantial evidence from which the court might find that the plaintiffs were driving across the intersection at a greater rate of speed than 15 miles per hour. The deceased was driving plaintiff's car.

[2] There was a blackboard used by counsel for the purpose of illustrating the testimony of witnesses. No map or reproduction of such diagram is in the record.

In an action where a map or blackboard is used in the trial court to illustrate the testimony of witnesses and such map or copy of such diagram and markings upon the blackboard are not a part of the record on appeal the appellate court must assume that the trial court in reaching its conclusions as to the possibility of the responsibility for the accident was guided to some extent at least by such diagram. *Godeau v. Levy*, 72 Cal. App. 13, 236 P. 354.

[3] On appeal every substantial conflict in the evidence must be resolved in favor of the finding. *Robertson v. Finkler*, 27 Cal. App. 322, 149 P. 784.

"In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the

finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion; and every substantial conflict in the testimony is to be resolved in favor of the finding." *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157.

[4] When the evidence is conflicting, or when reasonable men might differ as to the inferences which ought to be drawn from the undisputed evidence, the question of negligence or contributory negligence is not one of law, but of fact. *Davies v. Oceanic Steamship Co.*, 89 Cal. 280, 26 P. 827.

"Especially is this rule applicable when the negligence of the plaintiff depends upon * * * a comparison of his conduct with that which may be assumed to be the conduct of an ordinary man. * * * 'Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon the credibility of witnesses or inference from facts and circumstances about which honest and impartial men might differ, such a case should be submitted to the jury.'" *Smith v. Occidental & Oriental Steamship Co.*, 99 Cal. 462, 34 P. 84, 85.

[5, 6] A reviewing court is not justified in disturbing a judgment unless it appears that upon no hypothesis is there sufficient substantial evidence to support it (*People v. Tom Woo*, 181 Cal. 315, 184 P. 389), nor can it review a finding based upon a reasonable inference, though in its judgment the opposite inference is the more probable. 2 Cal. Jur. Appeal and Error, § 549, p. 935; *Ryder v. Bamberger*, 172 Cal. 791, 158 P. 753; *Skaggs v. Wiley* (Cal. App.) 292 P. 132.

See *Sites v. Howrey* (Cal. App.) 291 P. 597, to the effect that where plaintiff was riding in an automobile which her husband was driving, and the husband observed the approach of defendant some distance from the intersection, but believed that he had ample time to cross the intersection ahead of defendant, and after the husband had entered the intersection he again observed defendant approaching about 30 feet from the intersection and traveling at a high rate of speed, and the husband then applied his brakes and swerved to the right in an attempt to avoid the collision, whether or not plaintiff or her husband were guilty of contributory negligence under the circumstances was a question for the jury, and its verdict was conclusive on appeal.

Kienlen v. Holt (Cal. App.) 288 P. 866, is a case where plaintiff saw defendant's automobile coming when it was approximately 365 feet distant from the intersection and plaintiff had 110 feet to travel to cross the intersection, and plaintiff's wife saw defendant's automobile coming when it was 165 feet from the intersection and when plaintiff's automobile had approximately 55 feet to travel be-

fore passing out of the intersection, plaintiff had a right to assume that defendant would operate his car at a careful and prudent speed, and under the circumstances, it cannot be said that plaintiffs were guilty of contributory negligence as a matter of law in continuing across the intersection after observing the approach of defendant's machine.

In the case of *Donat v. Dillon*, 192 Cal. 426, 221 P. 193, 194, the court said: "Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended. He could not close his eyes so far as south-bound traffic on Chester avenue was concerned. To the contrary, having observed Riddle's car approaching at an exceedingly fast rate of speed for that vicinity, the defendant was no longer entitled to rely upon the presumption that the driver of this machine would comply with the rules of the road, and he was bound to take such reasonable measures as he could under the circumstances to prevent the injury. It was, therefore, a question for the trial court to determine upon all the evidence and the reasonable deductions therefrom whether the defendant, after having seen the approaching machine, continued to exercise the care and prudence which a reasonable man would have exercised under the circumstances."

In the case of *Flores v. Fitzgerald*, 204 Cal. 374, 268 P. 369, the court held that in an action for damages for personal injuries received by plaintiff in a collision between his motorcycle and an automobile at the intersection of two city streets, the fact that plaintiff failed to observe the movements of defendant's machine after first seeing it 150 feet west of the intersection did not make him guilty of contributory negligence as a matter of law, but the question was one of fact for determination by the court, as the motorist was obligated to proceed across the intersection in a careful and prudent manner and to take such reasonable measures as he could under the circumstances to prevent the injury.

[7] In the case at bar the plaintiff proceeded across the intersection after seeing defendant's car 200 or 300 feet distant. They next saw defendant's car about 100 feet away apparently suddenly increasing its speed. They proceeded at the same rate of speed in the same direction, or, in other words, did nothing to avoid the collision. Whether they were justified in so doing under all the conditions and circumstances present depends upon a comparison of their conduct with that which may be assumed to be the conduct of an ordinarily prudent man. Under the circumstances here presented we cannot say that reason-

able men might draw but one conclusion. The question was therefore one for the trial court, and its finding adverse to the appellant is conclusive upon this court.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

109 Cal. App. 71

**DANZIGER v. INDUSTRIAL ACCIDENT
COMMISSION et al.**
Civ. 7462.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1930.

Rehearing Denied Nov. 15, 1930.

1. Master and servant ⇨415.

Industrial Accident Commission is vested with full power and authority to regulate and prescribe nature and extent of proofs and evidence (St. 1917, p. 831, § 57(a), (6)).

2. Master and servant ⇨417(7).

Findings and conclusions of Industrial Accident Commission on ultimate facts are conclusive and final, and subject to review in proper proceedings (St. 1917, p. 831, §§ 19, 67(c)).

3. Master and servant ⇨417(7).

Findings of Industrial Accident Commission will not be disturbed when supported by substantial evidence (St. 1917, p. 831, §§ 19, 67(c)).

4. Master and servant ⇨419.

Finding that employee unreasonably refused to submit to surgical treatment for hernia under award held supported by evidence, warranting termination of employer's liability (St. 1917, p. 831, § 11(e)).

5. Master and servant ⇨348.

Workmen's Compensation Act should be construed in favor of employee (St. 1917, p. 831).

6. Master and servant ⇨419.

What constitutes reasonable diligence by employee in submitting to surgical treatment under award is question of fact (St. 1917, p. 831, § 11(e)).

Proceeding under the Workmen's Compensation, Insurance, and Safety Act by Harry Danziger, employee, against the Southern California Telephone Company, employer. On certiorari to review an order of the In-

dustrial Accident Commission, terminating employer's liability under award of surgical treatment and compensation after employee's unreasonable refusal to submit to treatment.

Order affirmed.

J. E. McAndrew, of Los Angeles, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

CRAIG, J.

The petitioner was injured in the course of employment. Upon application to the Industrial Accident Commission for adjustment of his claim, stating that he had asked for an operation and for a truss to relieve a hernia, it was found and awarded that he be compensated by a surgical operation with necessary incidental medical and hospital treatment and a weekly allowance for temporary disability. The applicant having refused surgical treatment when tendered, a petition to terminate liability was filed, which, following a hearing and repeated refusals to submit thereto, was granted. Upon a petition for a writ of certiorari it is asserted that the commission acted in excess of its authority in terminating liability, that such order was unreasonable, and that the evidence does not justify findings of fact requiring or warranting the same.

Section 11(e) of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), provides as follows: "No compensation shall be payable in case of the death or disability of an employee if his death is caused, or if and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, the risk of which is, in the opinion of the commission, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury."

[1-3] The commission is vested with full power and authority to regulate and prescribe the nature and extent of proofs and evidence. Section 57(a) (6). It may find therefrom upon ultimate facts, and its findings and conclusions in that respect shall be conclusive and final, subject to review in proper proceedings. Sections 19, 67(c). And its findings will not be disturbed when there exists any substantial evidence to support them. *State Comp. Ins. Fund v. Ind. Acc. Comm.*, 195 Cal. 174, 231 P. 996; *Smith v. Ind. Acc. Comm.*, 26 Cal. App. 560, 147 P. 600. Upon his application reciting that he had requested from his employer a surgical operation and truss which had been refused, the petitioner was accorded a hearing, the treatment was ordered, and for a period of three years the employer tendered and held itself ready, able, and willing to comply with the award. He was then notified that, unless he responded to such offer, the employer would seek prop-

er relief. Upon a petition to terminate liability, a hearing was again held, expert and other evidence was received, and petitioner at that time declined to submit to the prescribed treatment. A physician consulted by petitioner certified that he "would not consider him a very good risk for any major surgery at the present time"; a clinical abstract from an eastern hospital where he had been treated some twenty-four years previously indicated the existence of chronic diffused nephritis, and a chemical analysis furnished by a local druggist revealed a "slight trace of albumen," and a condition which "may not be serious now, but a delay may make it so," shortly before the hearing. A doctor designated by respondents, following an examination, certified petitioner to be "a well developed and nourished man," suffering from a left inguinal hernia "easily reducible," and reported that he found the albumen and sugar tests both negative. Another physician who reviewed the medical reports stated that he found no good reason "so far as his physical condition is concerned, why he should not submit to operation, and I believe his refusal is unreasonable." There was medical evidence before the commission that he "should have a surgical repair," and that the "outlook for complete recovery is good." The petitioner testified that he would not submit to an operation after receipt of the druggist's report mentioned. Upon the foregoing evidence the commission found as a fact that the applicant had unreasonably refused to accept the awarded treatment, and entered its order accordingly.

[4-6] Many authorities are cited from other jurisdictions which we think cast little if any light upon the issue here presented. Under the statutory and judicial authority mentioned above, it is not for this court to say as a matter of law upon conflicting evidence, and as against the conclusion of the commission upon competent medical and surgical testimony, that such conclusion was unreasonable. Nor can it be said upon the record presented that the commission acted in excess of its authority, or that there was not substantial evidence tending to support the finding. It is true that the act has been consistently construed as one requiring interpretation in favor of the employee. However, that an order of the commission is "unreasonable" is nowhere in the statute specified as a ground for nullification of its action. It must be assumed that the intent of the Legislature was that the applicant should exercise within a reasonable time and with reasonable diligence a tendered right to medical or surgical treatment, in the interest of his own well being. A further reason for this is that the employer might be advised as to whether existing compensation and the proffered treatment were to be accepted or rejected. That the question as to what constitutes reasonable

diligence is a question of fact requires no citation of authority. "As a proposition of general law, it has been affirmed in innumerable cases that a person's responsibility for his conduct will depend on whether the injurious consequences thereof might have been or ought to have been foreseen and prevented by him; and there seems to be every reason for the belief that, in cases arising under the workmen's compensation acts, this constitutes the true test, not only as to whether responsibility does or does not exist in the particular case, but also as to the extent to which the actor is to be deemed responsible for the consequences of his conduct." 28 R. C. L., § 101, p. 814. In logical concord with these principles, the supreme court of Kansas, following a review of numerous authorities of all the states where the subject has been discussed, concluded: "The reasonableness of the refusal of an injured employee to submit to an operation has been considered in most, if not all, the cases where he has been denied compensation on account of such refusal. That reasonableness has been disposed of in those cases as a question of fact. It is a question of fact that must be determined by the trier of facts, and when he has determined it, and his conclusion is supported by evidence, that conclusion is binding on this court the same as the determination of any other question of fact." *Strong v. Sonken-Galamba Iron & Metal Co.*, 109 Kan. 117, 198 P. 182, 186, 18 A. L. R. 415.

The order terminating liability is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

109 Cal. App. 163

LAHTI v. SOUTHWESTERN AUTOMOBILE
INS. CO.
Civ. 7499.

District Court of Appeal, First District,
Division 1, California.

Oct. 24, 1930.

Rehearing Denied Nov. 22, 1930.

Hearing Denied by Supreme Court
Dec. 22, 1930.

Insurance 435.

Husband of assured driving assured's automobile at time of accident with knowledge and consent of assured held "assured" within automobile liability policy (St. 1919, p. 776).

Injured person obtained judgment against husband, but did not obtain judgment against assured, and thereafter instituted suit against insurance company under St. 1919, p. 776, to recover amount of policy and interest. Insurer contended that under policy it contemplated no in-

demnity liability to any person except named assured designated in schedule of statement. Omnibus clause of policy provided in substance that, in addition to assured named in policy, any person while riding in or operating automobile shall be deemed to be included within meaning of the word "assured."

[Ed. Note.—For other definitions of "Assured," see Words and Phrases.]

Appeal from Superior Court, Alameda County; J. J. Allen, Judge.

Action by Mary Lahti against the Southwestern Automobile Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

L. J. Styskal, of Los Angeles, for appellant.

Elliott Johnson, of San Francisco, and Frank V. Cornish, of Berkeley, for respondent.

TYLER, P. J.

Action to recover indemnity under a policy of automobile liability insurance.

The policy which was issued by defendant company in the sum of \$5,000 covered a Chevrolet sedanette automobile of which one Margaret McMenamin was the owner and the assured named in the policy. Thereafter, and when the policy was in full force and effect, William McMenamin, her husband, while driving the automobile with the knowledge and consent of his wife, struck and injured the plaintiff, who brought suit against William McMenamin and recovered judgment in a sum in excess of \$16,000. Margaret McMenamin was not made a party to the action, and no judgment has been recovered against her. Thereafter the present action was instituted against the insurance company, as authorized by statute (St. 1919, c. 367, p. 776), to recover on its policy in the sum of \$5,000, together with interest on the judgment against William McMenamin.

Under the authority of the statute referred to and based upon the judgment recovered against William McMenamin, the court below rendered judgment for plaintiff on the theory that William McMenamin was included in the provisions of the policy, and that defendant was therefore liable to plaintiff on that instrument. From this judgment and from an order denying a new trial this appeal is taken.

The sole question here presented is whether or not defendant company is bound under the terms of the policy to pay a judgment rendered against William McMenamin where none was rendered against Margaret McMenamin.

The pertinent parts of the policy provide as follows:

"(Defendant) Does hereby agree:

"(1) To Indemnify the person * * * named in Statement 1 of the Schedule of Statements and herein called the Assured, against loss from the liability imposed by law upon the assured * * * as the result of an accident * * * caused by reason of the use, ownership, or maintenance of any of the automobiles. * * *

"(2) To defend in the name and on behalf of the assured any suit brought against the assured. * * *

"In addition to the assured named in the policy, any other person while riding in or operating any automobile covered hereunder, and any other person * * * while responsible for the operation of any such automobile, shall be deemed to be included within the meaning of the word 'assured' wherever used in this policy, provided (1) That such person * * * is not covered by any other valid and collectible insurance against an accident covered by this policy. * * *

"(3) That the word 'Assured' in the cancellation condition (G) and in the other insurance condition (N) of the policy shall be limited to the assured named in the schedule; (4) That the insurance under this policy shall be applied first to the protection of the assured named in the schedule, and the remainder if any shall alone be applicable to the protection of any person * * * entitled to indemnity under the provisions of this paragraph. * * *

"K. The Company shall not be liable * * * until a final judgment shall have been recovered against the assured in a suit covered hereby. The insolvency or bankruptcy of the assured shall not release the company * * * and if such insolvency or bankruptcy shall occur, * * * the judgment creditor shall have a right of action to recover the amount of such judgment against the Company to the same extent that the assured would have had to recover against the company had the assured paid the said judgment. * * *

"R. * * * The expenses incurred by the company in defending any suit, including the interest on any verdict or judgment and

any costs taxed against the Assured, will be paid by the company irrespective of the limits expressed above."

The person named as the assured in schedule 1 of the schedule of statements is Margaret McMenamin. It is appellant's contention that the defendant under its policy contemplated no indemnity liability to any other person except Margaret McMenamin, the person named in the schedule of statements. There is no merit in the contention. In plain and unambiguous language, the omnibus clause of the policy provides that, in addition to the assured named in the policy, any person, while riding in or operating the automobile covered by the policy, shall be deemed to be included within the meaning of the word "assured." William McMenamin was within the defined group, being the operator of the car, and, this being so, the policy contemplated indemnity liability for his acts as an unnamed assured with the same force and effect as if he had been expressly named therein. That appellant contemplated giving benefits to persons other than the named assured, Margaret McMenamin, is further evidenced by the clause in the policy providing that the insurance shall be first applied to the protection of the assured named in the schedule, and the remainder, if any, shall alone be applicable to the protection of others entitled to indemnity. To hold that the policy covered only liability incurred by the insured herself by reason of the driving of the automobile by a third person with her consent and did not cover the liability of the third person when the named insured was not herself liable would be to disregard entirely the express provisions of the omnibus clause. See *Ocean Accident & Guarantee Corp. v. Bear*, 220 Ala. 491, 125 So. 676; *Horn v. Commonwealth Co.*, 105 N. J. Law, 616, 147 A. 483; *Odden v. Union Indemnity Co.* (Wash.) 286 P. 59.

The terms of the policy are plain and explicit and the meaning clear and free from doubt, and need no construction. The declared intention was to insure, not only the named assured, but all the defined group named in the omnibus clause as well.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

108 Cal. App. 197

FAIRBANKS v. CRUMP IRRIGATION & SUPPLY CO., Inc., et al.
Civ. 439.

District Court of Appeal, Fourth District,
California.

Oct. 7, 1930.

Hearing Denied by Supreme Court Nov. 10,
1930.

1. Assignments ⇨134.

Bank seeking to recover amount due contractor and assigned to it need not prove that contractor's obligation to bank was not paid.

2. Assignments ⇨55.

Bank taking new note payable in futuro on assignment of other indebtedness impliedly promised to forebear and changed position to its detriment.

3. Assignments ⇨55.

Bank taking several assignments of indebtedness and new notes for old indebtedness changed position to its detriment, though new note was not shown payable in futuro.

4. Principal and agent ⇨189(4).

Under pleading construable as alleging actual agency, proof of ostensible agency held not variance.

5. Judgment ⇨725(6).

Holding that neither owner nor surety could deprive bank of amount of assignment from contractor necessarily determined surety's claim of subrogation to owner's rights.

6. Appeal and error ⇨843(2).

Rights of contractor's surety to payment against other lien claimants could not be determined on appeal involving only bank's right under assignment by contractor.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

On rehearing.

Rehearing denied.

For former opinion, see 291 P. 629.

Sloane & Sloane and Harrison G. Sloane, all of San Diego, for appellant South Coast Bank.

Rolland C. Springer, of San Diego, for respondent Fairbanks.

Lawler & Degnan, of Los Angeles, for respondent Hartford Accident & Indemnity Co.

Abrahams & Sadicoff, of Los Angeles, for respondent Columbia Steel & Tube Corporation.

George C. Mansfield and Arthur W. Kennedy, both of Los Angeles, for respondents Pacific Pipe & Supply Co. and Industrial Supply Co., Inc.

Culver & Nourse, of Los Angeles, for respondent Linde Air Products Company.

Hoye & Boehler, of Los Angeles, for respondents Murray & Alsup.

Honnold & Hubbell, of Escondido, for respondents Denney & Broerman.

Arthur F. H. Wright and C. G. Selleck, both of San Diego, for respondent Potter.

PER CURIAM.

[1] In the surety company's petition for the rehearing of this case it is claimed that our opinion overlooks the failure of appellant bank to establish that no part of the contractor's indebtedness to it has been repaid to it. That matter was in fact expressly dealt with, and in reversing the judgment we distinctly left it to the trial court to hereafter ascertain the facts in that behalf to the end that appellant should have credit from the fund assigned to it only for an amount equivalent to whatever remains unpaid on the contractor's obligation to it with the interest thereon. The surety company's real point is not so much that the matter was overlooked as that appellant bank was not required to prove a negative, namely, that the obligation to it had not been paid. No such burden rested on it. *Light v. Stevens*, 159 Cal. 288, 292, 113 P. 659; *Levey v. Henderson*, 177 Cal. 21, 23, 169 P. 673.

[2, 3] It is also claimed that we assumed without evidence that the maturity of the contractor's obligation to appellant bank was extended by the taking of a new note for it coincidently with the taking on September 13, 1927, of the collateral to secure the obligation, and that we have also erroneously assumed that the original indebtedness was paid by the taking of the renewal note, and that it is on the basis of these assumptions that we have held that appellant bank changed its position to its detriment when it took the assignment. That there was on the part of the bank a forbearance to press for payment of the contractor's obligation to it following its receipt of the collateral is, of course, unquestionable. True, such forbearance alone will not amount to such a change in a creditor's position to its detriment as to raise an estoppel. It is, of course, otherwise when there is a promise to forbear, and that may be implied as well as express, and, as pointed out in our original opinion, it will be implied when a new note payable in futuro is taken for the original obligation. The surety company claims that there is no evidence in this case that the new note was

payable in futuro, and that it may be a mere demand note. Though the record is bare of any such suggestion, the evidence does not exclude that as a possibility. Regardless of that phase of the matter, however, the portion of the record printed in the supplement to the surety company's petition for rehearing includes, inter alia, the following (page 10) from the testimony by the managing officer of appellant bank:

"We would loan them (i. e., loan the contractor) on an assignment, and when that assignment was paid off we would take another assignment; kept the fund revolving. * * *

"They (i. e., the contractor) paid off probably some assignment, and then a new assignment was made, and a new note made. *Any old indebtedness was paid off at that time and a new note was made.*"

In the light of this testimony it cannot successfully be claimed that the evidence is insufficient to show that when the present collateral was taken the position of appellant bank was changed to its detriment. *King v. Mellon Nat. Bank*, 227 Pa. 22, 75 A. 832; *Crawford v. Dollar Sav. F. & T. Co.*, 236 Pa. 206, 84 A. 694.

Up to this point we have, in discussing the petitions for rehearing, done so on the basis which would apply were it necessary for appellant bank in order successfully to rely on an ostensible agency, to make out a strict case of agency by estoppel, that is to show the presence of each of the elements referred to in the passage from 2 C. J. 464, quoted in our original opinion. We adhere to the view that the showing made was sufficient for that purpose.

In view, however, of the doctrine laid down in *Smitton v. McCullough*, 182 Cal. 530, 189 P. 686, 689, we are not prepared to hold that appellant bank was under any obligation to go so far as that, because it is there held, as noted in our original opinion, "that not only does an antecedent indebtedness constitute a valuable consideration for a transfer in satisfaction and discharge of said indebtedness, *but it is also a valuable consideration, within the protection of the equitable doctrine of bona fide purchase, for a transfer merely as security for a preexisting debt.*" In commenting on our reference to that opinion, counsel for the surety company assume that we gave significance only to the earlier part of the language quoted. It is necessary, however, to give effect to the rule embodied in the part of the quotation above italicized. We have recently had occasion to comment on this same language in *Schumann-Heink & Co., Inc., v. U. S. Nat. Bank*, 291 P. 684, as well as in our opinion denying a rehearing in that case.

[4] The point is made that we did not in our original opinion notice the contention that the pleadings of appellant bank, in effect at least, alleged an actual agency in Smart to accept in Fairbanks' behalf the assignment from the contractor to the bank, whereas our decision sustains the position of the bank on the basis of an ostensible agency not pleaded as such. But, as pointed out by counsel for the bank in his brief, even if his pleading could be construed as alleging an actual agency, proof of an ostensible agency could not amount to a variance. *Donnelly v. S. F. Bridge Co.*, 117 Cal. 417, 421, 422, 49 P. 559.

[5, 6] A considerable part of the surety company's petition for rehearing is devoted to the claim that we failed to pass on its assertion of the right to be subrogated to the right of the owner under the doctrine of *Castro v. Malcolm*, 66 Cal. App. 635, 226 P. 976, and the cases therein relied upon. So far as the controversy between the surety company and appellant bank is concerned, that matter was expressly and necessarily passed on to the extent of holding that neither the owner nor the surety company have any right to deprive the appellant bank of the \$5,000 covered by the assignment, in so far as the indebtedness from the contractor to the bank, for which that assignment was made security, may remain unpaid. To these views we adhere. We declined on the present appeal to pass on the respective rights, as between themselves, of the surety company and the claimants under material and labor liens, saying that their rights as between themselves had not been argued. To this we might have added that such a discussion would hardly be relevant to the present appeal, which is one by the bank to gain relief from a judgment against it. The surety company now asserts that all these matters were in fact argued. What it means is that they were necessarily implicated in its claim to be subrogated to Fairbanks' rights under the doctrine of *Castro v. Malcolm*, supra, and it apparently asks us to hold at this time, despite its joinder with such of the claimants of material and labor liens as were represented at the trial, in a stipulation that they should be paid pro rata with it, that because the other lien claimants, who did not appear at the trial, did not join in the stipulation, therefore it binds nobody, and that, by reason of the surety company's subrogation to the rights of Fairbanks, it must now be allowed its claim in full, from whatever is left if the bank is to be paid, to the exclusion of the material and labor lien claimants. It would be grossly unfair to the latter, who have had no reason to suppose any such question involved in the present appeal and have not discussed it before us to undertake to de-

cide any such questions at this time. Their initial solution must be left to the trial court in its further hearing of this case and it will be time enough for us to deal with them when they are properly before us.

The petitions for rehearing are each denied.

109 Cal. App. 75

**SHELL OIL CO. v. SUPERIOR COURT OF
LOS ANGELES COUNTY et al.**
Civ. 7477.

District Court of Appeal, Second District,
Division 2, California.
Oct. 17, 1930.

1. Mandamus ☞28.

Application for inspection of records is within trial court's discretion, which will not be controlled in absence of abuse (Code Civ. Proc. § 1000; Const. art. 1, § 19).

Code Civ. Proc. § 1000, provided for application for order for inspection of records and books, and Const. art. 1, § 19, prohibited unreasonable searches and seizures.

2. Mandamus ☞187(9).

All intendments are indulged in favor of validity of trial court's order permitting inspection of record (Code Civ. Proc. § 1000; Const. art. 1, § 19).

3. Discovery ☞97(1).

To obtain order for inspection of records, documents must be described so as to be readily recognized and must be shown to contain material and competent evidence (Code Civ. Proc. § 1000).

4. Discovery ☞97(4).

Affidavit to obtain inspection of record, alleging specific material evidence known to be in defendant's possession was sought, not "fishing expedition," stated mere conclusion insufficient to confer jurisdiction (Code Civ. Proc. § 1000).

5. Discovery ☞97(4).

Affidavit for inspection of records, not sufficiently describing documents and showing documents were incompetent as hearsay, except for leases to which plaintiff was not party, held insufficient (Code Civ. Proc. § 1000).

6. Searches and seizures ☞7(25).

Affidavit to inspect records showing mere "fishing device" violated constitutional im-

munity against unlawful searches (Const. art. 1, § 19; Code Civ. Proc. § 1000).

Application for writ of mandate by the Shell Oil Company to restrain the Superior Court of Los Angeles County and Douglas L. Edmonds, Judge, from enforcing order permitting inspection and right to copy certain records.

Writ granted.

McCutchen, Olney, Mannon & Greene, of Los Angeles, for petitioner.

J. Edward Johnson and Chas. Mitschrich, both of Los Angeles, for respondents.

SCHMIDT, Justice pro tem.

In an action pending in the superior court of the State of California, in and for the county of Los Angeles, Josephine Cook, as plaintiff by her second amended complaint against Shell Oil Company, alleged that she was the owner of certain fractional royalty units under a certain oil and gas lease known as the Shell-Coseboom-Dabney lease, a copy of which was attached to the complaint; that there were certain breaches of covenants, express and implied, under said lease by the Shell Oil Company, petitioner herein, and by which action she claimed damages in a large amount. Subsequent to the filing of answer by the defendant therein, and pursuant to section 1000, Code of Civil Procedure, said plaintiff made her motion before the respondent court for an order of inspection and copy of records alleged to be in the possession or under the control of petitioner, and upon the hearing of said motion the respondent court granted same and made its written "order to permit inspection and right to copy certain records and documents" whereby it ordered petitioner, the Shell Oil Company, to "give to the plaintiff and/or her attorneys * * * an inspection and permission to take copies of each and all the following described records and/or documents in possession of and/or under control of said defendant Shell Oil Company containing the information specified in said notice of motion for order for inspection and copy, to-wit:

"1. The location records showing the precise location in distance in terms of feet from the boundaries of the tract of land on which were located and drilled the following described oil and/or gas wells to-wit:

"(a) wells numbered 1-9, inclusive, located on" (here follows description of the two ten-acre pieces in which plaintiff claimed her unit interests and more than 40 additional wells described in a similar manner, all of which additional wells were on property other than the twenty acres covered by said lease).

"The evidence desired by plaintiff to be obtained from said records on each of the here-

inabove described oil and/or gas wells is: The precise location and distance in terms of feet and direction from the nearest boundary line of said Shell-Coseboom-Dabney Lease, and the precise location in terms of feet and direction from each of the two nearest boundary lines of the particular lease upon which each of said wells is located.

"2. The drilling records of each and all the foregoing oil and/or gas wells as to each of said wells:

"(a) The date actual drilling commenced;

"(b) The date of first completion;

"(c) The date first placed on production;

"(d) The depth in terms of feet when completed;

"(e) The depth in terms of feet at which each string of casing is set;

"(f) The size and length of such casing;

"(g) The length in terms of feet of perforated casing;

"(h) The depth in terms of feet from the surface of the land to the bottom of such perforated casing;

"(i) The depth in terms of feet from the surface of the land to the point where each oil and/or gas bearing strata was encountered both in the original drilling and/or in deepening;

"(j) The thickness in terms of feet of each oil and/or gas bearing strata encountered and/or penetrated;

"(k) The depth in terms of feet of open hole below the bottom of the deepest casing set;

"(l) The date at which actual drilling to deepen a well commenced;

"(m) The depth in terms of feet at which completed after redrilling or deepening;

"(n) The depth and/or thickness in terms of feet of each oil and/or gas bearing strata from which oil and/or gas has been produced or is now being produced;

"(o) The dates between which any and/or all of said wells were off production and the reason why said well was off production during such period.

"3. The production records on which is recorded the daily, weekly and monthly production of each and/or all said wells showing among other things:

"(a) The quantity of oil in terms of barrels and/or of gas in terms of cubic feet produced each day and/or each week and each month from each and/or all said wells from the time that the same began producing oil or gas to date hereof;

"(b) The specific gravity of the oil produced each day from each oil bearing strata penetrated by such well from which production was taken;

"(c) The monthly market price in terms of dollars per barrel of oil and in terms of dol-

lars per thousand cubic feet of gas on which royalties were based which have been paid by the defendant to the owner of the fee or of the royalties from the production of each well;

"(d) The period for which said wells or any of them were off production and the reasons therefor.

"4. The tracings and/or blue prints containing a chart showing the formation and/or structure penetrated in each such well during the drilling thereof from its commencement to its completion.

"5. The record of each and every survey and/or acid bottle test made on any and/or all of the above designated wells.

"6. The complete drilling log of each of said above designated wells.

"7. The lease and/or drilling contract and/or contract for the purchase of production under and/or by virtue of which the said defendant, Shell Oil Company, drilled and/or operated and/or is operating the wells on the following described tracts of land, to-wit: (here are enumerated eight leases).

"Also each and every contract and/or agreement which the defendant has heretofore made concerning the payment of royalties and/or the sale of production from each and every of the said wells hereinbefore described."

By its petition to this court the Shell Oil Company is seeking to restrain the respondent court from enforcing in any manner whatsoever the aforementioned order, claiming that the respondent court, under the facts in this case, was without jurisdiction to make the order.

[1.2] Without doubt, section 1000, Code of Civil Procedure, affords the trial court judicial discretion in passing upon any application made for inspection of books and records. We must indulge all intendments in favor of the validity of the order of the trial court, and the action of the trial court being discretionary, the writ here asked cannot issue unless the action of the trial court amounts to an abuse of discretion. *Maclay Rancho v. Superior Court*, 81 Cal. App. 471, 254 P. 287.

The question presented involves the constitutional right of the people to "be secure in their * * * papers and effects, against unreasonable seizures and searches." Const., art. 1, § 19.

As was said in *Kullman v. Superior Court*, 15 Cal. App. 276, at page 285, 114 P. 589, 593: "The right of the people to be secure against unreasonable or unnecessary seizure of their private papers and documents is justly regarded as a highly sacred one—so much so, in fact, that the people themselves have taken the pains in express written terms to guarantee and safeguard its perfect enjoyment. Const. art. 1, § 19. In no case, therefore, should a person be forced to surrender his pri-

vate books and papers to another who does not claim to own or have any interest in them except upon convincing proof that such books or papers contain evidence which materially affects the rights in litigation of the person demanding them." Citing and quoting from *Ex parte Clarke*, 126 Cal. 238, 58 P. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176.

[3] As a condition precedent to support such an order of inspection there must be shown, by clear and unequivocal proof, two essential facts:

(1) That the precise book, paper, or document containing the evidence material to the issue be described or designated so that it may be readily recognized; and

(2) That such book, paper, or document contains evidence material to the issue to be tried by the court. Such evidence must be competent evidence, not hearsay.

Again quoting from *Kullman v. Superior Court*, 15 Cal. App. 276, at page 286, 114 P. 589, 593, it is said: "Nor is it enough, as is said by the court in *Morrison v. Sturges*, 26 How. Prac. (N. Y.) 179, 'that the party believes or is advised that the paper contains material evidence. Facts must be shown to support it.'"

The *Kullman Case* was approved in *Funkenstein v. Superior Court*, 23 Cal. App. 663, and at page 667, 139 P. 101, 103, we find this significant language:

"If any of such books, papers, or documents so made, issued, or taken would be admissible upon any theory of the case, it was the duty of the affiant to set forth the facts and reasons showing wherein their materiality and admissibility consist; and it was not sufficient in his affidavit to merely rely upon the legal conclusion stated in general terms that such books, papers, and documents would be material.

"Finally, the entire failure to the affiant to identify with any particularity of description any specific book or paper or document constitutes, in our opinion, a fatal objection to the jurisdiction of the trial court to make the order in question."

See, also, *Pyper v. Jennings*, 47 Cal. App. 623, 191 P. 565; *People v. Nields*, 70 Cal. App. 191, 232 P. 985; *Commercial Bank v. Superior Court*, 192 Cal. 395, 220 P. 422.

The record in this case stands uncontradicted that: (1) Written demand was made upon plaintiff and her attorneys for a bill of particulars specifying in detail the precise respects in which petitioner was supposed to be in default under its lease, including a statement of the wells it was supposed to have failed to offset and a statement of the wells it was supposed to have completed under the leased premises. A bill of particulars was not forthcoming; several months later petitioner made a motion in respondent court for

an order directing plaintiff to furnish a bill of particulars substantially in accord with the original demand, in response to which plaintiff filed an affidavit with the court, stating that she had no knowledge of the particulars demanded and that she would need an inspection of petitioner's records before she could give the bill of particulars; the motion was denied. And (2) in her deposition taken prior to the hearing resulting in the order plaintiff admitted she had no knowledge of any facts in connection with the wells mentioned in her complaint; that she had verified her complaint on the "say so" of her husband. Likewise her husband in his deposition admitted he did not have any knowledge of the facts involved in the allegations charged in the complaint.

[4] In support of the motion for the order plaintiff below presented to the respondent court the affidavits of J. Edw. Johnson and Chas. Mitschrich, each of whom are counsel for plaintiff. The one affidavit of J. Edw. Johnson states "that said plaintiff's demand for an inspection of records * * * is only for the purpose of obtaining specific evidence which affiant knows to exist and which has a material bearing on the issues and which affiant knows to be in the possession of said defendant; that said demand for an inspection * * * is not a 'fishing expedition.'" In another affidavit he states "that each and all of the said records, * * * specified in said notice * * * are material to the proper presentation of plaintiff's case and are in the possession or under the control of said defendant and cannot be procured elsewhere." These statements of the affiant are mere conclusions, and under the decisions hereinbefore referred to could not confer any jurisdiction on respondent court.

Two affidavits were filed by Charles Mitschrich, one dated May 26, 1930, and the other June 12, 1930, which second affidavit substantially includes all that is in the first affidavit; we shall treat the two as one affidavit. The affidavit alleges, among other things:

"That affiant has been engaged in the actual practice of law since April 2, 1889, and that approximately twenty-five years of his practice has been to a large extent in connection with litigation connected with the oil and gas industry, and that affiant knows from personal experience that every successful oil operator in the regular course of his business makes and preserves records of all drilling operations and of the daily, weekly, monthly and yearly production of each and every well drilled and/or operated by it or him; and that the said defendant has in the regular course of its business made and preserved such records concerning each and every oil and/or gas well drilled and/or operated by it and particularly those certain oil and/or gas wells named and described in said written

'Demand for Inspection and Copy'; that said records so made and preserved by said defendant contain all of the information requested, set forth and described in said 'Demand for Inspection and Copy'; that all of said records and documents and the information contained therein are accurate, relevant, material, and essential to the proper presentation of this action and are admissible in evidence upon the trial thereof as is more fully hereinafter set out; that said records and the information contained therein and an inspection thereof by plaintiff are necessary to enable plaintiff to present her case to the court and that said information is not in the possession of plaintiff nor her attorneys and cannot be obtained by plaintiff elsewhere than from the said records of defendant." (Here follows mention of the more than fifty gas wells hereinbefore in this opinion referred to, followed by the words):

"That all of the oil and/or gas wells located on said lands were drilled and are owned and/or operated by said defendant and so near to the boundaries of said Shell-Coseboom-Dabney Lease as to drain and that they do drain oil and/or gas from beneath said demised land leased to defendant by said Shell-Dabney-Coseboom Lease.

"That the said Location Records demanded from said defendant will show the exact location of each of said oil and/or gas wells in relation to the boundaries of said demised premises and are material, relevant and necessary to show and will show that said wells are located so near to the demised land as to drain and that the same do drain oil and gas from beneath the said demised premises, and that the Court can ascertain therefrom that the same do drain oil and/or gas from beneath the demised premises.

"That the said 'Drilling Records' and 'Tracings' and/or 'Blue Prints' demanded from said defendant will show all of the information as set forth in * * * said written demand * * * and are material and relevant and admissible in evidence to show and do show the manner and *diligence or lack of diligence* with which the demised land was explored and developed for oil and gas; the particular sand or sands from which each of said wells have produced and are now producing oil and/or gas; the thickness of each particular oil and/or gas sand encountered * * * the size of the casing used in each well; the amount and exact location of perforated casing in each of said wells and the other information set forth in said demand, all of which is necessary and material to show and will show, and therefrom the court can determine *whether or not* the said wells on the said adjacent and nearby lands which were drilled and are owned and/or operated by said defendant are properly *or at all* offset by any well or wells on the said demised premises and to determine *whether or not*

said demised premises were properly and adequately explored for gas and/or oil and *whether or not* wells drilled, owned and operated on surrounding land by defendant company have drained and/or do drain oil and/or gas from beneath the demised premises, and that each and all of said records are admissible as evidence *tending to prove* the truth of the allegation in plaintiff's complaint.

"The said 'Production Records' demanded from said defendant will show the quantity of oil * * * produced * * * and the period during which same was so produced; the quality of the oil * * * price obtained * * * and the royalties * * * paid; that said records are necessary and material to show and do show the quantity of oil and gas produced * * * and it can be determined therefrom and the same will *tend to prove* how much of it *if any* produced from wells on the adjacent or nearby lands was drained from beneath the said demised premises, and will enable the court or jury to compute * * * the amount of damage *if any* to which plaintiff is entitled by reason of said drainage and that the same are admissible in evidence *as tending to prove* the truth of the allegations of plaintiff's complaint herein.

"That the said Tracing and/or Blue Prints demanded * * * will show the cross-section of each formation * * * penetrated * * * and the same are proper, necessary and material and admissible in evidence to prove the character of formations penetrated * * * the exact location of the strata * * * the length of time necessary to drain said wells * * * and *whether or not* production was or is now being taken from each sand or which particular sand from which it was and/or is taken and by comparison will *tend to prove* that defendant has neglected to protect the demised premises from drainage."

"The Record of each survey and/or acid bottle test * * * will show the general course and direction taken by the drill in the drilling of each of said wells and will show *whether or not* said hole or well is straight and if not straight the degree of deflection and the direction in which it veered from the point at which it entered the surface of the ground and the distance, and is necessary and material and admissible in evidence in this cause *as tending to show* and will show *whether or not* any one or more of said wells located on adjacent or nearby premises * * * are in fact completed * * * at a point underneath the said demised premises and in fact draining oil directly from beneath said demised premises, and to aid the court or jury to determine that fact.

"The 'Drilling Log' of each of said wells * * * will and does show a complete history of each well * * * and in addition to the information contained in the drilling record will and does *tend to prove* and to

show what *if any* delays there were in drilling the same; the cause of the delay; the length of the delay * * * *whether or not* delays in drilling were necessary or due to negligence or carelessness and are admissible in evidence to aid the court in determining *whether or not* diligence was used * * * and *whether or not* delays in drilling on the wells in the demised lands were intentional or unavoidable by the use of due skill and diligence, and by comparison with the logs of wells drilled by the defendant on adjacent lands will show whether defendant purposely or otherwise delayed the drilling of the wells drilled by it on the demised lands and are admissible in evidence as *tending to prove* the truth of the allegations in plaintiff's complaint.

"That the documents * * * contain evidence relative to the merits of this action which is material, relevant and competent and admissible in evidence in the trial of this cause in that such documents specify and prove among other things, the amount of royalties which defendant company agreed to pay to the respective owners of the lands surrounding and adjacent to the demised lands and affiant *is informed and believes* they will disclose that in some instances the royalties which defendant company agreed to pay * * * produced by it through wells on such adjacent and/or surrounding lands were less than those which defendant agreed to pay * * * on the demised land and will *tend to prove* that one of the motives of defendant in neglecting and failing to drill offset wells on the demised premises * * * was to secure as much as possible of the oil and/or gas from beneath the demised premises through such surrounding wells for a less royalty than that it agreed to pay * * * on the demised premises and to avoid the payment to the lessors of the demised premises and their assigns of the royalties it would otherwise have been compelled to pay therein; and will *tend to show* that defendant's contention that it has properly offset surrounding wells is not made in good faith and *tends to prove* the truth of the allegations in plaintiff's complaint, that defendant has wilfully and negligently failed to drill offset wells on the demised premises. * * *

"That the drilling records, location records, production records, tracings and blue prints above described and drilling log are all records which the defendant made in the usual course of business and taken together contain accurate evidence showing that defendant has during all of the times mentioned in the complaint drained, and still continues to drain oil and gas from beneath the demised premises through the wells * * * on adjacent premises and that it has failed and neglected to offset the same on the demised premises and are admissible in evidence and will *tend to prove* that offset wells could have been

profitably drilled and operated and should have been drilled and operated by defendant on the demised premises within a reasonable time after producing wells were brought in by defendant in surrounding lands for the mutual advantage of both parties hereto and that the same has not been done within a reasonable time or at all.

"That the record of surveys of its wells in adjacent lands contains evidence that some of such wells were completed under the demised premises and that the production therefrom is at a point under the same notwithstanding the top of such wells is on other lands, and the same is admissible in evidence as *tending to prove* and will prove *whether or not* defendant has produced and/or is producing oil and/or gas from underneath the demised lands through wells which were commenced in adjacent lands but completed under the demised land.

"That the material issues in this cause are *whether or not* wells drilled by defendant on adjacent lands drained and/or drain oil and/or gas from beneath the demised premises and if so, *whether or not* proper and/or necessary offset wells were drilled by defendant on the demised lands to properly protect the same from drainage, *whether or not* the defendant used diligence in protecting the demised premises * * * *whether or not* it used due diligence in exploring and/or developing the demised premises * * * how much *if any* oil and/or gas has been drained * * * and how much *if any* loss plaintiff suffered by reason of such drainage; *whether or not* wells commenced by defendant on adjacent lands were completed in the producing oil and/or gas sands underneath the demised lands and *if so*, how much and the quality and value of such production." (Italics ours.)

Taking this affidavit section by section, it will be noted throughout the affidavit, as was repeated toward the end thereof, appears affiant's conclusion that "each and all of said records are necessary, proper and admissible in evidence to aid the court in determining said issues and each of them and the inspection of said records by plaintiff is necessary and proper to enable plaintiff to properly and expeditiously present her evidence."

[5] Tested by the decisions hereinbefore referred to, not any of the documents, excepting the leases, is described or designated with sufficient particularity so that it can be readily recognized, and, secondly, it is not shown that any of the documents contain evidence material to the issue to be tried by the court. The affidavit of Mr. Mitschrich shows throughout that he has not any knowledge whatsoever as to the actual facts contained in the proposed records. Furthermore, each of the records referred to would not in and of itself be competent evidence, except the leases; his affidavit shows that each thereof is mere

hearsay. As to the leases, the record shows that plaintiff is not a party to any of them and has no interest whatsoever in any of them.

[6] The affidavit further shows, through its length, that it is a mere "fishing device," as contended for by petitioner. Being a fishing device, it is in direct violation of the constitutional immunity against unlawful searches and seizures. As was said in *Ex parte Clarke*, 126 Cal. 235, at page 240, 58 P. 546, 548, 46 L. R. A. 835, 77 Am. St. Rep. 176:

"In *Morrison v. Sturges*, 26 How. Prac. [N. Y.] 179, the court say: 'It is not enough that the party believes or is advised that the paper contains material evidence. Facts must be shown to support such belief.' Moreover, it was, in effect, a general omnibus order for the production of all defendant's books, which has always been held to be unauthorized; * * * the order was in the nature of what Lord Chancellor Hardwicke, over a century ago, called 'a mere fishing bill,' and such bills have been universally condemned. It is quite evident that these books were not required to be produced for the direct purpose of introducing them in evidence. Plaintiff would not have offered them, or any part of them, in evidence, unless he found something in the part offered that was relevant and material in support of his side of the case; and, indeed, they would not have been otherwise admissible. He merely intended to draw his dragnet of inspection through all these books under the ostensible motive of trying to catch something which his witness had testified was not there. In the meantime all the private business of the defendant—all its dealings with persons other than plaintiff, its methods of conducting its affairs, perhaps its financial condition, and other matters vitally important to its welfare—would have been exposed. There is no warrant in the law for such a forcible wholesale violation of a person's privacy upon such a showing as was made in this case. A man does not lose all his civil rights because he is brought into court as a party to a suit. As was said by Lord Hatherley: 'A court is bound to protect the defendant against undue inquisition into its affairs' (7 Ch. App. 97, and notes); and it would be difficult to imagine a more striking instance of such 'undue inquisition' than an order compelling a defendant to produce for inspection all his books upon the mere suspicion—against positive evidence to the contrary—that they might possibly contain some evidence favorable to the plaintiff, and without pointing to any particular part of all these books over which this suspicion was supposed to hover."

In the case at bar petitioner filed affidavits in opposition to the application for order of inspection, in which it was positively set forth

that the petitioner did not have any record of any violations of the terms of the lease upon which plaintiff brought her suit, and further, that they knew of no such violations.

There is not any merit in the contention of respondent that the letters referred to in the affidavits presented at the hearing contain admissions upon which the respondent court was justified to make the order of inspection.

A peremptory writ of mandate will issue as prayed.

We concur: WORKS, P. J.; CRAIG, J.

109 Cal. App. 168

**LAURITZEN et al. v. H. L. JUDELL &
CO. et al.**
Civ. 4150.

District Court of Appeal, Third District,
California.

Oct. 24, 1930.

1. Time $\S$ 10(7).

That last day for granting new trial fell on New Year's Day held not to extend time (Code Civ. Proc. $\S$ 12, 660).

Code Civ. Proc. $\S$ 660, limits the power of the court to grant a new trial to a period of 60 days from service on moving party of written notice of entry of judgment. Notwithstanding section 12, which is the only section specifying how time shall be computed, the last day of the 60-day period must be counted, even though a holiday.

2. New trial $\S$ 116(2).

If notice of judgment entry is defective, it is inoperative to set 60-day period within which court may grant new trial (Code Civ. Proc. $\S$ 660).

3. New trial $\S$ 116(2).

Where notice of entry of judgment contained error as to date, held, it was ineffective to set 60-day period within which court may grant new trial (Code Civ. Proc. $\S$ 660).

The record showed that the judgment was entered on October 30, and the notice of entry of judgment served upon party moving for new trial set forth that judgment had been entered on October 31.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Florence Lauritzen and Andrew Lauritzen, her husband, against H. L. Judell

& Company and another. Verdict for both plaintiffs, and from order granting new trial after judgment in favor of plaintiff last named, defendants appeal.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellants.

Derby, Sharp, Quinby & Tweedt, of San Francisco, for respondents.

PLUMMER, J.

This cause is before us upon an appeal by the defendants from an order granting a new trial after judgment in favor of the plaintiff Andrew Lauritzen in the sum of \$350. The jury in the above-entitled cause rendered a verdict in favor of the plaintiff Florence Lauritzen in the sum of \$12,000 and in favor of her husband, against the defendants, in the sum above named. The motion for new trial was made by the plaintiff Andrew Lauritzen only in so far as it affected the judgment in his favor, and the order granting a new trial related only to that part of the judgment.

[1] It is contended by the respondents that the trial court had no jurisdiction to make the order granting a new trial to the plaintiff Andrew Lauritzen, by reason of more than sixty days having elapsed from and after service on said plaintiff of a written notice of the entry of judgment. The appellants rely upon the provisions of section 660 of the Code of Civil Procedure limiting the power of the court to grant a new trial within the period named. This contention is met by the respondents with the statement that as the sixtieth day fell upon the 1st day of January, a nonjudicial day, the court had all of January 2 within which to make the order. This contention, however, on the part of the respondents is answered in the negative by the following cases: *Dolan v. Superior Court*, 47 Cal. App. 235, 190 P. 469, and *Shepherd v. Superior Court*, 54 Cal. App. 673, 202 P. 466. While the opinions in both of the cases just cited fail to give any consideration to the fact that section 12 of the Code of Civil Procedure is the only section specifying how time shall be computed, yet in view of the fact that hearing in the Supreme Court was denied in both cases, the holding that the last day of the 60-day period must be counted, even though a holiday, must be considered as definitely settled.

[2, 3] It is further contended on the part of the respondents that in order to set the 60-day period in operation, the requirement of the sections relative to giving notice of the entry of judgment must be strictly complied with. The record in this case shows that judgment in the case of plaintiffs against the

defendants named in this action was entered on the 30th day of October, 1929. The notice of the entry of judgment served by the appellants upon the respondents reads as follows (omitting the title): "You and each of you are hereby advised and you will please take notice that judgment in your favor and against the above-named defendants has heretofore, to-wit, on the 31st day of October, 1929, been entered in the above-entitled action by the clerk of the above-entitled court." (Signed by attorneys for appellants.) Service of this notice was made on the 2d day of November, 1929. The notice of intention to move for a new trial was filed November 8, 1929. The order of the court granting a new trial in favor of the plaintiff Andrew Lauritzen was made and entered on the 2d day of January, 1930. If the notice of the entry of judgment in this action was and is defective, then and in that case the court had jurisdiction to make the order granting a new trial.

In the case of *Carpentier v. Thurston*, 30 Cal. 123, the Supreme Court had before it a similar question and held that an error in the date of the entry of the judgment, or of the decision, rendered it inoperative to set the 60-day period in operation.

A very similar case is that of *Weeks v. Coe*, 36 App. Div. 339, 55 N. Y. S. 263, 265. There the trial court made an order granting a new trial on October 22, 1898, which was entered on October 29, 1898. The notice of entry of the order was served on plaintiff on October 29, 1898, stating that the order had been made and entered on October 29. The plaintiff appealed from the order 32 days after receiving such notice. The section of the New York Code (section 1351) applicable to such cases provided that an appeal must be taken within 30 days after service of notice of entry of the order. The defendant in the *Weeks Case* moved to dismiss the appeal. The court, in considering the question, held as follows: "It is well settled that where a party seeks to limit the time of his adversary to appeal he must be strictly regular in his practice to accomplish that result. * * * But if we treat the notice of the entry of the order as having been brought to the knowledge of the plaintiff, it is insufficient to limit the time in which to appeal. The notice states that it is a copy of an order made and entered on the 29th day of October, 1898. Reference to the order itself shows that no such order was made on that day. On the contrary, its heading, and the certificate of the clerk attesting the same, show that it was made on the 22d day of October, 1898. This is a departure from strict regularity, and within the authority of the cases first above cited is insufficient as a notice to limit the time of appeal." The defendants' motion to dismiss the appeal was denied.

The record in the instant case shows that there was no judgment made and entered, or made or entered, on the 31st day of October, 1929, and in line with the cases cited, it must be held that the trial court had jurisdiction to grant a new trial herein.

The order is therefore affirmed.

All concur.

109 Cal. App. 99

PEOPLE v. BROWN.

Cr. 108.

District Court of Appeal, Fourth District,
California.

Oct. 20, 1930.

1. Criminal law — 419, 420(10).

Testimony by manager of store broken into that he personally checked stock before and after burglary, and knew certain merchandise was missing and stolen, *held* not objectionable as hearsay.

2. Burglary — 41(1).

Variance between dates of burglaries and sales of stolen merchandise *held* not fatal, but went to weight of testimony concerning sales.

The evidence disclosed that burglaries were committed on March 28, April 5, and May 5. Witness testified that he was employed by defendant to sell merchandise identified as merchandise stolen, and that he made first sale along in month of March, and subsequent sales within two and three weeks of first sale.

3. Criminal law — 1159(3).

Conviction for burglary under conflicting evidence cannot be disturbed by appellate court.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Gilbert P. Brown was convicted for burglary, and he appeals.

Affirmed.

Chester R. Andrews, of Palo Alto, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

MARKS, Acting P. J.

Appellant and F. C. Hertel were jointly charged with the crime of burglary in three separate counts of an information filed by the district attorney of Fresno county. It was alleged that the accused entered the

store or warehouse of the Better Buy Cash Grocery in Fresno, Cal., on or about March 28, April 7, and May 5, 1930, with intent to commit the crime of theft. Three prior convictions of felonies were alleged against appellant, and admitted by him. Hertel escaped from jail and was at large at the time of the trial. Appellant was found guilty on all three counts and judgment pronounced against him.

Appellant relies upon two grounds for a reversal of the judgment. He urges that the trial court erred in denying his motion to strike the testimony of the witness Harry Markowitz, offered in support of the third count of the information, and that the evidence was not sufficient to support the verdict and judgment against him.

[1] Harry Markowitz was manager of the Better Buy Cash Grocery at Fresno. He testified that on the nights of March 28, April 5, and May 5, 1930, the store was broken into and several cases of three popular brands of cigarettes stolen. The entrances were made through a window and a trapdoor. The cigarettes were packed in cases with the store name and other identifying marks on the outside of each. The witness personally checked over the stock on the nights before and the mornings after the first two burglaries, and testified to the number of cases stolen. Before and after the burglary of May 5th the inventories of the stock were taken by other employees of the store and reported to the witness. The motion to strike was made on the ground that the testimony of the witness concerning the taking of the cigarettes on this occasion was hearsay. The witness further testified that he closed the store the night before and opened it the morning after the burglary and knew from what he then saw, and of his own knowledge, that the cigarettes were missing from the stock, which furnished sufficient grounds to support the court's denial of the motion to strike this portion of his testimony.

Frank Pierce, a witness for the people, testified that upon three occasions appellant employed him to sell several cases of the same brand of cigarettes as those stolen in Fresno. He made the sales to Mona Pitts and a Mr. Cruise and collected the money therefor, which he paid to appellant after deducting his commission. Some of the cigarettes, still in the cases, were recovered from the purchasers.

[2, 3] Appellant claims a fatal variance between the dates of the burglaries in Fresno and the sales of the cigarettes by Pierce. The burglaries were committed on March 28, April 5, and May 5, 1930. Pierce first testified that he saw appellant and made the first sale of the cigarettes about March 1, 1930. Appellant maintains that, as this date

was twenty-seven days before the first burglary, the cigarettes then delivered by appellant to Pierce, and sold to Pitts and Cruise, could not have been those stolen on March 28th or thereafter. Pierce also placed his second sale about two weeks after the first, and the third about one week after the second. Pierce, however, did not definitely fix the date of the first sale as March 1st. He testified that it was somewhere along there in the month of March. Only three sales were made by Pierce to Pitts and Cruise. The packing cases found in the possession of the purchasers were positively identified as those stolen from the Better Buy Cash Grocery. The variance in the dates, if any, went to the weight to be given Pierce's testimony, and arguments concerning it should have been addressed to the jury rather than to this court. The jury decided the issues against appellant, and we cannot disturb the verdict. There is ample evidence in the record to support the verdict and judgment.

Judgment affirmed.

We concur: BARNARD, J.; WARMER, Justice pro tem.

108 Cal. App. 655

CITY OF LOS ANGELES v. BOARD OF SUPERVISORS OF MONO COUNTY et al.

Civ. 4055.

District Court of Appeal, Third District,
California.

Sept. 30, 1930.

Rehearing Denied Oct. 30, 1930.

Hearing Denied by Supreme Court
Nov. 24, 1930.

1. Taxation ☞178.

Attempted tax sale of city's "patent right" to land conveyed by patent from federal government held void; statutory procedure for taxing possessory rights being exclusive (Pol. Code, §§ 3804a, 3650, subd. 10; Const. art. 13, § 1).

Evidence showed lands in controversy had been reserved and withdrawn from entry by federal government pursuant to Act Cong. June 17, 1902 (32 Stat. 388), and had subsequently been purchased by city pursuant to Act Cong. June 30, 1906 (34 Stat. 801).

2. Taxation ☞174.

In absence of express authority, public property is not taxable.

3. Taxation ☞473.

That statute used word "may" did not give county supervisors discretion to deny

city's petition for cancellation of invalid taxes (Pol. Code, § 3804a).

While "may" is primarily and ordinarily permissive term and not peremptory, nevertheless, when rights of public or other persons are dependent upon exercise of power conferred, word "may" takes on mandatory form, and performance of act provided for is neither optional nor discretionary upon person designated and authorized to perform act.

[Ed. Note.—For other definitions of "May," see Words and Phrases.]

Taxation ☞445.

Assessment of city's "patent right" to land conveyed by patent from federal government held not to include city's "possessory right" to the land (Pol. Code, §§ 3804a, 3650, subd. 10; Const. art. 13, § 1).

"Possessory right" was not included, since there existed no such thing, entity, or right to receive a patent, the patents having already been issued, and the patent right to the lands involved being the title to the fee; the word "patent," as used with reference to lands, being a conveyance from the government of United States to some person or persons, transferring the title from the government to such person or persons, in and to the thing itself.

[Ed. Note.—For other definitions of "Patent" and "Patent Right," see Words and Phrases.]

Action by the City of Los Angeles for a writ of mandate to compel the Board of Supervisors of the County of Mono to direct the cancellation of certain tax assessments. From a judgment denying the writ, the city appeals.

Reversed, with directions.

See, also, 287 P. 135.

Jess E. Stephens, of Los Angeles, W. Turney Fox, of Glendale, and W. B. Mathews, George T. Warren, Kenneth K. Scott, and Erwin P. Werner, all of Los Angeles, for appellant.

Charles L. Hayes and A. Boyer, both of Bridgeport, and Platt & Sanford, of Carson City, Nev., for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the appellant's appeal from the judgment of the trial court denying a writ of mandate in an action wherein the appellant sought the order of the court requiring the board of supervisors of Mono county to direct the cancellation of certain tax assessments, etc., under the provisions of

section 3804a of the Political Code. The taxes referred to were levied for the years 1916-17 upon lands belonging to the appellant, situate in Mono county. The cause was originally begun in Mono county and transferred for trial to the county of Nevada.

The facts admitted by the pleadings and found by the court are, in substance, as follows: That on the first Monday in March, 1916, and prior thereto, the city of Los Angeles was the owner of certain lands in Mono county described in the petition and designated as "Long Valley Lands" and "River Channel Lands." The lands were acquired from the United States by purchase under the Acts of Congress approved April 24, 1820 (3 Stat. 566), and June 30, 1906 (34 Stat. 801), the latter act being entitled "An Act authorizing and directing the Secretary of the Interior to sell to the City of Los Angeles certain public lands" situate in the state of California. Prior to the approval of the act of June 30, 1906, to wit, on August 24, 1903, all of the lands described as "Long Valley Lands" and "River Channel Lands" were reserved and withdrawn from entry by the United States government, pursuant to an Act of Congress approved June 17, 1902 (32 Stat. 388). After the passage of the act approved June 30, 1906, to wit, on July 12, 1907, the Secretary of the Interior abandoned the Owens river project, in contemplation of which the lands herein referred to had been withdrawn from entry on August 24, 1903. While the lands were withdrawn from entry, the city of Los Angeles filed with the Register of the United States Land Office a map describing certain land sought to be acquired by the city under the provisions of section 4 of the Act of June 30, 1906. This map was approved by the Secretary of the Interior of the United States on the 21st day of August, 1911. Thereafter the appellant paid for the lands described the sum of \$1.25 per acre, amounting in the aggregate to the sum of \$6,568.39. On the 9th day of December, 1912, the United States issued to the city of Los Angeles a patent conveying to it all of the lands described in the plaintiff's petition, designated as the "Long Valley Lands." This patent was recorded on March 28, 1912, in book "R," page 26, of the official real estate records of Mono county. On the 11th day of September, 1908, the city of Los Angeles, while the lands mentioned therein were withdrawn from entry, filed a map pursuant to the act of June 30, 1906, covering certain lands described in the appellant's petition and designated as "River Channel Lands." This map was approved by the Secretary of the Interior on the 6th day of January, 1912. Thereafter, the city paid for said lands at the rate of \$1.25 per acre, aggregating the total sum of \$10,085.89, and on the 24th day of January, 1913, the United States issued a patent to said lands conveying the same to the city of Los Angeles. This

patent was recorded February 11, 1913, in book "R," real estate deeds, at page 35 of the official records of Mono county.

The record shows, and the court found, that for the fiscal year 1916-17 the assessor of Mono county assessed the "patent right" to lands described in paragraphs 3 and 4 of the appellant's petition, and levied certain taxes thereon; that on the 25th day of June, 1917, the "patent right" to said lands was sold to the state of California for nonpayment of \$804.70 state and county taxes levied and assessed in Mono county for the year 1916-17; that on the 25th day of July, 1922, the county tax collector of Mono county made and executed a deed to the "patent right" to all said lands to the state of California. The court also found that on the 14th day of November, 1922, the appellant appeared before the board of Supervisors of Mono county and demanded that said board direct the county recorder to cancel all assessments on his record, on said property, and to direct the county recorder of the county of Mono to cancel any and all deeds to the state of California, covering the property described in the petition, in so far as said certificates or deeds, or any of them, relate to property patented in the United States of America to the city of Los Angeles. That at said time the board was convened and heard the written demand filed by the appellant. The court further found that the appellant did not offer or adduce any evidence, oral or documentary, at said hearing. The court also found that at said hearing James Borland, the county assessor of said county, appeared and was present before the board and opposed the cancellation of the taxes levied on said lands; that the said assessments and taxes levied were then and there in evidence before the board, and there was then and there before the board the evidence and presumption of law that said lands were subject to taxation and were not exempt from taxation. The court further found that the appellant again, on the 4th day of April, 1927, appeared before said board of supervisors and presented a petition for the cancellation of erroneous taxes, and to cancel a deed and direct the county recorder of Mono county to cancel the tax deed made the 28th day of July, 1922, covering the real estate known and described in the petition for mandate as the "Long Valley Lands" and "River Channel Lands," on the ground that said real estate was erroneously assessed for taxation for the year 1916, to the city of Los Angeles.

The court further found that the appellant, at said meeting of the board of supervisors, on November 14, 1922, or on April 4, 1927, or at all, presented no matter or thing except the respective demands; that at said meeting the board had evidence before it to show that said land was subject to taxation. The court further found that no legal evidence was of-

ferred or submitted to said board at any time in support of petitioner's applications. Judgment was therefore entered denying the relief prayed for.

Three questions are really presented for consideration: First, were appellant's lands in Mono county exempt from taxes in the year 1916-17 under the provisions of section 1, article 13, of the state Constitution? Second, what, if anything, was included within the assessment designated as the "patent right" of the city of Los Angeles in and to the real estate described in the assessment? (This question is not presented in this form in the briefs filed by counsel, but is necessarily included.) And is such an assessment valid for any purpose. Third, was the city of Los Angeles required, in addition to making a written demand to the board of supervisors to cancel an erroneous assessment of taxes for the year 1916-17 against said lands, to make any additional proof other than the reference to the recorded patents? Exhibit A, being the first demand made by the city of Los Angeles, is in the following words and figures, to wit:

"Bridgeport, California, Nov. 14-1922

"To the Honorable Board of Supervisors of the County of Mono.

"Gentlemen:—The City of Los Angeles hereby respectfully demands that your honorable body direct the County Auditor to cancel all instruments on his records on the property hereinafter mentioned and that it also direct the Recorder of the County of Mono to cancel any and all certificates of sale to the State of California covering the property particularly described under the designation No. 4 in the addenda to the delinquent tax list of said County, issued on or about the fifth (5) day of June, 1922, (being the delinquent list for taxes levied in the year 1921), insofar as said certificates or deeds, or any of them, relate to property patented by the United States of America to said City of Los Angeles, by two certain patents recorded in Book 'R' of Real Estate Deeds at page 31 and in Book 'R' of Real Estate Deeds at page 26, records of said Mono County. That said demand is made upon the ground that the said property is, and at all times has been exempt from taxation under the provisions of section 1 of article XIII of the constitution of the State of California, and that the said instruments, certificates of sale and deeds shall be cancelled under the provisions of Section 3804a of the Political Code of the State of California.

"The City of Los Angeles

"By S. B. Robinson—

"Attorney for said City."

The second demand was in similar form, save and except it includes a description of the property by governmental subdivisions, referring more specifically to the fact that the

"patent right" to said real estate, only, was assessed.

During the course of the trial the court admitted evidence of declarations of water rights upon the waters of Owens river and Owens lake, preceding the date of the withdrawal order by the Secretary of the Interior, as heretofore mentioned, and also certain deeds of conveyance. The court also admitted evidence showing that rights and interests of a promissory nature, in and to the waters of Owens river, and rights of way for ditches and canals over certain lands which were conveyed to the appellant, had been taxed by grantors of the appellant. These instruments were all admitted over the objection of the defendant. By reason of what we shall hereinafter state, as to whether the court was or was not in error in the admission of this evidence, a decision thereon is wholly immaterial. Among the deeds so introduced is one from Frederick Eaton to the city of Los Angeles, purporting to convey to the city a large tract of land, including some of the land involved in the assessment under consideration, and also all of the grantor's rights in and to certain waters and water rights therein mentioned, giving and granting to the appellant the right also to flood certain other lands belonging to the grantor. This deed bears date of December, 1905.

The record shows that, for the years 1905, 1906, and 1907, the grantors of the appellant paid taxes on said property or whatever interest they possessed therein. The record purports to be an assessment directly upon the land itself, and the certificate thereto leads to that conclusion. One of the certificates to the assessment roll reading as follows (omitting a portion thereof): "Do hereby certify that the foregoing is a full, true and correct description of the land assessed to the Rickey Land & Cattle Company, situate," etc. This land was transferred to Eaton, and by Eaton transferred to the city. Whether the lands referred to in the exhibits were assessed, or only the right to subsequently acquire a title thereto, is likewise immaterial, as shown by what is hereinafter set forth.

The Act of June 30, 1906 (34 Stat. 801), governing the acquisition of the lands involved in this proceeding, after specifying the procedure to be followed, set forth in section 3 thereof the following: "That the rights of way hereby granted shall not be effective over any land upon which homestead, mining, or other existing valid claims shall have been filed or made until the city of Los Angeles shall have procured proper relinquishments of all such entries and claims, or acquired title by due process of law and just compensation paid to said entry men or claimants and caused proper evidence of such fact to be filed with the Secretary of the Interior: Pro-

vided, however, 'That this Act shall not apply to any lands embraced in rights of way heretofore approved under any Act of Congress, nor affect the adjudication of any pending applications for rights of way by the owner or owners of existing water rights, and that no private right, title, interest, or claim of any person, persons, or corporation, in or to any of the lands traversed by or embraced in said right of way shall be interfered with or abridged, except with the consent of the owner or owners or claimant or claimants thereof, or by due process of law, and just compensation paid to such owner or claimant.'

Nothing has been set forth in the transcript showing the existence of any homestead or mining claim involved in this action. The deeds herein referred to would indicate that the city of Los Angeles has acquired certain water rights, easements, and rights of way. Whether they were valid or existing at the date of acquisition is not made to appear, and could not, of course, be decided in this proceeding.

In the case of *Silver Lake Power & Irrigation Co. v. City of Los Angeles*, 176 Cal. 96, 167 P. 697, 700, where the facts set forth in the opinion appear to be parallel with the facts involved in this action, it was held that, by the withdrawal order of the Secretary of the Interior, pursuant to the act of Congress, the rights of appropriators acquired prior to such withdrawal, were destroyed and not merely suspended. There the argument was made: "That the withdrawal orders were temporary orders; that they operated only to suspend and not to destroy the rights of the original appropriator, and that those rights were revived in all their fullness upon the formal vacation of the orders of withdrawal." The court said that this argument "loses all force in view of the congressional exercise of the power to which we have adverted. Congress, had it chosen to do so, without any order of withdrawal having been made by the executive department, could have granted the lands and rights to the City of Los Angeles, as in fact it did, during the existence of the orders of withdrawal. It may be conceded that to have done so would have been a harsh exercise of the power, but this concession can have no effect upon the legality of its exercise. So here the legal situation presented is, and this statement of it is made in the light most favorable to respondent, that before respondent's predecessors in interest had acquired any vested right in the lands against the United States, Congress, in the exercise of its supreme authority, made conveyance to the city of Los Angeles of the lands and of the waters in connection therewith for all the purposes for which they were designed to be used by the original appropriators. It must be held that these appropriators and all others upon the public domain act with the knowledge and under the peril to their ven-

tures that this may be done. The property rights which they acquire while working and before those rights have become vested as against the government of the United States, are held, as it were, upon condition, in that they are liable to extinguishment at any time by an act of Congress directed to that end." As stated herein, no homestead rights and no mining claims are involved in this action, and the case to which we have referred shows that in fact other rights in the land did not exist.

[1] In *Gottstein v. Adams*, 202 Cal. 581, 262 P. 314, 315, the Supreme Court had before it the question involving taxation of public land, and, in holding that such land was untaxable, quoted from section 3 of the act admitting California into the Union (9 Stat. 452), as follows: "Sec. 3. And be it further enacted, that the said state of California is admitted into the Union upon the express condition that the people of said state, through their Legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States." The opinion in the *Adams* Case then proceeds to review sections 3617, 3820, 3821, 3824, and 3825 of the Political Code relative to the taxation of property, and really disposes of the contentions involved in this case by holding that, unless the procedure specified in taxing possessory rights referred to in the sections is followed, the tax is absolutely void. There can be no such procedure as an attempt to sell the land or what is called in this case a "patent right" to the land—whatever that may mean. In that case, just as in this, an attempt was made to fix the tax as a charge upon the land, the court saying: "It is clear from the uncontradicted record herein that the method provided by the foregoing sections of the Political Code was not followed * * * but that, instead of so doing, the assessor and tax collector of Imperial county undertook to treat the assessment and tax above referred to as a charge upon the land itself, and proceeded to declare such tax delinquent and to sell said land therefor to the state in 1919 and to the plaintiff herein in 1924, under the other provisions of the Political Code which relate to the sale of lands for a delinquent tax imposed thereon. They had no such power, and it therefore necessarily follows that the sale of the land and premises herein by this latter method was invalid, and hence that the deed of the plaintiff issued to him pursuant thereto was and is wholly void."

[2] In *State Land Settlement Board v. Henderson*, 197 Cal. 470, 241 P. 560, 565, an ac-

tion similar to the instant case, where mandamus was sought to compel a county board of supervisors to cancel certain assessments, etc., the court held that, as the land belonged to the state, it was exempt from execution, and, with reference to presumptions applying to public lands ruled: "The rule that provisions exempting property from taxation are to be strictly construed has no application to this case. In *Pasadena v. County of Los Angeles*, 182 Cal. 171, 187 P. 418, speaking of the strict construction rule, it is said: 'That rule applies to exemptions of property held in private ownership. But, where the question is whether or not public property shall be taxed, the rule is that it is not to be taxed unless there is express authority therefor. An example of this is found in the decisions to the effect that property belonging to a city was not taxable under the Constitution of 1849, although there was no express exemption thereof in that Constitution. *People v. Doe*, 36 Cal. 220,' "

The authorities are so numerous that public lands are not taxable that citation is unnecessary. The opinion in the case of *State Land Settlement Board v. Henderson*, supra, effectually disposes of the presumption mentioned in the findings of the trial court and relied upon in entering judgment. There is, under the authorities, no presumption that public lands are taxable, and, as just shown the contrary is the rule.

The respondents base their contention upon such cases as *Pasadena v. County of Los Angeles*, 182 Cal. 172, 187 P. 418, wherein it is held that, "although government land is not taxable, yet possessory rights thereon and the improvements made for the convenience of such rights are subject to taxation, in view of subdivision 12, section 3650, of the Political Code." A number of cases are cited by respondent, but the one citation here only is necessary to set forth the law relative to taxing what is called "possessory rights."

Subdivision 10 of section 3650 of the Political Code reads as follows: "Taxable improvements owned by any person, firm, association, or corporation, located upon land exempt from taxation, shall as to the manner of assessment, be assessed as other real estate upon the assessment-book. No value shall however, be assessed against the exempt land, nor under any circumstances shall the land be charged with or become responsible for the assessment made against any taxable improvements located thereon." This section limits the right of action and prohibits the sale of the land under any of the sections providing the procedure for selling lands for delinquent taxes, and is directly in line with the holding in the case of *Gottstein v. Adams*, supra.

As heretofore stated, the court found that the petitioner did not offer or adduce any evi-

dence, oral or documentary, at the hearing before the board of supervisors, upon its petitions for cancellation of the assessments, etc. However, the court did find and set forth, in finding No. 8, the following: "That at said hearing James Borland, the county assessor of said county, appeared and was present before the board and opposed the cancellation of the taxes levied on said lands. And the said assessments and tax levy were then and there in evidence before the board, and there was then and there before the board the evidence and presumption of law that said lands were subject to taxation and were not exempt from taxation." The law, as we have shown, is directly contrary to the presumption here relied upon by the court, and the finding of the court expressly shows that there was before the board the evidence constituting the assessments and tax levy asserted to be invalid. These records, together with the reference to the patents which were of record in the public official records of the county of Mono, established everything which we have been considering herein, and plainly indicated the character of the assessment and the attempt of the tax collector of Mono county to charge the lands with the assessment, contrary to the holding in the cases which we have cited, and also contrary to subdivision 10 of section 3650 of the Political Code.

[3] It is further argued that the board of supervisors of Mono county, nevertheless, had a discretion to deny the appellant's petition, by reason of the use of the word "may" in section 3804a of the Political Code. This contention, however, is untenable. In the case of *County of Los Angeles v. State*, 64 Cal. App. 290, 222 P. 153, this court considered somewhat at length the use of the word "may," and under what circumstances it would be held mandatory, and not merely permissive, and it was there held, quoting from the syllabus: "While the word 'may' is primarily and ordinarily a permissive term and not peremptory, nevertheless, when the rights of the public or of other persons—in this case the state of California—are dependent upon the exercise of the power conferred, the word 'may' takes on the mandatory form and the performance of the act provided for is neither optional nor discretionary upon the person or officer designated and authorized to perform the act."

A like question was again before this court in the case of *Stockton, etc., v. Wheeler*, 68 Cal. App. 592, 229 P. 1020, in which the case of *County of Los Angeles v. State*, supra, was followed and approved. In both cases a number of authorities sustaining the rule were cited. Thus, if a showing was made in this case of the invalidity of the assessment it was mandatory upon the board to act.

[4] The question still remains as to what property was attempted to be assessed. The

assessment reads "patent right" to lands belonging to the appellant, being the lands described in the two patents to which we have referred. In this case the "patent right" cannot be read "possessory right." There existed no such thing, entity, or right to receive a patent. The patents had already been issued, and the "patent right" to the lands involved was the title to the fee. The word "patent" ordinarily refers to some invention and letters patent, the right to exclusive use granted by the government. The word "patent" is defined in 47 C. J. 1376 as follows: "As a noun, a grant of some privilege, property or authority made by the government or sovereign of the country, to one or more individuals." As used in relation to inventions, the words "patent right" indicate an exclusive ownership in the thing itself and its use. As used in the bankruptcy acts, it refers to the title of the bankrupt. As shown by the definitions of the words found in volume 6 of Words and Phrases, First Series, page 5233, it includes the title and the right in and to the thing itself. With reference to land, it is the conveyance from the government of the United States to some person or persons, transferring the title from the government to such person or persons, in and to the thing itself. In this case the two patents transferred the title to public lands from the government to the city of Los Angeles.

Under the cases which we have cited, and also under the terms of section 1 of article 13 of the state Constitution, such lands were not and are not subject to taxation.

The judgment is reversed, with directions to the trial court to issue the writ of mandate as prayed for.

109 Cal. App. 89

**VON KESLER v. SUPERIOR COURT IN
AND FOR LOS ANGELES COUNTY et al.**
Civ. 7525.

District Court of Appeal, Second District,
Division 2, California.

Oct. 17, 1930.

Rehearing Denied Nov. 15, 1930.

Hearing Denied by Supreme Court
Dec. 15, 1930.

1. Process ⇨120.

Nonresident, appearing before court merely as witness, may not be served with process in civil action.

2. Process ⇨119.

Nonresident plaintiff voluntarily appearing as party *held* not exempt from service of process in action for allegedly malicious attachment issued in original action.

Application by J. R. Von Kesler for a writ of prohibition prayed to be directed to the Superior Court of the State of California, in and for the County of Los Angeles, and others, to restrain proceedings in action after process served on alien suitor.

Writ denied.

Edmond Wheeler Pottle and Edward H. Estill, both of Los Angeles, for petitioner.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for respondents.

CRAIG, J.

An action having been commenced in Los Angeles county by the petitioner, a resident of Illinois, he appeared in person to prosecute the same, whereupon he was served with process in an action filed against him by the defendant in the former suit. Petitioner's counsel, by a special appearance, moved to vacate such service upon the ground that he had appeared only as a party and witness, and that service upon a nonresident suitor or witness is void. Said motion was denied, and the present proceeding in prohibition is here presented, seeking to restrain further proceedings in the action last mentioned.

[1, 2] That a nonresident, appearing before the courts of any state merely as a witness, may not be subjected to service of process in a civil action, while in attendance only for that purpose, is the consensus of the authorities cited by both parties, and is not denied. As to whether or not one appearing voluntarily as a party may be so served, there is a conflict of authorities. These decisions are so numerous that they have been classified, respectively, under a "majority rule," that he is in the category of witnesses, and a "minority rule," to the contrary. However, in the instant case they are all of but little aid, since the suit which becomes the subject of present consideration arose out of, and in fact was engendered by, the institution of the first action by the petitioner herein against the plaintiff in the second action, wherein a writ of attachment was issued and levied upon the property of the latter, who, in turn, sued the petitioner for damages for an allegedly malicious attachment and obtained service of summons after the trial had commenced.

At a somewhat early date the validity of service under like circumstances was upheld in Maryland. *Mullen v. Sanborn*, 79 Md. 364, 29 A. 522, 523, 25 L. R. A. 721, 47 Am. St. Rep. 421. Disregarding, for obvious reasons, the rule exempting from service of process those who might be forced into the jurisdiction as witnesses or defendants, it was said: "Sound public policy, on the contrary, as well as the administration of equal justice, would seem to demand that no inducements

should be held out to nonresident suitors to avail themselves of the harshest remedy known to our statutes; but if they should come, and should abuse the remedy, to the injury of an alleged debtor, let them answer here, as the residents of this state must do in like cases."

In *Rizo v. Burrue*, 23 Ariz. 137, 202 P. 234, 236, 19 A. L. R. 823, the Supreme Court of Arizona declined to hold exempt from service of a petition for adoption of a minor child a nonresident petitioner in habeas corpus proceedings seeking custody of the same minor. Upon an exhaustive review of authorities, the opinion on this point finishes as follows: "In *Livengood v. Ball*, 63 Okl. 93, L. R. A. 1917C, 905, 162 P. 768, it was held that nonresident plaintiffs who voluntarily brought an action in the courts of Oklahoma against a citizen thereof were not exempt from service of summons in an action by the defendants seeking relief connected with the subject of the litigation commenced by them. In *Tiedemann v. Tiedemann*, 35 Nev. 259, 129 P. 313, the court held that immunity from being sued could not be claimed by a nonresident 'when within the jurisdiction on matters affecting the same correlated subject-matter, and the action is brought in good faith and calls for the adjudication of substantial rights.'"

Following the cited cases, a plea in abatement was denied. We are neither cited to nor aware of any judicial expression calculated to question the right of a resident plaintiff to litigate with a nonresident, in a cross-action, issues created by such nonresident, in the same forum.

The petition for writ of prohibition is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

108 Cal. App. 755

BARTLETT v. SUPERIOR COURT IN AND FOR MARIN COUNTY et al.
Civ. 7583.

District Court of Appeal, First District,
Division 2, California.

Oct. 4, 1930.

1. Habeas corpus ☞46.

Jurisdiction in habeas corpus is limited to persons in actual custody in county where superior court is sitting (Const. art. 6, § 5, as amended in 1911).

2. Prohibition ☞20.

Writ of prohibition would issue under circumstances, though petition did not allege

petitioner first demanded that respondent court dismiss proceedings.

Petitioner had been cited to come from southern part of state and to produce his two minor daughters before the court in Marin county. The expense of making an appearance for purpose of attacking court's jurisdiction, in view of other circumstances, was sufficient excuse to pass rule requiring petitioner to first seek relief in court which it is sought to prohibit.

Petition by Clifford L. Bartlett against the Superior Court of the State of California in and for the County of Marin, Hon. Edward I. Butler, as Judge thereof, for writ of prohibition to prohibit respondent from hearing a proceeding in habeas corpus.

Writ issued.

Joseph Harris Brewer, of Los Angeles, for petitioner.

Carlos R. Freitas, of San Rafael, for respondents.

NOURSE, P. J.

This is an original application to prohibit the superior court, sitting in Marin county, from hearing a proceeding in habeas corpus directed to the petitioner at his home in Pasadena, Los Angeles county, to determine the custody of his two minor children who were living with him at the time in the latter county. Prohibition is sought on the theory that the superior court in Marin county is without jurisdiction to bring petitioner or the children from another county to answer before the court in Marin.

The jurisdiction of the superior court is found in section 5 of article 6 of the Constitution, which reads in part: "Said courts, and their judges, shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus, on petition by or on behalf of any person in actual custody, in their respective counties." This is the wording of the section as amended in 1911 (see St. 1913, p. xxviii). The original section contained the same language but omitted the comma after the word "custody."

In passing on the question of jurisdiction in mandamus the Supreme Court, in *Kings County v. Johnson*, 104 Cal. 198, 203, 37 P. 870, held that the superior court, under this section, could issue a writ of mandamus to run out of the county. In so holding, the Supreme Court commented on the absence of a comma or other punctuation as indicating the intention not to limit the jurisdiction of the superior court in this respect.

The purpose of inserting the comma in the amendment of 1911 is not clear. It was not

called to the attention of the voters in the literature submitting the proposal—the purpose of the amendment was to eliminate justices' courts from the section in conjunction with the amendment of the same character to section 1 of article 6 which was submitted to the electors at the same time.

[1] In the absence of authority interpreting the section as amended, we would be compelled to hold, on first impression, that the insertion of the comma would have the effect of making the clause "in their respective counties" modify all the writs mentioned in the sentence so that the jurisdiction of the superior courts would be limited to the issuance of these writs running only to persons and inferior tribunals within their respective counties. But the presence or absence of a comma does not change the meaning of the section in so far as writs of habeas corpus are concerned, as the clause "in their respective counties" modifies "habeas corpus" with or without a comma. As to these writs the court's jurisdiction is confined to those persons in actual custody in their respective counties. It is a matter of common knowledge that such has been the practice since the Constitution of 1849 was adopted. Furthermore, it is the only sound interpretation to be given the section. It is inconceivable that the electors would knowingly confer upon every judge of the fifty-eight counties the power to transport a citizen to a distant part of the state to show under what authority he is held in custody in another section. It is also inconceivable that this same power would have been conferred to summon a sheriff, or other peace officer, to a distant county to show by what authority he holds a prisoner in custody in his own county. We are satisfied, simply on the grounds of reason, that the jurisdiction in habeas corpus is limited to those persons in actual custody in the county where the superior court is sitting, though, of course, the process of the court in the exercise of this jurisdiction is statewide.

[2] Respondent raises the additional point that the writ of prohibition should not issue because the petition fails to allege that the petitioner first demanded that the respondent court dismiss the proceedings. True it is that, ordinarily, prohibition will not issue where no effort has been made to obtain the relief in the court which it is sought to prohibit. 25 Cal. Jur. p. 627. But here the force of the argument is lost by counsel's statement in open court that the respondent court intends to proceed with the hearing unless restrained by this court. Thus, to require the petitioner to seek relief there or to amend his petition to allege the futility of demand would merely delay these proceedings and would serve no purpose to any party con-

cerned. The rule is not an arbitrary one, but, like the rule in mandamus, is relaxed when to insist upon it would be of no service. A better example for the nonapplication of the rule could not be found than in the case we have here. The petitioner has been cited to come from the southern part of the state and to produce his two minor daughters before the court in Marin county. The expense of making an appearance for the purpose of attacking the court's jurisdiction is a sufficient excuse for passing the rule in view of the other circumstances noted.

Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.

109 Cal. App. 166

BECKER et al. v. HENDRICKS et al.
Civ. 7584.

District Court of Appeal, Second District, Division 2, California.

Oct. 24, 1930.

Appeal and error 479(1).

Where execution of judgment permitting inspection of corporate records was not stayed by appeal therefrom, corporation *held* entitled to supersedeas effecting stay (Code Civ. Proc. § 949).

Action by F. W. Becker and another against L. H. Hendricks and others, doing business as the Highboy Coaster Trust. From the judgment, defendants appeal. On application of defendants for writ of supersedeas prayed to be directed to the superior court of Los Angeles county, Thomas C. Gould, judge, to stay execution pending appeal.

Writ granted.

Howard F. Shepherd, of Los Angeles, for appellants.

Samuel J. Crawford, of Ocean Park, for respondents.

WORKS, P. J.

Respondents brought two actions to quiet title to certain units or certificates of beneficial interest in appellant Highboy Coaster Trust, a common-law trust. Judgment was rendered in each of these actions and appeals were taken to the Supreme Court therefrom. These appeals are still pending. After the appeals were prosecuted respondents brought the proceeding in which this petition for the writ of supersedeas is presented. Judgment

went therein for plaintiffs, and defendants appealed to this court. The writ of supersedeas is asked by appellants here in order that the fruits of their victory may be preserved in the event that they are successful upon the appeal.

The proceeding which is on appeal here is one for the writ of mandate requiring appellant Highboy Coaster Trust to submit its records to the inspection of respondents. The latter claim the right to inspect under the provisions of section 377 of the Civil Code, which are to the effect that the members or stockholders of a corporation are entitled to inspect its records.

The execution of the judgment from which an appeal has been taken to this court was not stayed by the appeal and the writ of supersedeas is necessary to effect such a stay. Code Civ. Proc. § 949. We think the issuance of the writ is requisite to the protection of appellants. Otherwise, if the judgment in the mandate proceeding shall be reversed, appellant Highboy Coaster Trust will have suffered an inspection of its records by those not entitled to such inspection.

In issuing the writ of supersedeas, we are not to be understood as deciding either that section 377 of the Civil Code does or does not apply to common-law trusts.

Let a writ of supersedeas issue, pending the appeal, undertaking thereunder to be in the sum of \$1,000, to be approved by one of the justices of this court.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

109 Cal. App. 110

M. J. CONWAY, Plaintiff and Appellant, v. Edward W. FUNK, Defendant and Respondent.

Civ. 6155.

District Court of Appeal, Second District,
Division 2, California.

Oct. 21, 1930.

Appeal from Superior Court, Los Angeles County; G. S. Gans, Judge.

Caesar A. Roberts, of Los Angeles, for appellant.

Charles W. Fowl and Edward W. Tuttle, both of Los Angeles, for respondent.

SCHMIDT, Justice pro tem.

Appellant brought suit against respondent, alleging that he (appellant) through the solicitation of respondent, had purchased certain stock in a corporation, and that respondent

had orally guaranteed to repurchase the stock from appellant at any time that appellant might become dissatisfied with his purchase. In a second cause of action, an additional subsequent promise in writing to repay the sum is alleged. Appellant appeals to this court from the judgment in favor of respondent.

Appellant, in so far as his brief goes, apparently contends that the findings and judgment are not supported by the evidence, and yet fails to print in the record the findings and conclusions of the lower court. In fact, the notice to the clerk, specifying in detail the exact papers desired, fails to enumerate the findings.

Also appellant has not printed in his brief, as required by section 953c, Code of Civil Procedure, the portions of the record relied upon for a reversal.

Our examination of the transcript of the evidence shows sufficient evidence to support a finding in favor of respondent that there was not such an oral guaranty nor a subsequent promise in writing as claimed by appellant.

The judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

108 Cal. App. 223

SCHUMANN-HEINK & CO., Inc., v. UNITED STATES NAT. BANK.

Civ. 140.

District Court of Appeal, Fourth District,
California.

Oct. 3, 1930.

Hearing Denied by Supreme Court Nov. 10,
1930.

1. Bills and notes ⇨358.

Antecedent debt constitutes valuable consideration, within protection of equitable doctrine of bona fide purchase, for transfer as security for pre-existing debt (Civ. Code, § 3106).

2. Contracts ⇨71(1).

Forbearance to sue, unaccompanied by agreement to forbear, is not in itself sufficient consideration, at least for executory promise.

3. Contracts ⇨50.

Statutory definition of value as applied to consideration for execution of negotiable instrument applies also in determining existence of consideration for contract of any sort (Civ. Code, § 3106).

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

On application for rehearing.

Application denied.

For former opinion, see 291 P. 684.

Curtis Hillyer and Irve C. Boldman, both of San Diego, for appellant.

James C. Pfanstiel, of San Diego, for respondent

PER CURIAM.

Appellant asks our reconsideration of this case with respect to one point only, that is, whether respondent should be considered a holder for "value" of the securities pledged to it. In deciding it to be a holder for value we declined to follow the apparently contrary ruling in *Fairmont C. Co. v. Los Angeles, etc., Co.*, 33 Cal. App. 414, 418, 165 P. 553, in view of the language of section 3106, Civil Code, and of various decisions of the Supreme Court summarized in *Smitton v. McCullough*, 182 Cal. 530, 537, 538, 189 P. 686, 689.

It is true that in 2 Pomeroy's *Equity Jurisprudence* (3d Ed.) § 749, it is said that: "A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a bona fide purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before." And that: "The rule has been settled, therefore, in very many of the states that such a transfer is not made upon a valuable consideration within the meaning of the doctrine of bona fide purchase."

The author says further, however, that: "In some states, on the contrary, even the securing of a preexisting debt is held to be a valuable consideration."

[1] It is with reference specifically to the passages above quoted from Prof. Pomeroy's work that the Supreme Court in the passage from *Smitton v. McCullough*, *supra*, quoted in our original opinion, said: "The law in this state on this question is well settled to the effect that not only does an antecedent indebtedness constitute a valuable consideration for a transfer in satisfaction and discharge of said indebtedness, *but it is also a valuable consideration, within the protection*

of the equitable doctrine of bona fide purchase, for a transfer merely as security for a pre-existing debt." (Italics ours.)

[2] While, therefore, were the question a new one, it might be open to argument whether the rule to which preference is given in Prof. Pomeroy's text and which is followed in many decisions from other jurisdictions cited in the petition for rehearing ought not to prevail, we must hold that the law in this state is settled to the contrary. It is true that in California forbearance to sue on an obligation, unaccompanied by any agreement to forbear, is held not in itself to constitute a consideration, at least for an executory promise. But that is not the same thing as to hold that the original obligation is not consideration for a subsequent pledge made to secure it.

[3] Section 3106 of the Civil Code, cited in our original opinion, to the effect that an antecedent or pre-existing debt constitutes value, occurs, of course, in the title of the Code devoted to negotiable instruments. It is claimed that since a stock certificate is not a negotiable instrument the section has no application to this case. That the definition of value, however, as applied to the consideration for the execution of a negotiable instrument, applies also in determining whether there is consideration for a contract of another sort is, in *Smitton v. McCullough*, *supra*, explicitly held to have been established in this state since the decision in *Frey v. Clifford*, 44 Cal. 335, 342; as to which see, also, *Fowles v. National Bank of California*, 167 Cal. 653, 140 P. 271.

Appellant urges, further, that the doctrine that a pre-existing debt is a sufficient consideration for a contract of pledge, without any new consideration, has no application where the pledgor is a stranger to the debt, citing *Bynum Mercantile Co. v. First National Bank of Anniston*, 187 Ala. 281, 284, 65 So. 815, and *Abraham v. First Bank of Cook County*, 37 Ga. App. 220, 139 S. E. 583. It is not necessary for us to decide whether or not any such distinction exists in California, since in the instant case there is evidence in the record that Henry Schumann-Heink was himself a party to the making of the pledge. He, of course, was no stranger to the debt.

The petition for rehearing is denied.

**MT. SHASTA POWER CORPORATION v.
McARTHUR et al.**
Civ. 4034.

District Court of Appeal, Third District,
California.

Oct. 24, 1930.

Rehearing Denied Nov. 22, 1930.
Hearing Denied by Supreme Court
Dec. 22, 1930.

1. Waters and water courses ⇨143.

Generally, quantity of water required for irrigation is question of fact governed largely by nature of soil, climatic conditions, and use.

2. Waters and water courses ⇨152(8).

Award of 33½ cubic feet of water per second to irrigate 542 acres of land *held* not excessive and wasteful under evidence.

Evidence tended to show that, because of nature of soil, surrounding conditions, and character of irrigation system, more water was required than amount which might suffice under other and ordinary circumstances.

3. Waters and water courses ⇨143.

Fact that irrigation system was primitive and wasteful *held* not to warrant court in disturbing water award as excessive and wasteful.

Irrigation system in use consisted of what is termed contour check or pondage system. Water was supplied to small areas throughout ranch, partially inclosed by artificial checks or miniature dikes of earth, into which inclosures water was furnished under pressure by means of pipe line through various valves.

4. Waters and water courses ⇨152(8).

In suit to quiet title to water rights, evidence *held* to support finding that defendant appropriated and used 33½ cubic feet of water per second continuously flowing upon his land.

Pipe line extending from canal to tract of land irrigated was supplied by means of several valves or outlets for purpose of distributing water to various fields or ponds. Evidence showed that valves were not all opened at same time but only when and where water was in present use. Measurement tables indicated variance in actual amount of water which flowed from valves on different occasions. Sometimes flow was less than 33½ cubic feet per second, and sometimes it exceeded that amount, but evidence showed that canal and pipe line actually diverted and carried the full 33½ cubic feet of water per second to which defendant claimed prescriptive title.

5. Waters and water courses ⇨137.

Actual constant distribution of entire maximum amount of water allowed for irrigation purposes need not necessarily be deposited on land.

6. Waters and water courses ⇨137.

Water, before claimant acquired prescriptive title, must have been actually, continuously, and beneficially used for statutory period of five years.

7. Waters and water courses ⇨152(10).

Finding that irrigation pipe line had designated capacity and for statutory period conveyed designated amount of water which was beneficially used for irrigation purposes *held* not in conflict with findings that such amount of water was not actually and continuously used for irrigation.

Evidence supported finding that it was necessary to maintain constant flow of 33½ cubic feet of water per second at head of pipe line during entire irrigation season in order to operate irrigation system, but full amount of 33½ cubic feet per second was not deposited on land. Such amount of water at head of irrigation system was necessary to prevent sucking of air into pipe and consequent collapse and to keep pipe clear of sediment and débris.

8. Waters and water courses ⇨152(12).

Quantity of water allowed for watering live stock and period during which allowed are questions of fact for trial court, determination of which may not be disturbed on appeal.

9. Appeal and error ⇨931(1).

Every reasonable construction of evidence presented should obtain with view to supporting judgment.

10. Waters and water courses ⇨152(8).

Allowance of 10.65 cubic feet of water per second throughout irrigation season for seepage and evaporation *held* not excessive under evidence.

Evidence showed that summers were hot, soil was porous, and water conveyed a great distance through open canal and ditches, and stood in ponds on somewhat rough and sloping fields.

11. Waters and water courses ⇨144½.

Appropriator, entitled to specific amount of water at certain place without regard to quality, cannot complain of mere means of transportation, so long as use is not restricted.

If, in interest of saving loss by percolation and evaporation incident to transport-

ing water through open canal, party was permitted to deliver like amount in quality of water by means of pipe line, appropriators would not be injured, and could therefore not complain.

12. Waters and water courses ⇨144½.

Appropriator using water from river by means of canal for prescriptive period secures easement for conveyance of water in particular canal.

13. Waters and water courses ⇨156(4).

Provisions of deed *held* to reserve right to convey water through pipe line and ditches across premises conveyed.

Deed reserved to grantor and his wife only the right to use "the line of iron pipe now in use, together with the head-gates and ditches connected with it," so as to secure water wanted at all times.

14. Waters and water courses ⇨154(1).

Unless expressly conveyed by owner, prescriptive right to appropriate designated amount of water would remain as easement appurtenant to land.

15. Waters and water courses ⇨153.

Various instruments transferring and conveying land between original grantor and remote grantee *held* mere confirmation of water rights acquired by prescription, and not conveyance of additional water.

16. Waters and water courses ⇨144.

Appropriator cannot reserve water which is available for irrigation or domestic purposes without using it while claiming prescriptive or riparian rights to other water from same source for same purpose.

17. Waters and water courses ⇨127.

Prescriptive rights to water for irrigation purposes are based primarily upon necessity.

If one owns ample supply of water for all necessary purposes secured by deed or otherwise, he may not store it up and hold it in idle reserve while he resorts to another supply of water which he seeks to obtain by prescriptive use.

18. Waters and water courses ⇨152(6).

Presumption exists that court awarded to appropriators all water necessarily and beneficially used and acquired by prescription.

Consequently, appropriators may not quiet title to their prescriptive use of water and in same action assert conflicting title by deed to further quantity to be used for same purpose.

19. Waters and water courses ⇨127.

Title to adequate water for irrigation purposes by deed will defeat claim of prescriptive title for same purpose.

20. Waters and water courses ⇨47.

Appropriators may not claim riparian title to water for irrigation purposes taken from one river to be used upon lands adjoining another river.

Water to which appropriators claimed title was taken from Tule river and conveyed across swamp lands through canal five miles long penetrating ridge between rivers, and carrying water into different watershed for use in irrigating land riparian only to Pit river.

21. Waters and water courses ⇨40.

Riparian rights to water for benefit of adjoining properties exist independently of any claim of owner.

Riparian rights are acquired as common-law appurtenance to land or as a part and parcel of the soil itself. Such rights are separate and distinct from prescriptive or contractual rights to water.

22. Waters and water courses ⇨130.

Riparian owner may acquire prescriptive title to water distinct from or in addition to normal riparian rights.

23. Waters and water courses ⇨127.

Acquisition of prescriptive rights to water from stream arising from use, without owner's objection for statutory period, may defeat owner's riparian right.

24. Waters and water courses ⇨144.

Appropriator of water for irrigation purposes obtains title to extent only of use of water for beneficial purposes.

Under law of appropriation, the right to use of water lasts only so long and is effective only to such extent as actual use is exercised.

25. Waters and water courses ⇨48.

Riparian rights are appurtenant to land and not waived by failure to use them.

26. Waters and water courses ⇨47.

Riparian rights may not be transferred to injury of another riparian owner for use of nonriparian lands remote from stream upon which they depend.

Appeal from Superior Court, Shasta County; H. D. Burroughs, Judge.

Action by the Mt. Shasta Power Corporation against Roderick McArthur and another.

From the judgment rendered, both plaintiff and defendants appeal.

Affirmed.

Wm. B. Bosley and Jones & Dall, all of San Francisco, Chenoweth & Leininger, of Redding, and Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, for plaintiff.

Jesse W. Carter, of Redding, and Annette Abbott Adams, of San Francisco, for defendants.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

From a decree apportioning and quieting title in the respective parties to a quantity of river water for irrigation and power purposes, each party has appealed.

This action involves both prescriptive and riparian rights to the waters of Pit, Fall, and Tule rivers, acquired for power purposes and for the benefit of lands adjacent to the confluence of these nonnavigable streams.

The Pit river, which has its source in Goose lake in northeastern California, flows in a southwesterly direction to its confluence with Fall river at a point north of Redding in Shasta county. Fall river rises in Siskiyou county and flows southeasterly to join the Pit river. Tule river rises in Trout lake, Shasta county, flowing southerly through a flat tule country, emptying into Fall river several miles north of its junction with Pit river. The village of Fall River Mills is situated at the confluence of Fall and Pit rivers.

The plaintiff is engaged in the enterprise of producing and marketing hydroelectric power for use as heat and light. For this purpose it acquired and owns large tracts of lands adjacent to the Pit and Fall rivers above the confluence thereof. Included in the plaintiff's holdings are numerous tracts of lands consisting of about 14,000 acres, previously owned by Scott McArthur, a former party defendant in this suit, from whom title was acquired subsequent to the commencement of this action. The cause against him was then dismissed. After procuring from the California Railroad Commission a finding of public necessity therefor, the plaintiff constructed and thereafter maintained at a point a short distance above Manning Falls on the Fall river, which location is a few miles above the junction of Pit and Fall rivers, a hydroelectric power plant consisting of buildings and machinery, a diverting dam, canal, tunnels, surge-chamber and waterway, penstock, and apparatus. The carrying capacity of the canal, tunnel, and penstock was 1,800 cubic feet of water per second, which is in excess of the entire normal flow of Fall river.

John A. McArthur, who was the father of the defendants and of their brother Scott, settled upon the banks of Pit river as early as

1875. He thereafter acquired all of the lands owned by the defendants which are involved in this suit and which border on Pit, Fall and Tule rivers. The home ranch was located on the south bank of Pit river 2 miles above its confluence with Fall river. In the course of twenty years John McArthur constructed some 16 miles of dikes along the borders of Tule river and Trout lake, together with many miles of canals and ditches, by means of which several thousand acres of swamp land intervening between Pit and Tule rivers were drained and reclaimed. The main canal was 40 feet wide and 18 feet in depth extending for a distance of 4 miles from the north bank of Pit river opposite the McArthur home place in a northwestern direction to Tule river. This canal severed the divide which separated the Pit river watershed from the Fall river watershed. After draining and reclaiming this vast tule tract, John McArthur irrigated it by means of a dam across Fall river at Manning Falls, thus backing up the water of Fall river until it flowed into the canal and ditches through gates and supplied a considerable portion of the tract. In this manner he used to advantage much of this tule land for grazing purposes. Subsequently he extended the use of the 40-foot canal above mentioned by impounding the water on the north bank of Pit river and conveying it across the stream by means of a pipe line. In this manner he irrigated 542 acres of the home place on the south side of the river.

January 18, 1902, John McArthur posted notices therefor and appropriated 100,000 inches of water from Fall river, measured under a 4-inch pressure, to be used for power, domestic, and irrigation purposes on his lands in townships 37 and 38, north of ranges 4, 5, and 6 east, M. D. M., to be diverted by means of gates and dams at Manning Falls. January 21, 1902, he further appropriated in the same manner from Tule river 80,000 inches of water for use on his lands in section 16, township 37, north of range 5 east, M. D. M., to be diverted and transported to the land through the 40-foot canal above mentioned. A quantity of water was adversely used in this manner for more than five years, and title was thus acquired.

In 1906, John McArthur organized a family corporation, 500 shares of which were issued and distributed among his sons and daughters. All of his agricultural lands and water rights were conveyed to this corporation, with the exception of the home place. In 1908 he died, leaving the home ranch to his wife Catherine. She died in 1917. The children inherited the home place in equal shares. In 1919 the corporation was dissolved and the assets were distributed to the children pursuant to a written agreement which was duly executed by all of the shareholders of the corporation. By means of deeds of conveyance

from the several children, the defendant Luther McArthur became sole owner of the home place. Scott McArthur became the sole owner of the swamp lands, which, on December 11, 1924, he conveyed to the plaintiff.

September 24, 1919, Scott and Anna McArthur executed a quitclaim deed to the defendant Roderick McArthur, to "the right to use all the water which flows through a thirty-inch pipe, under a four-foot pressure, from that certain ditch or canal beginning at the diversion gates in the Tule river." October 30, 1919, the same grantors executed a similar quitclaim deed to Frank, Luther, Roderick, Anna McArthur, and Victoria Cadwallader for the use of a like quantity of water, from the same source. The language conveying this water is identical with that of the previous deed. November 6, 1920, Scott and Anna McArthur executed to Luther McArthur a similar quitclaim deed to the use of a like amount of water from the same source. The trial court held that these quitclaim deeds merely confirmed water rights previously acquired by the respective grantees, and conferred no title to additional water. From that portion of the judgment which is based upon this finding, the defendants have appealed.

The court found that the respective defendants had acquired prescriptive title by adverse use to the several allotments of water hereinafter specified, to be taken from Tule river and measured at the diverting point therefrom. The plaintiff has appealed from that portion of the judgment, and seeks a reversal on the grounds that each separate allotment is excessive and is unsupported by the evidence. These awards are as follows:

To Roderick McArthur the court allowed 21 cubic feet of water per second for 48 hours of each period of ten days from March 15th to October 15th of each year for the purpose of irrigating 63 acres of land adjacent to Pit river; also 2 additional cubic feet of water per second flowing continuously night and day throughout the year for the purpose of irrigating six acres of land and for fire protection of the buildings situated in the town of McArthur on the south bank of Pit river; also 10 additional cubic feet of water per second flowing continuously throughout the year for the purpose of operating a power plant for generating heat and light and for a pumping plant.

To Luther McArthur the court allowed 33½ cubic feet of water per second flowing continuously from March 15th to October 15th of each year for the purpose of irrigating 542 acres of land, constituting the home place, which is situated on the south side of the Pit river; also 10 additional cubic feet of water per second flowing continuously from October 15th to March 15th of each year for the purpose of watering stock.

To Roderick and Luther McArthur jointly the court allowed 10.65 additional cubic feet of water per second flowing continuously from March 15th to October 15th of each year, on account of the loss of water by seepage and evaporation in transporting it from Tule river through the McArthur canal for the foregoing purposes.

The court then found that the plaintiff was the owner of the power plant and lands described in the complaint together with the tule lands which were acquired from Scott McArthur, and that it was entitled to a continuation of the natural flow of the waters of Tule river into Fall river, and to appropriate, divert, and use all of the water of Fall river for irrigating its lands and operating its power plant, subject to the defendants' title to the foregoing allotments of water to them for the purposes mentioned and subject to any rights to water beneficially acquired by other upper riparian owners of land, provided that "all water used by the plaintiff in the operation of its power plant shall be returned to the Pit river before it leaves the properties of the plaintiff."

The plaintiff asserts that the award to the defendant Luther McArthur of 33½ cubic feet of water per second from March 15th to October 15th of each year to irrigate 542 acres of land is excessive, wasteful, and unsupported by the evidence; that that quantity of water does not appear to have been actually, necessarily, and beneficially used continuously during the statutory period of the years which is necessary to confer prescriptive title thereto; that the findings of the court are in irreconcilable conflict with respect to the continuous use of that quantity of water.

[1] Respecting the duty, as that term is technically used, or the quantity of water which is necessarily required for irrigating agricultural land, it ordinarily becomes a question of fact to be determined by the trial court, within an exercise of sound reason, which is governed largely by the nature of the soil, climatic conditions, and circumstances surrounding the tract involved and the use to which it is applied. In the case of Joerger v. Pac. Gas & Elec. Co., 207 Cal. 8, 276 P. 1017, 1024, it is said:

"In this state there is no statute which definitely regulates the duty or amount of water reasonably necessary for irrigation. This being so, the question becomes one of fact for the court, in a given case, to determine upon the evidence presented to it. The question of what quantum of water is reasonably required for irrigation is necessarily a complicated one, depending, as it does, upon many different conditions. * * * There can be no question, therefore, that an acquired right in waters is limited to the amount that is reasonably necessary for the beneficial pur-

pose for which it is diverted, and no title can be acquired to that part of a diversion which is excessive of such needs. In so far as the diversion exceeds such reasonably necessary amount, it is contrary to the policy of the law, and is a taking without right, and confers no title, no matter for how long continued. * * * Defendants assert that * * * no decree has ever been upheld awarding more than one miner's inch per acre. This may be true, and yet such circumstance is not controlling, for this court cannot fix a limit beyond which a trial court may or may not go, or say, as a matter of law, that the amount allowed is excessive, irrespective of the evidence. As above stated, the amount of water necessary for beneficial use is a question of fact in each particular case."

[2] The foregoing language is peculiarly applicable to the present case. It seems to answer the plaintiff's contention that 33½ cubic feet of water per second which was awarded the defendant Luther McArthur is excessive or wasteful. These were questions of fact for the determination of the trial court. Moreover, there is evidence to support the defendants' claim that the nature of the soil, the surrounding conditions, and the character of their irrigation system required more water than an amount which might suffice under other and ordinary circumstances.

[3] There is evidence to support the finding of the court that "the climate in that part of California where defendants' lands are situated is very dry and the annual rainfall is very slight." The soil is porous. The surface of the land is somewhat rough, sloping, and irregular. The irrigation system which was in use consisted of what is termed the contour check or pondage system. The water is supplied to small areas throughout the ranch partially inclosed by artificial checks or miniature dikes of earth, into which inclosures the water is furnished under pressure by means of a pipe line through various valves. This irrigation system may be primitive and wasteful as compared with more modern methods of irrigating. The judgment, however, may not be disturbed on that account. The Joerger Case, *supra*, also settles this controversy. It is there said:

"Nor is there merit in the claim that the method employed by plaintiff in diverting the water is unauthorized. * * * The ground is hilly and porous, marked by numerous depressions, and is irrigated by turning the water upon the ground and permitting it to run over the slopes. This is the character of system commonly used in the vicinity. There is no authority which requires an appropriator of water to change his system of irrigation so that others may perhaps be benefited thereby, assuming that the method may produce some waste."

[4] The plaintiff contends there is a lack of evidence to support the finding of the court to the effect that Luther McArthur had appropriated and used 33½ cubic feet of water per second *continuously flowing* through the canal and over and upon the 542-acre tract of land, and that this finding is in irreconcilable conflict with a subsequent finding of the court that "in the operation of said irrigation system in the manner herein specified the entire flow of 33½ cubic feet per second is *not in use continuously in the irrigation of said land*, but it is necessary to maintain a constant flow of 33½ cubic feet per second of water at the head of said pipe line. * * *"

Both expert and nonexpert witnesses were called by the respective parties. The pipe line extending from the canal across the Pit river over and upon this 542-acre tract is supplied by means of six several valves or outlets along its course for the purpose of distributing the water to the various fields or ponds. These valves were not all opened at the same time, but only when and where the water was in present use. Elaborate tables of the result of actual measurements of water from these several valves appear in evidence. These measurements were taken once a day over a period of time. These tables indicate a variance in the actual amount of water which flowed from the valves on different occasions. Sometimes the flow was less than 33½ cubic feet per second, and sometimes it exceeded that amount slightly. The figures and testimony, however, indicate that the canal and pipe line actually diverted from the Tule river and carried the full 33½ cubic feet of water per second to which the defendant Luther McArthur claims prescriptive title and which amount was awarded to him. It would be arduous and useless to extend this opinion by the quotation of evidence to the unwarranted length necessary to prove this conclusion. The record consists of 2,500 pages of evidence. It is sufficient to say there appears to be substantial evidence to support this conclusion.

[5-7] Nor do we think the finding to the effect that the pipe line has a capacity and for five consecutive years has conveyed to the 542-acre tract 33½ cubic feet of water per second, which has been necessarily and beneficially used thereon for irrigation purposes, is in conflict with the subsequent finding that that amount of water "is not in use continuously in the (actual) irrigation of said land." The court further found in this regard, and there is substantial evidence to support the finding, that "it is necessary to maintain a constant flow of 33½ cubic feet per second of water at the head of said pipe line during the entire irrigation season * * *" in order to operate the irrigation system so as to obtain that specified amount at any of the

valves along the pipe line when water was required, to prevent the sucking of air in the pipes and the consequent collapse thereof, and to keep the pipes clear of sediment and débris. The actual constant distribution of the entire maximum amount of water allowed is not necessarily required to be deposited on the land. It is necessary that the entire amount allowed shall have been actually continuously and beneficially used by the claimant for the statutory period of five years in order to acquire prescriptive title thereto. *Witherill v. Brehm*, 74 Cal. App. 286, 302, 240 P. 529. But if the water is so used as a necessary incident to the irrigation of the land, it sufficiently fulfills the requirements of law above quoted. It follows that, if the 33½ cubic feet of water has been necessarily used to maintain a head adequate to distribute a less quantity of water for necessary and beneficial use along the pipe line, which is furnished with various valves to supply different fields in the tract of land, it fulfills the mandate of law even though a much less quantity ultimately reaches the soil in the process of irrigation.

Thirty-three and a half cubic feet of water per second seems to be a liberal allowance for the irrigation of 542 acres of land under ordinary conditions. Irrigation devices more modern than the primitive systems which were used in the pioneer days of California may eventually become necessary to supply a growing population and an increased demand for water, to prevent unnecessary waste, and to conserve an economical use thereof. The latest expression of the Supreme Court, however, which is found in the *Joerger Case*, supra, indicates that time has not yet arrived. No absolute limitation with respect to the duty required in the use of water for irrigation and domestic purposes is fixed by legislative enactment or the decisions of our courts. No special method of irrigation is required. No particular device or system is prescribed. These features with relation to water litigation are deemed to be questions of fact for the reasonable determination of the trial court.

[8] Ten additional cubic feet of water per second were awarded to Luther McArthur for watering stock on the home place from October 15 to March 15 of each year, during which period of time no water was allowed for irrigation purposes. We are of the opinion there is substantial evidence to support this allowance.

The evidence indicates that Luther McArthur kept from 400 to 1,200 head of stock. This allowance of water was to be taken from the point of the Tule river diversion. It is conveyed through the open canal a distance of five miles, thence through the pipe line for more than 3,000 feet, and by means of an open hillside ditch some two miles further. The

tule land soil through which the canal ran was permeated with alkali. There was a considerable loss of water in transportation. A steady stream of water through the pipe line and open ditch may be necessary to purify the water and to prevent it from freezing in the pipes during the winter season. Although the season is variable during which freezing weather prevails, and the herd is not uniform as to the exact number of cattle with which it is comprised, still, under the circumstances of this case, both the quantity of water and the period during which it is allowed are questions of fact, the determination of which may not be disturbed on appeal.

The court found that 21 cubic feet of water per second flowing for forty-eight hours during each ten-day period from March 15 to October 15 of each year had been appropriated and used by Roderick McArthur to irrigate 63 acres of land bordering on the north bank of the Pit river opposite the home ranch; that he had acquired in a similar way 10 additional cubic feet of water per second flowing continuously throughout the year to operate a hydroelectric generating plant and to maintain a pumping plant by means of which he conveyed 2 additional cubic feet of water per second flowing continuously the year round through a pipe line to irrigate 6 other acres of land in a field remote from the 63-acre tract. But it was further found that the 10 cubic feet of water per second used to operate the power plant was subsequently wasted by discharging it into Pit river, and that it must be saved and contributed toward the amount of water which is allowed to irrigate the 63-acre tract. These several amounts of water were accordingly awarded to Roderick McArthur for the purposes mentioned. We are unable to say any of these awards are excessive as a matter of law. For the same reasons previously assigned with respect to the allotment of water to Luther McArthur, we are impelled to affirm these several allowances to Roderick. A method of contour check or pondage system of irrigating these last-mentioned tracts was maintained similar to that which was used on the 542-acre home ranch. The climatic conditions and the character of the soil were the same with respect to all the land involved.

[9] Discrepancies exist between the figures supplied by the plaintiff and those of the defendants regarding the measurement of the water which was actually consumed. Every reasonable construction of the evidence adduced, however, should obtain with a view to supporting the judgment. We think the evidence is adequate to sustain these allowances.

[10] A further award to Luther and Roderick jointly of 10.65 cubic feet of water per second throughout the irrigation season from March 15 to October 15 of each year on account of seepage and evaporation is also chal-

lenged by the plaintiff. The summers are hot, the soil is porous, and the water is conveyed a great distance through an open canal and ditches. It stands in ponds on somewhat rough and sloping fields. We are of the opinion this allowance was therefore not excessive. Kinney on Irrigation and Water Rights (2d Ed.) p. 1601.

[11, 12] Finally the plaintiff contends the measurements for the allowance of water to the defendants should have been effective at the end of the canal where it reaches the bank of Pit river, and not at the point of the Tule river diversion. It is asserted this canal across the tule land, the entrance to which was fixed by the court as the point of diversion of the waters to which the defendants are entitled, was constructed for the purpose of draining and reclaiming the swamp land, and that the defendants may not complain so long as they obtain the full amount of water to which they are entitled. In support of this assertion, the plaintiff relies upon the case of Wiggins v. Muscupiabe L. & W. Co., 113 Cal. 182, 195, 45 P. 160, 164, 32 L. R. A. 667, 54 Am. St. Rep. 337, where it is said:

"The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream, or by artificial means."

In the case last cited only the quantity of the water which was necessary for irrigation purposes was involved. It is undoubtedly true that, when one is entitled to a specified amount of water at a certain place without regard to its quality, he may not complain of the mere means of transportation so long as his enjoyment of the use of the water for the purposes for which its title was acquired is not restricted. In the present case, however, one of the essential purposes for which the defendants used the water was to water their stock. It was claimed by the defendants the water of Tule river was purer and more suitable for watering stock than that which came from Trout Lake, Mud Lake, or the swamp water from the numerous lateral tule ditches in the vicinity.

By appropriating and using water from Tule river by means of the McArthur canal for the prescriptive length of time, the defendants not only acquired title to the water, but they also secured an easement for the conveyance of the water in that particular canal. If the same quality and quantity of water as that to which the defendants acquired title were delivered at their pipe line at the times and in a manner which would not disturb their prescriptive use of it, they could not complain. If, in the interest of saving the loss by percolation and evaporation incident to transporting the water 5 miles

through the open canal, the plaintiff was permitted to deliver a like amount and quality of water by means of pipe lines, the defendants would not be injured and could not complain. The mere substitution of the means of conveyance of the water from Tule river to the defendants' properties was not an issue in this case. We are therefore of the opinion there was no error in finding that the defendants were entitled to their specific awards of water to be taken from the Tule river diversion at the mouth of the McArthur canal and transported through this canal to their properties, together with an easement in this canal, with the privilege of repairing and maintaining it in the same condition in which it existed during the time they acquired prescriptive title thereto.

This disposes of the plaintiff's appeal. We will now consider the defendants' appeal.

The defendants claim to have acquired by deeds of conveyance from John McArthur an amount of water in addition to the allotments obtained by prescription and awarded to them in this action. The court construed the language of these instruments affecting the water rights to constitute a mere confirmation of their prescriptive title thereto, and found that these deeds conveyed to them no additional water. From this portion of the judgment the defendants have appealed.

The language of these instruments which requires construction with respect to the water rights will be hereafter quoted. January 12, 1906, John McArthur conveyed all of his land north of Pit river to the family corporation. In this deed he reserved to himself and wife certain privileges appertaining to the enjoyment of water rights for the benefit of the home place south of the river in the following language: " * * * Save and except the right of John McArthur or Catherine McArthur, their heirs or assigns, to use at all times free of charge for the purpose of irrigating the lands which they or either of them own or may own lying on the south bank of Pit river, or for any other purpose for which it may be wanted on those lands or any other lands, *the line of iron pipe now in use, together with the headgates and ditches connected with it*, and the right to repair and maintain the said line of iron water pipe so as to secure the water wanted at all times. Said iron water pipe commences on the northwest quarter of the northeast quarter of section sixteen in township thirty-seven, north of range five east, M. D. M."

In deeding the home place to his wife in September of the following year, John McArthur conveyed to her all of the water rights appurtenant to the land which he possessed, in the following language: " * * * Also water rights connected with said lands, including all of an iron water pipe line commencing on the northwest quarter of the northeast

quarter of section sixteen in township thirty-seven, north of range five east, M. D. M., and running southeast, together with the right to use all headgates and ditches connected with said iron water pipe line in supplying said iron water pipe line with water and the right to maintain and repair same when necessary."

Catherine McArthur died in 1917. Her estate was distributed in equal one-sixth shares to her children. Luther McArthur subsequently acquired the entire interest in the home place. The water rights appurtenant to this home place were described in the decree of distribution which was entered in the Catherine McArthur estate in the exact language of the deed from John McArthur to his wife, as above quoted, except that the following sentence was omitted from the decree of distribution, to wit: "In supplying said iron water pipe line with water." This omission is immaterial.

In conveying his one-sixth interest in the home place to Roderick McArthur in April, 1918, his brother Scott employed the precise language affecting the water rights which was used in the decree of distribution.

In their several separate deeds of conveyance of their respective one-sixth interests in the home place, which instruments were executed in February, March, June, and July, 1920, the heirs, Roderick, Anna, Luther, and Frank McArthur, and Victoria Cadwallader, in referring to their water rights in the premises, employed the following language: "Also an undivided one-third interest in and to the right to use all the water which flows through a thirty (30) inch pipe, under a four (4) foot pressure, from that certain ditch or canal beginning at the diversion gates in the Tule river * * * (describing the land through which the McArthur canal extends), together with the right to have said water conducted through the above described ditch and the right of access to and over and along the said ditch from the point where said water is taken from said ditch in said pipe in said section sixteen through the sections aforementioned to the said diversion gates in the said Tule river, with the right to keep said ditch in repair if the party of the second part so elect; it being the intention herein simply to convey the amount of water herein described measured through said pipe, and the right to have the water conducted as aforementioned, and it is not intended to convey any rights in the lands aforementioned except the right of access along the said ditch for the purpose of necessary repairs to the same. Also all water rights connected with said lands."

[13,14] A reasonable construction of the language of the original deed of conveyance from John McArthur to the McArthur family corporation indicates that the grantor did not purport to specifically reserve for the use of

the home place south of Pit river any water whatever. He evidently assumed that was unnecessary since the home place was not conveyed.

The language of that instrument is unambiguous. It reserves to the grantor and his wife only "the right * * * to use * * * the line of iron pipe now in use, together with the headgates and ditches connected with it * * * so as to secure the water wanted at all times." This language seems to clearly infer that the grantor intended to reserve the use of the line of iron pipe, together with the headgates and ditches connected therewith, as a means of conveyance of the water to which he was entitled by prescription, from Tule river to the home place. This is the meaning of the preceding language employed in the same reservation, as follows: "* * * Save and except the right * * * to use * * * for the purpose of irrigating the lands which they * * * own * * * the line of iron pipe now in use, together with the headgates and ditches connected with it. * * *" From this reservation of the pipe line and ditches which were located chiefly on the land he was conveying, without specifically mentioning the water, it seems apparent the grantor recognized the fact that certain prescriptive water rights existed appurtenant to the home place. He specifically provided, by means of this reservation, that his right to convey this water belonging to the home place through the pipe line and ditches across the premises which were deeded should not be disturbed. The court found that 542 acres of the home place were entitled to 33½ cubic feet of water per second which were acquired by prescription. This water supplied the needs of the home place for many years. It flowed from Tule river through ditches and a pipe line. Unless expressly conveyed by the owner, it would remain as an easement which is appurtenant to the land. *Farmer v. Ukiah Water Co.*, 56 Cal. 11; *Clyne v. Benicia Water Co.*, 100 Cal. 310, 34 P. 714; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 724, 93 P. 858, 15 L. R. A. (N. S.) 359; *Franscioni v. Soledad L. & W. Co.*, 170 Cal. 221, 149 P. 161; 25 Cal. Jur. 1030, § 30.

[15] In subsequently deeding this home place to his wife, John McArthur does specifically convey all "water rights connected with said lands," together with the right to use the pipe line, ditches, and headgates. The same language was used in the decree of distribution in conveying the water rights of this home place to the heirs. Scott McArthur used this exact language in subsequently conveying his interest in this home place to Roderick. In none of these instruments is any specific amount of water or character of title thereto indicated. There is no suggestion that the grantors are purporting to

convey an interest in water acquired by deed as distinguished from prescriptive title thereto. Upon the contrary, it seems apparent that all parties interested in these various conveyances assumed that the respective tracts of land were entitled to certain allotments of water which had been acquired by prescriptive use for necessary and beneficial purposes.

[16-19] This leaves only the language of the deeds of conveyance from the remaining heirs to Luther McArthur to be considered. The language respecting the water rights which is employed in these deeds is more explicit in describing the quantity of water sought to be conveyed. These heirs could convey no more water or title different in character from that which they possessed. There is no satisfactory evidence that any of them ever held title to an interest in water rights which were acquired by purchase, devise, or otherwise, except such prescriptive rights as were awarded to them in this proceeding. There is no evidence from which we may reasonably infer that the defendants were possessed of any other water rights. If such rights had been acquired by appropriation, they seem to have been waived and abandoned by nonuser, except as to the portion thereof which was awarded to them. A careful examination of these instruments of conveyance and a reading of the record convinces one that the grantors were attempting to preserve their respective titles to their prescriptive rights to use the water of Tule river for the benefit of their land bordering on Pit river. Reference is made to the headgates, ditches, and pipe line which for many years was the sole method of conveying the water from Tule river across the swamp lands to their properties on Pit river. The description and capacity of the pipe line referred to in the deeds indicate that they allude to the identical means of enjoying the very prescriptive rights to the same water which was awarded to the defendants in this action. There was no other 30-inch pipe line in use. All the natural and reasonable inferences from the record support the court's findings to the effect that these deeds merely confirm or preserve for the use of the defendants the very prescriptive rights to water which were awarded to them in this action. The theory of the defendants that they possessed title to a quantity of water procured by means of deeds of conveyance which is distinct from the prescriptive rights awarded to them in this action seems inconsistent. The law will not permit one to hold in reserve a quantity of water acquired by purchase or deed or otherwise which is available for irrigation or domestic purposes, and put it to no use whatever while the same owner claims prescriptive or riparian rights to other water secured from the same source

for the purpose of irrigating the identical premises.

Prescriptive rights to water are based primarily upon necessity. If one owns an ample supply of water for all necessary purposes procured by deed or otherwise, it follows that he may not store it up and hold it in idle reserve while he resorts to another supply of water which he seeks to obtain by prescriptive use. We must presume that the court awarded to the defendants *all the water* necessarily and beneficially used upon their respective properties which they acquired by prescription. If this be true, the defendants may not quiet title to their prescriptive use of water and in the same action assert a conflicting title by deed to a further quantity of water to be used for the same purpose. These claims are utterly antagonistic. The title to an adequate supply of water by deed will defeat the claim of prescriptive rights to water to be used on the same land for the same purpose.

[20] Nor may the defendants claim riparian title to water taken from Tule river to be used upon their lands adjoining Pit river. The lands for the use of which the water involved in this action was claimed are riparian to Pit river and not adjacent to Tule river. These rivers occupy different watersheds. A divide separates them. The water to which the defendants claim title was taken from Tule river and conveyed across the swamp lands through a canal which is five miles in length and which penetrates the ridge and carries the water into a different shed for use in irrigating land riparian only to Pit river. Under such circumstances, riparian rights to water from Tule river may not be claimed for the purpose of irrigating land which borders on Pit river.

[21-23] Riparian rights to water for the benefit of property adjoining a stream exist independently of any claim of the owner. *Perry v. Calkins*, 159 Cal. 175, 113 P. 136. Riparian rights are acquired as a common-law appurtenance to the land, or as a part and parcel of the soil itself. Such rights are separate and distinct from prescriptive or contractual rights to water. *San Bernardino v. Riverside*, 186 Cal. 7, 13, 198 P. 784; 25 Cal. Jur. 1019, § 22. It is true that an owner of land adjacent to a stream may acquire prescriptive title to water therefrom, distinct from, or even in addition to, his normal riparian rights. It is also true that the acquiring of prescriptive rights to water from a stream by using it without objection on the part of the owner for the statutory period of time may defeat the owner of his riparian rights. *Healy v. Woodruff*, 97 Cal. 464, 32 P. 528; *Rindge v. Craggs Land Co.*, 56 Cal. App. 247, 205 P. 36; *California, etc., Co. v. Madera Canal & Irr. Co.*, 167 Cal. 78, 85, 138 P. 718, 721.

In the case last cited it is said: "One actually diverting water under a claim of appropriation for a useful or beneficial purpose cannot by such diversion acquire any right to divert more water than is reasonably necessary for such use or purpose, no matter how long a diversion in excess thereof has continued, and that there is no such thing as the acquirement by such an appropriator of a title by prescription, in so far as the excessive diversion is concerned."

It is argued that Scott McArthur acquired prescriptive title to a quantity of water used by him in irrigating the swamp land riparian to Tule river, which water was conveyed to Roderick by deed dated April 26, 1918. This deed purported to transfer "all the water rights connected with said lands." It is also contended that Scott acquired an additional quantity of water by means of statutory appropriation on the part of John McArthur of 180,000 inches of water, notices of which were posted and filed in January, 1902. These claims are untenable.

[24] An appropriator obtains title to the extent only of his use of the water for beneficial purposes. 26 Cal. Jur. 44, § 223; 27 R. C. L. 1273, § 183; *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240; *Calif., etc., Co. v. Madera Canal & Irr. Co.*, 167 Cal. 78, 138 P. 718. Under the law of appropriation, the right to the use of water lasts only so long and is effective only to such an extent as the actual use is exercised.

[25, 26] Upon the contrary, riparian rights are appurtenant to the land and are not waived by a failure to use them. Riparian rights are perpetual whether they are exercised or not. 1 *Wiel on Water Rights* (3d Ed.) p. 20, § 18. But riparian rights, being appurtenant to the lands bordering on the stream from which they are acquired, may not be sold and transferred to the injury of any other riparian owner for use on nonriparian lands remote from the stream upon which they depend. *Calif., etc., Co. v. Madera C. & I. Co.*, 167 Cal. 78, 138 P. 718; *Duckworth v. Watsonville, etc., Co.*, 150 Cal. 520, 89 P. 338, 341; *Spring Valley W. Co. v. County of Alameda*, 88 Cal. App. 157, 263 P. 318; 27 R. C. L. 1070, § 11.

In the *Madera Case*, *supra*, regarding the effect of a grant of riparian rights by an owner, it is said: "The effect of such a grant is simply to convey the grantor's right to the use of the water on his own riparian land, and to estop the grantor to complain against any use of the water which the grantee may make to the injury of such riparian right."

In the *Duckworth Case*, *supra*, it is said, regarding the same subject: "No one can sell or convey to another that which he does not himself own. Grimmer could not, by a trans-

fer of his riparian rights, sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or nonriparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties."

It follows that any effort on the part of Scott and Anna McArthur to deed to Roderick their interest in the waters of Tule river, acquired by appropriation or riparian rights appurtenant to the swamp lands, in excess of the quantity actually, necessarily and beneficially used either on the swamp lands or on the lands adjacent to Pit river, was void as against the rights of the plaintiff. All the waters acquired by appropriation or adverse possession which were necessarily and beneficially used on the defendants' land was awarded to them. All the riparian rights appurtenant to and necessarily used for the benefit of the swamp lands were conveyed by Scott McArthur to the plaintiff after the commencement of this action.

The record will not support the contention that the defendants are entitled to an additional amount of water salvaged from the swamp lands. There is no evidence to indicate that any such rights were acquired or preserved.

The entire history of this case indicates that the deeds of conveyance upon which the defendants rely for their claim to water in addition to the allotments awarded to them were executed only to preserve and confirm the same prescriptive rights to which they were awarded in this action. The defendants' appeal is therefore without merit.

The judgment is affirmed; neither party to recover costs.

210 Cal. 559

BARRETT v. BARRETT.

S. F. 13373.

Supreme Court of California.

Oct. 27, 1930.

1. Marriage ⚭64.

Statute authorizing court, in "divorce" action, to make, modify, or vacate order for custody of children, *held* applicable to "annulment" proceeding (Civ. Code, §§ 84, 138).

Civ. Code, § 138, relating to custody of children, although by terms applicable only in actions for divorce, is part of article 4 (sections 136-148) entitled "General Provisions," included within chapter 2 (sections 82-148), which is entitled "Divorce," and which contains three other articles, dealing with nullity, dissolution of marriage, and causes for denying divorce. Section 84 was subsequently amended by St. 1929, p. 738, expressly authorizing court, in annulment proceedings, to make orders for custody of children.

2. Parent and child ⚭2(1).

Statutes conferring jurisdiction to award custody of children do not confer new authority, but merely recognize court's original or inherent jurisdiction.

3. Divorce ⚭289.

Under general chancery powers, equity courts, even in absence of statute, may control custody of children of parties in suit for dissolution of marriage.

4. Divorce ⚭296.

In awarding custody of children of parties in suit to dissolve marriage, trial court has very large measure of power and discretion.

5. Divorce ⚭312.

Trial court's conclusion, awarding custody of children in suit to dissolve marriage, will not be disturbed, unless abuse of discretion clearly appears.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for divorce by Daisy Barrett against Charles S. Barrett, with a cross-complaint by defendant for annulment. Over a year after entry of a judgment annulling the marriage and awarding custody of a minor child to defendant, the judgment, on motion of plaintiff, was modified, and defendant appeals.

Affirmed.

Knight, Boland & Christin and John H. Riordan, all of San Francisco, for appellant.

Abraham M. Dresow, of San Francisco, for respondent.

WASTE, C. J.

Plaintiff filed a complaint for divorce against the defendant, who subsequently answered and cross-complained for an annulment. A judgment annulling and setting aside the marriage contract and awarding the custody of the minor child of the parties to the defendant was entered March 8, 1927. No appeal was taken therefrom, and no motion for a new trial or to set aside the judgment was ever made. However, on April 24, 1928, more than one year after the entry of the judgment, the plaintiff moved the trial court for an order modifying the decree of annulment and awarding the custody of the child to her. Over the defendant's written and oral objection that it was without jurisdiction to entertain such a motion, the court modified that portion of the decree of annulment relative to the custody of the child, and awarded it to the plaintiff, with directions to the defendant to pay \$20 a month for the support of the child. From the order of modification, the defendant prosecutes this appeal.

[1] In support of the trial court's action, the respondent points to section 138 of the Civil Code, which reads: "In actions for divorce the court may, during the pendency of the action, or at the final hearing, or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same." Appellant contends that this section by its terms has application solely to "actions for divorce," and that, in the absence of a reservation in the decree of a right to modify the same, or of a statute giving such right, a trial court is powerless to change the custody of minor children awarded under a decree of annulment, after such decree has become final.

The annulment of a marriage does not affect the legitimacy of children conceived or born before the judgment (Civ. Code, § 84), and we cannot bring ourselves to the conclusion, suggested by the appellant's contention, that the Legislature intended that the custody of the children of an annulled marriage should be governed by a rule other or different than the rule applicable to the custody of children in "actions for divorce." Section 138, *supra*, is a part of article 4 of chapter 2, title 1, part 3, of the Civil Code (sections 136-148), an article entitled "Gen-

eral Provisions." Chapter 2 is entitled "Divorce," and contains four articles, article 1 (sections 82-86) being entitled "Nullity," and embracing the provisions stating the causes for annulment, and providing for the proceedings to obtain such relief, article 2 (sections 90-107) being entitled "Dissolution of Marriage," and providing for ordinary divorce proceedings, article 3 (sections 111-132) being entitled "Causes for Denying Divorce," and article 4, as already stated, being entitled "General Provisions." It may reasonably be held that the term "Divorce," constituting the title of chapter 2, was intended to include annulment proceedings as well as divorce proceedings, and it may therefore well be argued that such provisions in the subdivision entitled "General Provisions," of which section 138 is one, as are appropriate in actions for annulment, are applicable thereto. Such was the suggestion made by this court in the case of *Dunphy v. Dunphy*, 161 Cal. 87, 92, 93, 118 P. 445. The case of *Millar v. Millar*, 175 Cal. 797, 808, 809, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184, relied on by the appellant, contains nothing that is opposed to this conclusion, for that case was not concerned with any of the "General Provisions" of article 4, but rather with a provision of article 3 which, by its very language, could have application only to divorce proceedings as distinguished from annulment proceedings. Nor does the case of *Coats v. Coats*, 160 Cal. 671, 118 P. 441, holding, in effect, that section 146 of the Civil Code is without application to annulment proceedings, present any difficulty, for that section, though one of the "General Provisions" of article 4, was clearly inappropriate to an annulment proceeding, and could have application only to a divorce action. Section 138, however, providing for the custody and support of minor children is appropriate, and may be applied as well to annulment proceedings as to divorce actions, and the legislative intention undoubtedly was that it should have such application, for not until the year 1929 did the Legislature provide by separate and independent enactment for the custody and maintenance of minor children affected by annulment proceedings. In that year, and for the purpose of setting at rest this very question, the Legislature amended section 84 of the Civil Code (Stats.

1929, p. 738) to read as follows: "A judgment of nullity of marriage does not affect the legitimacy of children conceived or born before the judgment, and the court may during the pendency of the action, or at the time judgment is rendered or at any time thereafter make such order for the custody, care, education, maintenance and support of such children during their minority as may seem necessary or proper; except that the court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent."

[2-5] It is only reasonable to conclude that prior to the 1929 amendment of section 84 of the Civil Code it was the legislative intention that, in so far as the custody of minor children was concerned, section 138, supra, should govern both annulment and divorce proceedings. Any other conclusion would result in an unwarranted distinction and discrimination. No injustice results from this conclusion, for statutes conferring jurisdiction on courts to award the custody of children do not confer a new authority or jurisdiction upon them, but merely recognize their original or inherent jurisdiction in the premises. 9 R. C. L. 472, § 286; *Cowls v. Cowls*, 3 Gilman (Ill.) 435, 44 Am. Dec. 708, 711; *Hartmann v. Hartmann*, 59 Ill. 103, 104. In the exercise of their general chancery powers, courts of equity, even in the absence of statute, have always been held to be invested with power to award and control the custody of infant children of parties in a suit for dissolution of marriage. *Decker v. Decker*, 176 Ala. 299, 58 So. 195. The welfare of the children is always of paramount interest and importance, and their custody must of necessity remain subject to the control of the court. In the exercise of this jurisdiction, the trial court is invested with a very large measure of power and discretion, and its conclusion will not be disturbed on appeal unless it clearly appears that its discretion has been abused. Examination of the record now before us fails to disclose such an abuse of discretion.

The order appealed from is affirmed.

We concur: CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

210 Cal. 408

GOLDWATER v. OLTMAN et al.
L. A. 9754.

Supreme Court of California.
Oct. 1, 1930.

Rehearing Denied Oct. 30, 1930.

1. Joint-stock companies and business trusts
⌚1.

Generally, "Massachusetts or business trust" is created wherever trustees are given legal title, with complete power of management, and, in their discretion, share profits with creators of trust.

[Ed. Note.—For other definitions of "Business Trust" and "Massachusetts Trust," see Words and Phrases.]

2. Joint-stock companies and business trusts
⌚1.

Shareholders, if empowered to remove or elect trustees, have ultimate control; hence, organization is partnership, not true Massachusetts or business trust.

3. Joint-stock companies and business trusts
⌚1.

Massachusetts or business trusts, with their limited liability, are lawful (Civ. Code, § 2220).

4. Joint-stock companies and business trusts
⌚15(1).

Shareholders of true Massachusetts or business trust are not personally liable on obligations incurred by trustees, or trustees' managing agents.

5. Joint-stock companies and business trusts
⌚1.

Agreement giving trustees full control, with power to elect successors, *held* to create Massachusetts or business trust, not partnership.

Agreement disclosed that trustees, although having full power to borrow money and execute notes or other evidences of indebtedness, could not mortgage trust property without consent of holders of two-thirds of certificates, and, although trustees had full power to amend trust agreement, any changes affecting cestuis required consent of holders of two-thirds of certificates. Besides these two negative powers, cestuis had one affirmative power, which was power to terminate trust without consent of trustees.

6. Pleading ⌚53(1).

Causes of action based on same transaction, and involving same indebtedness, may

be set forth in various and, if necessary, inconsistent counts.

7. Pleading ⌚369(2).

Since plaintiff could sue either on note or original indebtedness, causes of action on note, book account, and account stated were properly joined, and court erred in compelling plaintiff to elect.

8. Pleading ⌚121(3).

Allegation defendants have no information or belief on which to base answer is insufficient, where matters are presumably within defendants' knowledge; specific denial being necessary.

9. Pleading ⌚121(3).

Denial on information and belief that note sued on was delivered as evidence of obligation of defendants *held* insufficient; positive denial being necessary.

Denial in question was insufficient, since it did not deny fact of delivery; and did not positively deny delivery, which it should have done, since such delivery was presumptively within defendants' knowledge.

10. Pleading ⌚121(4).

Allegation copartnership filed statutory certificate cannot be put in issue by denial on information and belief; being matter of public record (Civ. Code, §§ 2466, 2468).

11. Trial ⌚159.

Where answers were insufficient to raise issues on material allegations, plaintiff was not required to offer proof thereon; nonsuit being erroneous.

12. Trial ⌚178.

On motion by certain defendants for nonsuit, court erred in entering judgment for others, in absence of similar motion.

13. Joint-stock companies and business trusts
⌚17.

In absence of express or implied agreement with creditors to contrary, trustees of Massachusetts or business trust are personally liable.

14. Joint-stock companies and business trusts
⌚17.

Agreement creating Massachusetts or business trust, authorizing trustees to stipulate in contracts that trustees are not personally liable, will not be enforced, unless creditors had clear understanding thereof.

In Bank.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Henry Goldwater against William Oltman and others. Judgment for certain defendants, and plaintiff appeals.

Reversed, and new trial ordered.

Superseding opinion of the District Court of Appeal in 285 P. 734.

John W. Rankin, Kimball Fletcher, and Albee & Watkinson, all of Los Angeles, for appellant.

Schweitzer & Hutton, Edward Winterer, and Winterer, Combs & Ritchie, all of Los Angeles (H. F. Clary, of Los Angeles, of counsel), for respondents.

Barrett & McConnell, of Santa Rosa, amici curiæ for appellant.

Manson & Allan, of San Francisco, amici curiæ for respondents.

David M. Burnett and John M. Burnett, both of San Jose, Bohnett, and Hill & Campbell and Edward M. Fellows, all of San Jose, amici curiæ.

PER CURIAM.

In order to permit a re-examination of the record herein and to give further consideration to several important problems involved on this appeal, a hearing was granted by this court in this case after decision of the District Court of Appeal in and for the Second Appellate District, Division 2, 285 P. 734, affirming the judgment of the trial court. Although we are of the opinion that the District Court of Appeal correctly states the law in reference to the principal point involved in this appeal, due to the importance of the questions involved and due to the fact that we differ from the District Court of Appeal in reference to several of the minor points involved, we deem it necessary to more completely state the law than was done by the District Court of Appeal. We adopt as part of this opinion the following statement of facts taken from the prevailing opinion of the District Court of Appeal:

"This appeal is taken from a judgment entered in favor of certain of the defendants following the granting of a motion for nonsuit. An understandable presentation of the points presented for our consideration requires that we first review, as briefly as possible, the extremely voluminous pleadings in order that the issues between the plaintiff and various groups of defendants may be clarified.

"The second amended complaint, on which the plaintiff went to trial, sets forth ten causes of action. The first, omitting matters not germane to any point in controversy and dispensing with the legal verbiage, may be summarized as follows, the Roman numerals referring to the paragraphs as numbered in the pleading:

"II. Defendants Oltman and Morante are partners under the name of 'Morante Comedy Company';

"IV. All defendants other than Morante and Morante Comedy Company are partners under the name 'Drascena Productions';

"V. Between October 15 and December 1, 1920, Bloom Film Laboratories, a copartnership (hereinafter for brevity referred to as 'Laboratories'), 'performed and furnished work, labor and materials, and expended money, all at the special instance and request of defendants' Morante, Oltman and Morante Comedy Company;

"VI. \$3,822.94 was the reasonable value of this work, etc., of which \$3,000 is unpaid;

"VII. February 9, 1921, an agreement was made between defendants Oltman and Morante and Morante Comedy Company as vendors and all the other defendants as vendees, whereby the business and property of the vendors was transferred to the vendees, who, as part of the consideration, 'promised, assumed and agreed to pay' to the Laboratories the debt from the vendor. This agreement, the plaintiff, on information and belief, alleges was in writing;

"VIII. January 3, 1921, one of the three partners composing the Laboratories assigned his interests to the other two, who continued in business under the firm name, and on June 7, 1922, assigned and transferred the claim in suit to the plaintiff;

"IX. February 9, 1921, 'as evidence of said obligation of the defendants, excepting only * * * Morante and Morante Comedy Company', the defendants other than these two executed and delivered to the Laboratories a note for \$3,000, dated as above, payable April 15, drawing seven per cent interest and containing a provision for attorney's fees to be fixed by the court in case of suit for collection, and signed 'Drascena Productions, by Charles M. Conant, President'; \$1,273.78 is a reasonable attorney fee;

"X. No part of the \$3,000 'or any amount of principal, interest or attorney's fees, of said note' has been paid;

"XII. None of the defendants has filed certificates of copartnership in the clerk's office.

"The second, third and fourth causes of action are identical with the first, with these exceptions: the second omits paragraph six, alleging reasonable value, and in lieu thereof alleges a promise to pay the Laboratories and a part payment, leaving a \$3,000 balance unpaid; the third omits paragraphs five and six and substitutes an allegation of account stated between Morante Comedy Company and the Laboratories; and the fourth, with the same omissions as the third, alleges the original indebtedness to have been on a book account.

"The remaining causes of action all plead that the defendants other than Morante and Morante Comedy Company are members of and unit holders in an association known as 'Drascena Productions', all the business of which is transacted and all the property of which is held in trust by five of the defendants as trustees under a declaration of trust of record in Los Angeles county, the provisions of which are, at least in part, set forth. It is further alleged that each of seventy-two named defendants owns the number of units or 'shares of trust certificates' set opposite his name in the complaint. Except for the omission of the allegation as to partnership of those defendants connected with Drascena Productions found in paragraph four of the first cause of action, and by reference thereto incorporated in causes two, three and four, and the substitution thereof of the allegation as to nature and membership of Drascena Productions above referred to, causes five to eight, both inclusive, contain the same allegations as do causes one to four, respectively; that is to say, five corresponds to one, counting on the reasonable value of the work done, etc., as the basis of the original indebtedness; six corresponds to two, counting on the promise of Morante Comedy Company to pay, and so on.

"It is to be noted that while the first eight causes of action differ in the details above enumerated, they all set up the note executed by Drascena Productions. The ninth and tenth causes of action do not. The ninth cause of action alleges indebtedness to the Laboratories on the part of all the defendants on a book account showing \$3,000 due and an assignment thereof to the plaintiff, while the tenth sets up an account stated between the Laboratories and all the defendants together with such assignment. With these exceptions the last two causes of action are but a repetition of the allegations of the first with paragraphs four, six and nine, hereinabove briefed, omitted.

"Drascena Productions as a separate entity was not made a party to the action, the title of the same as it appears from the complaint listing all defendants other than Oltman and Morante as 'copartners doing business under the firm name and style of "Drascena Productions"'. The transcript fails to show service on or appearance by some of the defendants, including Oltman, Morante and the Morante Comedy Company; others who were served defaulted, and their defaults were duly entered. Therefore in further reference to 'the defendants,' we are to be understood as meaning only those who answered. These may be divided into four groups. Group one was composed of thirteen defendants on behalf of whom an answer was filed by attorneys Schweitzer & Hutton and included the defendant Lars A. Dahl, specially mentioned for reasons which

will appear later. The answer of this group failed to deny or in any way refer to the tenth cause of action set up in the complaint. Group two also consisted of thirteen defendants, represented by attorney Winterer, and to these thirteen may be added defendants Apostol and Arnis, who had filed a separate answer by other counsel, but who were represented at the trial by Mr. Winterer. Group three was composed of defendants I. N. and Nellie M. Thompson, on whose behalf an answer was filed by attorney C. O. Morgan. The record indicates that Nellie M. Thompson died pending the proceedings and that attorneys Bordwell & Mathews appeared for the executor at the trial. The fourth group (if merely for the purpose of classification we may be permitted to apply the word 'group' to one individual) consisted of the defendant Howard C. Galloupe, who appeared in propria personam. The answers of the three last mentioned groups included denials as to the tenth cause of action.

"During the progress of the trial, but before the plaintiff had rested his case in chief, the defendants composing groups one and two as hereinabove designated moved the court 'that the plaintiff be required to elect as to which particular remedy and which particular cause of action in the amended complaint he will stand on'. This motion the court granted over the objection of the plaintiff, who thereupon elected to stand upon his fifth cause of action. No such motion was made on behalf of the other defendants.

"Upon the plaintiff resting his case, Mr. Winterer, upon behalf of the fifteen defendants whom he represented (group two), moved for a nonsuit. Mr. Clary, appearing for Schweitzer & Hutton, made a similar motion on behalf of twelve of the defendants represented by that firm, but did not so move on behalf of the defendant Dahl. No such motion was made as to defendants Galloupe and I. N. Thompson, or as to the executor of Nellie M. Thompson. True, the judgment recites that such a motion was made on behalf of said executor, but the bill of exceptions contained in the transcript shows this to be incorrect. These two separate motions were granted and judgment was entered against the plaintiff and in favor of all of the defendants represented by Mr. Winterer, the twelve defendants represented by Schweitzer & Hutton on whose behalf the motion had been made, and also in favor of the executor of the last will and testament of Nellie M. Thompson, as to whom the bill of exceptions, certified by the trial judge as correctly setting forth all of the proceedings had during the trial, fails to show that any such motion was made."

It thus appears that the first eight causes of action are based on a promissory note executed by Drascena Productions. Before discussing the correctness of the ruling compel-

ling plaintiff to elect upon which cause of action he desired to proceed, and before discussing the various questions of pleading involved, we deem it expedient to discuss the liability of the members of this organization, all of them having been made defendants herein. The basic problem involved on this appeal involves the question as to whether the members or shareholders of Drascena Productions are personally liable on the promissory note executed by the president of that organization. Upon an examination of the "Agreement and Declaration of Trust," which is attached as an exhibit to the answer of the defendants represented by Schweitzer & Hutton, it appears that it was by that agreement that Drascena Productions came into existence. It appears from this declaration of trust that the parties thereto attempted to create a type of business organization usually referred to as a Massachusetts or business trust. Inasmuch as this court has never directly passed upon the validity and legal incidents of this type of business organization, and inasmuch as it appears from the numerous briefs of amici curiæ on file herein that there are a considerable number of such organizations in California, it seems well that some definite statement of their legal status be made at this time.

These organizations, commonly denominated Massachusetts trusts, originated because of the hostility of some states towards corporations, and due to the desire of those organizing the same to secure some of the advantages that would be secured by incorporating without incurring the burdens and restrictions resulting therefrom. Due to statutory provisions in Massachusetts prohibiting corporations from dealing in real property, this type of organization reached its fullest development and most extensive use in that state, but, as will appear, has been adopted for use in many other states. The chief advantages of such organizations from the standpoint of those desirous of combining their wealth for business purposes are that until recently they were, in most states, free from regulation, enjoyed freedom from corporation taxation, and its members enjoyed the freedom from personal liability that is imposed upon partners. This type of organization is nothing more than an attempt to use the old common-law trust for the purpose of carrying on business enterprises.

Such a trust is brought into being by a declaration of trust, by the terms of which those desiring to invest their capital agree to the creation of a governing group of trustees, the powers and duties of this board being dependent on the terms of the trust agreement. The interest of each subscriber is evidenced by transferable certificates, similar to shares of stock in a corporation, and, in this state, subject to the scrutiny of the corporation department. The organization does not dissolve as

does a partnership upon the transfer of any share, nor upon the death, insanity, or bankruptcy of a subscriber. The trust agreement usually provides that the trustees and not the subscribers are the owners of the property, and the trustees are given, in a true Massachusetts trust, complete control of the management of the business. In the trust agreement it is always provided that the subscribers are not personally liable for any of the acts of the trustees, a freedom from liability which, in this state, is even greater than that accorded to stockholders of corporations, except, since 1929, stockholders in limited corporations.

[1] Generally stated, a trust of this nature is created wherever several persons transfer the legal title in property to trustees, with complete power of management in such trustees free from the control of the creators of the trust, and the trustees in their discretion pay over the profits of the enterprise to the creators of the trust or their successors in interest. As thus defined it is apparent that such a trust is created by the act of the parties and does not depend on statutory law for its validity. In the case of *Hecht v. Malley*, 265 U. S. 144, 146, 44 S. Ct. 462, 463, 68 L. Ed. 949, Mr. Justice Sanford referred to such organizations as follows:

"The 'Massachusetts Trust' is a form of business organization, common in that State, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.

"Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created."

The leading case in Massachusetts where this so-called control test is fully discussed is *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355. In that case the question involved was whether the Boston Personal Property Trust was to be taxed as a partner-

ship or as a trust. The court, after discussing certain cases holding the particular trust therein involved created a partnership, and others where it had been held that a trust had been created, stated (page 357 of 102 N. E.) that the distinction "lies in the fact that in the former cases the certificate holders are associated together by the terms of the 'trust' and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property, the property is their property, they are the masters; while in *Mayo v. Moritz* (151 Mass. 481, 24 N. E. 1083), where it was held the instrument created a trust, on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in *Mayo v. Moritz* had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them."

The court then held that the Boston Personal Property Trust was a trust and not a partnership, stating (page 358 of 102 N. E.): "The certificate holders * * * are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which * * * they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders * * * can do is to give or withhold their consent to the trustees taking such action."

In another leading case decided shortly after *Williams v. Inhabitants of Milton*, supra, the same court said concerning the controlling features between a trust and a partnership: "A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership." *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009, 1010; see, also, *Horgan v. Morgan*, 233 Mass. 381, 124 N. E. 32; *Sleeper v. Park*, 232 Mass. 292, 122 N. E. 315; *Crocker v. Malley*, 249 U. S. 223, 39 S. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601; *Mayo v. Moritz*, supra.

In those jurisdictions other than Massachusetts that have recognized this type of organization as a trust, it is the retention or non-retention of ultimate control by the shareholders which has been treated as a determining factor in the question as to whether the particular organization is a trust or a partnership. *Beitcs v. Hackathorn*, 159 Ark. 621, 252 S. W. 602, 31 A. L. R. 847; *Schumann-Heink v. Folsom*, 328 Ill. 321, 159 N. E. 250, 58 A. L. R. 485; *Sears, Trust Estates as Business Companies* (2d Ed.) 144. By the weight of authority, where the trustees have complete control of the business, the creators of the trust are treated as are the cestuis que trust of an ordinary equitable trust, and are exempt from direct personal liability to the creditors of the business; but if the trustees are subject to the control of the creators of the trust, the latter or their successors are liable as partners. *Rand v. Morse* (C. C. A.) 289 F. 339; *Hart v. Seymour*, 147 Ill. 598, 30 N. E. 246; *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808; *Frost v. Thompson*, supra.

The old idea was that any sharing in the profits of an unincorporated organization necessarily implied a partnership, but that concept was specifically repudiated as early as 1860 in the case of *Cox v. Hickman*, 8 H. L. Cases 267, 11 Eng. Reprint 431. Most American jurisdictions have followed the English case and hold that mere profit sharing of itself does not necessarily create a partnership, and that therefore, for the reasons already discussed, if a true trust has been created, the certificate holders are not liable personally. Other jurisdictions, however, still adhere to the doctrine that profit sharing in an unincorporated company creates a partnership, and in these states, regardless of the degree of control, all certificate holders are treated as partners and held personally liable as such. The courts that adhere to this viewpoint contend that the only way to secure limited liability is by complying with the corporation or limited partnership law of the state. *Thompson v. Schmitt*, 115 Tex. 53, 274 S. W. 554; *Weber Engine Co. v. Alter*, 120 Kan. 557, 245 P. 143, 46 A. L. R. 158; *State v. Hinkle*, 126 Wash. 581, 219 P. 41; *Reilly v. Clyne*, 27 Ariz. 432, 234 P. 35, 40 A. L. R. 1005; *McClaren v. Dawes, etc., Co.*, 86 Ind. App. 196, 156 N. E. 584; *Willey v. Hoggson*, 90 Fla. 343, 106 So. 408.

[2] In this state this court has never directly passed upon the problem as to whether certificate holders can secure freedom from personal liability by organizing a trust of the nature under discussion. Appellant strenuously contends that the case of *Old River Farms Co. v. Roscoe Haegelin Co.*, 98 Cal. App. 331, 276 P. 1047 (hearing denied by this court June 13, 1929), laid down the rule that the certificate holders of such organizations are personally liable regardless of the degree of control exercised by the trustees. It is

true that there is language in that decision indicating that to permit such limitation of liability is against public policy, but that language is merely dicta. When applied to the facts of that case it appears that the reasoning therein employed is correct. From an examination of the record therein it appears that by the terms of the trust agreement the Roscoe Haegelin trustees were elected by the shareholders for one-year terms. Even in those states that recognize the limitation of liability of certificate holders it is generally held that the power to elect trustees and fill any vacancies in the board gives the certificate holders such ultimate control over the trustees that the organization will be treated as a partnership and not a true trust. *Frost v. Thompson*, supra; *Horgan v. Morgan*, supra; 23 Columbia L. Rev. 423, 433-435. That rule appeals to us as the correct one to apply. If the trustees are subject to being removed by the shareholders, and are dependent upon them for election, it is apparent that the ultimate control of the organization rests in the shareholders. It therefore follows that the Haegelin Case is only authority for the point that, where the trustees are subject to election by the shareholders, the latter exercise ultimate control of the organization, and the organization is a partnership and not a true trust.

[3] In the absence of controlling authority to the contrary, we can see no reason why such organizations with their limited liability should not be recognized in this state. It is true that the statutes of this state provide for limited liability in the case of limited partnerships and corporations, but we find nothing in those statutory provisions that manifests an intent to limit the types of business organizations which shall enjoy this privilege to the two types of business organizations enumerated. Section 2220 of the Civil Code expressly states that trusts in personalty may be created for any purpose for which a contract may lawfully be made. It is true that until 1929 certain limitations were placed upon the purposes for which trusts in real property might be created by section 857 of the Civil Code, but, as stated before, there was no such restriction in reference to trusts in personal property. *Estate of Walkerly*, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97; *Estate of Hinckley*, 53 Cal. 457, 482; *Toland v. Toland*, 123 Cal. 140, 55 P. 681. Even the restrictions on trusts in real property have now been removed by a 1929 amendment to section 2220 of the Civil Code. It seems clear to us that the settled legislative policy of this state is to lay no restrictions against the formation of trusts in personalty, but rather to leave open to such organizations the conduct of any lawful enterprise. The law of trusts is just as much a part of the legislative policy of this state as the law of limited partnerships and corpora-

tions. It is true that trusts historically were not used for the purpose of running large business enterprises and were a development of the equity courts. The law, however, is not static, but is ever growing and expanding, and in recent years this form of handling property has been extended to nearly every field of activity. *Sears, Trust Estates as Business Companies* (2d Ed.) § 19; *Wrightington, Unincorporated Associations & Business Trusts* (2d Ed.) § 4. Just because a new use is being made of the trust does not mean new principles of law are to be applied in determining the rights of the trustees, cestuis que trust, creditors of the trust, or others that deal with the trust. *Schumann-Heink v. Folsom*, supra. If this new extension of the use of trusts requires regulation, that is a matter of legislative and not judicial concern. Some states have seen fit to regulate this form of business enterprise by statute. See *Massachusetts Gen. Laws, 1921, c. 182*; *Massachusetts Acts and Resolves, 1926, c. 290*; *Oklahoma Sess. Laws, 1925, c. 56*; *Oklahoma Sess. Laws, 1927, c. 17*; *Wisconsin Laws, 1923, c. 431*.

[4] From the foregoing analysis it follows that in this state, if, in fact, a true trust has been created, the shareholders are not personally liable on the obligations incurred by the trustees or the managing agents appointed by the trustees.

[5] We now turn to an application of the above principles to the trust agreement involved in this case. The "Agreement and Declaration of Trust" of Drascena Productions is set forth in full in one of the answers filed herein, and by stipulation was admitted into evidence. It would serve no useful purpose to summarize that agreement. It is sufficient to say that it contains the usual provisions found in the agreements which under the authorities cited supra have been held to create a true trust. It provides, among other things, that the five trustees shall have full authority and control; that title to the property shall be vested in them; that they shall fill all vacancies on the board and elect their successors, and thus differs from the Haegelin Case, supra; that the subscribers are not to be personally liable. The term of the existence of the organization is fixed upon lives in being, so that no question of the rule against perpetuities is involved. The only limitations placed upon the powers of the trustees are as follows:

1. The trustees are given full power to borrow money and to execute notes or other evidence of indebtedness, except "they shall have no power to mortgage the property of this trust without the written consent of the holders of two-thirds of the issued certificates of trust, except a purchase money mortgage."

2. As stated above, the trust is to remain in existence during the duration of certain

specified lives in being, but it is provided that the trust may be terminated "by the unanimous vote of all of the trustees, or by a two-thirds vote of all the cestuis que trust, given at any meeting called for that purpose."

3. The trustees are given full power to amend, alter, or add to the trust agreement, except that "any changes, additions or alterations in any way affecting the rights, privileges and interests of the 'cestui' shall only be made by the consent of the owners and holders of two-thirds of all the outstanding shares of trust certificates."

No other restrictions upon the powers of the trustees than those enumerated are to be found in the trust agreement, nor can the subscribers, under that agreement, exercise any powers not mentioned above. It is to be noted that in the three matters enumerated above the subscribers are only granted one affirmative power—the power to terminate the trust without the consent of the trustees. The other two powers are purely negative; they must give their consent to any change in their legal status, and they must consent to any mortgage, except a purchase-money mortgage, executed by the trustees. No powers of suggestion or control other than those mentioned are conferred. It seems apparent that these rights and powers fall short of making the trustees mere agents of the certificate holders. It seems clear that these limitations on the powers of the trustees leave the trustees the masters, and do not confer upon the subscribers that degree of ultimate control that will make the organization a partnership rather than a trust. This is in accordance with the views adopted elsewhere. *Williams v. Inhabitants of Milton*, supra; *Betts v. Hackathorn*, supra; *Greco v. Hubbard*, 252 Mass. 37, 147 N. E. 272; *Crocker v. Malley*, supra.

It therefore follows that no direct personal liability attaches to the shareholders of Drascena Productions on the promissory note set forth in the first eight causes of action above enumerated simply by virtue of the fact that they are shareholders of that organization.

[6, 7] We turn now to a discussion of the various points of pleading involved. As set forth in the statement of facts, supra, before the plaintiff had rested his case, the court granted a motion to compel him to elect upon which cause of action he desired to proceed. This was undoubtedly error. As already noted, the first eight causes of action are all based on the promissory note in one form or another. The ninth and tenth causes of action do not refer to the note, the former being on a book account as to all the defendants, and the tenth upon an account stated. Assuming that all these causes of action are based upon the same transaction and involve the same amount of money, a fact which seems to be conceded by all parties involved on this ap-

peal, the plaintiff had the right to set them forth in various, and, if need be, even inconsistent counts. *Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78; *Wilson v. Smith*, 61 Cal. 209; *Stockton Combined Harvester, etc., Works v. Glen Falls Ins. Co.*, 121 Cal. 167, 53 P. 565; *Froeming v. Stockton Elec. R. R. Co.*, 171 Cal. 401, 153 P. 712, Ann. Cas. 1918B, 408; *Tanforan v. Tanforan*, 173 Cal. 270, 159 P. 709; *Turner v. Turner*, 173 Cal. 782, 161 P. 980. The law is well settled that in such cases a plaintiff cannot be compelled to elect as to the cause of action upon which he desires to rely. *Cowan v. Abbott*, 92 Cal. 100, 28 P. 213; *Rucker v. Hall*, 105 Cal. 425, 38 P. 962; *Estrella Vineyard Co. v. Butler*, 125 Cal. 232, 57 P. 980; *Murphy v. Crowley*, 140 Cal. 141, 73 P. 820; *Figlietti v. Frick*, 203 Cal. 246, 263 P. 534. Assuming, for the purposes of this opinion, that the first eight causes of action can be treated as but one (since they are all upon the note in one form or another), the plaintiff clearly had the right to sue upon the note or upon the original indebtedness, i. e., book account or account stated (*Holly v. Smalley*, 50 App. D. C. 178, 269 F. 694; *Lake v. Fletcher*, 52 App. D. C. 46, 280 F. 1020; *Schreyer v. Turner Flouring Mills Co.*, 29 Or. 1, 43 P. 719; *Savage v. Savage*, 36 Or. 268, 59 P. 461; *Sullivan v. Rudisill*, 63 Iowa, 158, 18 N. W. 856; *Stalnaker v. Tolbert*, 121 S. C. 437, 114 S. E. 412; *First Nat. Bank v. Larsen*, 146 Wis. 653, 132 N. W. 610), and this being so, under our practice, under the authorities supra, it was proper for the plaintiff to join the causes of action in one complaint, and it was error for the trial court to compel him to elect.

[8] Appellant also contends that the court erred in granting the motions for nonsuit. In reference to this assignment of error it will be necessary to consider each group of defendants separately. Turning our attention to the defendants represented by Schweitzer & Hutton, it appears that the answer interposed by this group failed, as above noted, to in any way mention the tenth cause of action. As to the seventh cause of action, the answer was as follows: "That the defendants have no information or belief upon which to base an answer to the allegations contained in the seventh cause of action, and on that ground deny each and every allegation thereof." Although this form of denial is sufficient under some circumstances (*Jensen v. Dorr*, 159 Cal. 742, 116 P. 553; *Mahoney et al. v. Atchison*, etc., Ry. Co. et al. [Cal. App.] 281 P. 1108), it is not sufficient as to any matter presumably within the knowledge of the defendant, in which case his denial must be specific (*Hensley v. Tartar*, 14 Cal. 508; *People v. Hagar*, 52 Cal. 171, 182; *Mahoney et al. v. Atchison*, etc., Ry. Co. et al., supra). Certain of the allegations in the complaint were presumably within the knowledge of defendants, and as to these, therefore, the answer under the

authorities *supra* must be held to have raised no issue. What these matters are will more particularly appear when we consider the answer of the defendants represented by Mr. Winterer.

[9] As to these defendants (not including Apostol and Arnis who filed a separate answer) it appears that their answer does specifically deny the matters alleged in the various counts of the complaint. Most of these denials, however, are on information and belief, and it is the contention of appellant that, as to certain of these, such form of denial was insufficient and raised no issue, and that therefore this group of defendants must be regarded as having admitted many of the facts alleged in the complaint. We do not deem it necessary to separately consider each assignment of error made by appellant in this regard, but confine ourselves to some of the most obvious defects in the answer of these defendants. Paragraph 9 of plaintiff's first cause of action, incorporated by reference in all other causes of action except the ninth and tenth, alleges that all the defendants, with the exception of Morante and Morante Comedy Company, executed the note upon which the first eight causes of action are based, and delivered the same to the Morante Comedy Company as evidence of the obligation of the defendants to plaintiff's assignor. This group of defendants denied the delivery of the note on information and belief, and even with this form of denial only denied that the note was delivered "as evidence of any obligation at all of the said defendants or any of them." This denial is insufficient for two reasons: First, it does not deny the fact of delivery, and, second, whether or not the defendants delivered the note was a matter presumptively within their knowledge, and therefore they were called upon to deny the same positively if they wished to raise an issue on this point. *Mulcahy v. Buckley*, 100 Cal. 484, 35 P. 144; *Zany v. Rawhide Gold Mining Co.*, 15 Cal. App. 373, 114 P. 1026; *Jensen v. Dorr*, 159 Cal. 742, 116 P. 553.

[10] In each cause of action plaintiff alleged that Bloom Laboratories had filed the certificate required by sections 2466 and 2468 of the Civil Code. This group of defendants denied this allegation on information and belief. This was clearly such a matter of public record that it could not be put in issue by a denial on information and belief. *Santa Barbara Lumber Co. v. Ross*, 183 Cal. 657, 192 P. 436; 21 Cal. Jur., p. 150.

[11] Without detailing any further errors in the answer of these defendants, it appears from the foregoing that this answer, and likewise that of defendants represented by Schweitzer & Hutton, raises no issue as to certain material allegations, and the plaintiff was required to offer no proof thereon. The

trial court was clearly in error in granting the nonsuit in favor of these defendants.

[12] As to the other defendants, no motion for nonsuit was made in their behalf, and it was error to enter such a judgment in the favor of any one of them in the absence of such motion.

[13, 14] Inasmuch as this case must be reversed and a new trial had, it seems well to indicate that the order of nonsuit was also erroneous in reference to another group of defendants. Although Drascena Productions is not made a party to the action as a separate entity, it being plaintiff's theory that that organization was a copartnership (which theory, as we have heretofore seen, was incorrect), all of the trustees are made parties defendant, because they are all likewise shareholders. These defendants are all respondents here, and are Harlan, Fox, Conant, St. John, and Watts. The law is clear that, in the absence of an express or implied agreement with the creditor to the contrary, the trustees are personally liable on all contracts with third persons. In the case of *Taylor v. Davis*, 110 U. S. 330, 4 S. Ct. 147, 150, 28 L. Ed. 163, the rule is thus stated: "A trustee is not an agent. An agent represents and acts for his principal. * * * When an agent contracts in the name of his principal, the principal contracts, and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. * * * He is personally bound by the contracts he makes as trustee, even when designating himself as such. * * * If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate." See, also, *Hewitt v. Phelps*, 105 U. S. 393, 26 L. Ed. 1072; *Betts v. Hackathorn*, 159 Ark. 621, 252 S. W. 602, 31 A. L. R. 847; *Frost v. Thompson*, *supra*; 9 *Fletcher, Corporations* § 6095; 8 *Thompson (3d Ed.) Corporations*, § 6746. This broad personal liability of the trustees may be limited by provisions to that effect in the declaration of trust, if known and agreed to by all the parties affected. *Frost v. Thompson*, *supra*; *Wells-Stone Merc. Co. v. Grover*, 7 N. D. 460, 75 N. W. 911, 41 L. R. A. 252; *Taylor v. Davis*, *supra*. In the trust agreement under consideration the following provision is found relating to the liability of the trustees: " * * * All contracts * * * shall be the obligation of the trustees, and in every written order, contract or obligation made by the trustees, it shall be their duty to stipulate therein that neither the trustees nor the cestui que trust shall be held to any personal liability under or by reason of such order, con-

tract or liability, and that all persons having dealings with the trustees shall look only to the property of this trust for payment." In the first place, even if plaintiff knew of this clause in the trust agreement, it does not appear therefrom that, in any contract where the trustees have not stipulated against personal liability, mere knowledge of the above clause would release the trustees from the ordinary and usual personal liability. As we interpret that clause, the creators of the trust have conferred on the trustees the power of releasing themselves from personal liability, but, in order to enjoy that privilege, they must stipulate to that effect in every contract with a third person. That privilege is a limitation of the general rule of liability, and is a limitation on the rights of the creditors of the trust. That being so, the limitation will not be enforced in the absence of a clear understanding and knowledge on the part of the creditors to the effect that no such liability is to exist. In the second place, there is nothing in the record of this case to show that plaintiff's assignor had knowledge of that clause at the time the promissory note was executed. It was therefore error to grant a nonsuit in favor of the five trustees, for, on the record before us, they are clearly liable for the amount set forth in the note.

For the purposes of clarity it might be well to enumerate briefly the points discussed in this opinion.

1. In all causes of action in which issue was properly joined a nonsuit would have been proper as to all subscribers who were not trustees, for the reason that the organization involved is an example of a Massachusetts or business trust. The certificate holders in such an organization are not personally liable on the contracts of the trustees. Therefore, as to these causes of action it was not prejudicial error to compel an election, because, regardless of the election, this plaintiff could not possibly prove any liability on the part of the shareholders other than the trustees.

2. It was clearly error for the trial court to compel the plaintiff to elect between those causes of action based on the note and those based on the alleged original obligation of which the note is the evidence.

3. As to the defendants represented by Schweitzer & Hutton, it was clearly error to grant a nonsuit in their favor, for the reason that said defendants either utterly failed to answer certain allegations of the complaint, or so defectively did so, that no issue was raised thereby.

4. As to those defendants represented by Winterer, other than Apostol and Arnis, the answer filed in their behalf failed to properly deny certain material allegations of the com-

plaint, and therefore must be deemed to have admitted the same.

5. The other defendants did not move for a nonsuit, and therefore it was error to enter such a judgment in their favor.

6. In any event, from the state of the record, it appears that the five trustees of the Drascena Productions are personally liable on the note, and it was therefore error to enter a nonsuit in their favor.

In order to secure complete justice in the premises it seems well to indicate to the trial court that, before the new trial in this case, plaintiff and defendants, if they be so advised, should be permitted to file amended pleadings in accordance with the foregoing opinion, and thus properly present to the trial court the issues involved.

The judgment appealed from is reversed and a new trial ordered.

210 Cal. 532

**HIBERNIA SAVINGS & LOAN SOC. v. DE
RYANA et al.
S. F. 13227.**

Supreme Court of California.
Oct. 25, 1930.

1. Fraudulent conveyances $\S$ 259(2).

Creditor's bill to set aside fraudulent conveyance must show plaintiff has reduced claim to judgment.

Foregoing rule is applicable, notwithstanding debtor is nonresident of state or is for any reason not available for service of process as prerequisite to making entry of such judgment.

2. Trusts $\S$ 361.

Equitable action to establish trust could be maintained where property was attached, though claim against principal defendant was not reduced to judgment (Code Civ. Proc. $\S$ 542, subd. 2).

Plaintiff brought action to recover money loaned and to establish trust in real property alleged to be owned by principal defendant, but with record title standing in name of another person alleged to hold same and title thereto in trust for principal defendant. Case was dismissed as to principal defendant, but plaintiff at time of commencement of action levied writ of attachment upon realty to abide whatever judgment plaintiff might obtain.

3. Pleading $\Rightarrow$ 252(1).

Defect in complaint based on attachment, not averring issuance of attachment and levy, but containing averment showing proper case for attachment, *held* cured by amendment showing issuance and levy.

Complaint contained averment showing action to be one wherein attachment might properly issue directed against property of debtor standing in name of another. Amendment to complaint showed that at time of filing of demurrer, attachment had been actually issued and levied upon specific property. Amendment to cure defect related back to antecedent date thereof.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the Hibernia Savings & Loan Society against J. V. De Ryana and others. Case was dismissed as to defendant named, and from a judgment for plaintiff, defendant Rachel Cafiero appeals.

Affirmed.

Superseding opinion 284 P. 462.

Walter E. Hettman, Chauncey F. Eldridge, and Leo R. Friedman, all of San Francisco, for appellant.

Tobin & Tobin, of San Francisco (Geo. A. Clough and Robert H. Borland, both of San Francisco, of counsel), for respondent

RICHARDS, J.

The plaintiff commenced this action against the defendants J. V. De Ryana, Rosalia V. De Ryana, Rachel Cafiero, and certain fictitious defendants. The averments of its complaint, which is in several counts but which all relate to the same cause of action, briefly stated, show that on or about September 20, 1926, the defendant J. V. De Ryana negotiated a loan from the plaintiff to him in the sum of \$7,000 based upon his promissory note for that sum, payable one year after date, and purporting to be secured by a mortgage upon certain real estate apparently standing in the name of the borrower. Upon the report of a title insurance company to that effect, he obtained said loan and the money represented thereby in full. A short while thereafter the plaintiff discovered that the said real estate did not belong to said De Ryana, but that his representations to that effect were based upon a series of frauds and forgeries done and intended to deceive the plaintiff into making said loan; whereupon the plaintiff commenced the present action to recover the amount of said loan thus fraudulently obtained. The complaint further alleged that at the time of obtaining said loan

said J. V. De Ryana was and for some time prior thereto had been the owner of a certain other piece or parcel of improved real estate which at the time of his purchase thereof had been placed in the name of Rosalia V. De Ryana, his wife, and a codefendant herein, but which had been later conveyed by her without consideration to her sister Rachel Cafiero, also a codefendant herein, for the purpose of holding the same in trust for J. V. De Ryana, who at all times was and continued to be the real owner thereof. The complaint further stated that upon the receipt from said plaintiff of the amount of said loan by the fraudulent processes above set forth the said J. V. De Ryana paid over a large portion thereof to his said wife and sister-in-law, who applied the same to the payment of a certain outstanding indebtedness against said real estate and which had constituted a portion of the purchase price thereof. The prayer of the plaintiff's complaint was for a judgment against said J. V. De Ryana and his said codefendants for the sum of \$7,000 and for a decree declaring that said codefendants have and hold said last-named parcel of real estate in trust for said J. V. De Ryana, the real owner thereof, and that the same be subjected to the payment of the judgment for said sum of money, and for general relief. Coincidentally with the institution of said action, the plaintiff sought and obtained a writ of attachment to be issued and levied upon said real estate; and thereafter and at the conclusion of the trial of the action obtained leave of court to file and serve an amendment to its complaint to conform to the proofs which, while so designated, is in form and fact a supplement thereto, and in which it was alleged that at the time of the institution of said action the plaintiff had procured to be issued and levied an attachment upon said real estate to abide whatever judgment the plaintiff should obtain in said action. In its said amended pleading the plaintiff amplified the averments of its original complaint and of each count thereof to the extent of setting forth that at all the times mentioned in both of said pleadings the said J. V. De Ryana, up to the time of his disappearance as therein set forth, had been engaged in the real estate business in the city and county of San Francisco, which said business he carried on and conducted in the name of his said wife Rosalia V. De Ryana and of his sister-in-law Rachel Cafiero, and during which time all of the properties he acquired and dealt in were held in the name of his said wife and sister-in-law, including the property upon which said attachment had been levied, and that the acts and conduct of J. V. De Ryana in thus using the names of his codefendants were at all times done and undertaken for the fraudulent purpose of concealing his ownership of such properties for

the purpose of hindering, delaying, and defrauding his creditors; that shortly after J. V. De Ryana had obtained the aforesaid loan from the plaintiff, in furtherance of his aforesaid fraudulent purposes he had disappeared and become a fugitive from justice and could not be found in this state or elsewhere for the purpose of service of process upon him in this action; that J. V. De Ryana was, other than his ownership of the said real estate then standing in the name of his said sister-in-law, insolvent and had no other assets in the state of California or elsewhere to which plaintiff might have recourse for the satisfaction of its claim and of any judgment it might obtain based thereon, save by virtue of its aforesaid attachment of said real estate. Subsequently to its filing and service of its said amended and supplemental complaint the plaintiff dismissed its present action as to the defendant J. V. De Ryana and thereafter commenced and prosecuted against him another action for the recovery of a judgment upon the note which formed the basis of the original loan and also procured an attachment in that action; and having made service upon said De Ryana by publication of summons procured a judgment by default to be entered against him. In the meantime Rosalia V. De Ryana and Rachel Cafiero, having been each duly served with process in the present action, appeared separately herein, the latter by filing a general demurrer to the plaintiff's complaint, and the former by answer thereto. The demurrer of Rachel Cafiero having been overruled, she also answered. The answers of these two defendants contain denials in the main predicated upon a lack of information and belief of the plaintiff's averments, but also contained positive denials of any ownership of the real estate in question or any portion thereof in J. V. De Ryana at any time, and assert full ownership in the defendant Rachel Cafiero. The cause went to trial upon the issues as thus framed, and upon its submission the court made and filed its findings of fact and conclusions of law sustaining generally the averments of the plaintiff's original and also of its amended complaint, and as conclusions of law upon the facts as thus found determined that J. V. De Ryana had become and continued to be indebted to the plaintiff in the sum of \$7,000 and the interest thereon as and in the manner set forth in the plaintiff's complaint; that J. V. De Ryana had for many years conducted his business of a real estate agent in the name of either his wife or his sister-in-law; that the ownership of the particular real estate, while standing in the name of Rachel Cafiero, was at all times vested in J. V. De Ryana, and that neither said Rachel Cafiero nor Rosalia V. De Ryana had at any time any right, title, or interest therein save and except to hold the same in trust for J. V. De Ryana, the real owner thereof; that the plaintiff was entitled to a judgment and de-

cree so declaring, and directing that the said real property be sold for the satisfaction of the judgment to be entered thereon, the proceeds of such sale to be applied to the satisfaction of the plaintiff's indebtedness, the balance, if any, to be paid to the defendant Rachel Cafiero. Judgment was entered thereon accordingly, and from such judgment the defendant Rachel Cafiero has alone appealed.

[1-3] The first contention which the appellant urges upon her appeal is that her general demurrer to the plaintiff's original complaint should have been sustained. This contention presents substantially the only point involved in this appeal, and that point is that the plaintiff was, as a matter of law, not entitled to commence or maintain this action against the defendants therein, or any of them, or to subject the real property sought to be affected thereby to its said claim, until such time as it had first obtained a judgment against the defendant J. V. De Ryana establishing the fraudulent processes by which the latter had obtained from the plaintiff the aforesaid loan. The authorities cited by the appellant in support of this contention, among which are the cases of *Roberts v. Buckingham*, 172 Cal. 458, 156 P. 1018, and certain other recent decisions by the appellate courts, state generally the well-established rule that a creditor's bill to set aside an alleged fraudulent conveyance by the debtor must show that the plaintiff has reduced his claim to judgment; and that this is true notwithstanding the debtor is a nonresident of the state or is for any other reason not available for service of process as a prerequisite to the making and entry of such judgment. The respondent herein does not question the application of these authorities to proper cases, but urges that they have no application to the case at bar, wherein the plaintiff, having a good cause of action against his debtor upon a claim arising on contract upon which an attachment might properly issue, is entitled to bring such action, issue such attachment, and levy the same upon property of which it asserts the debtor was at all times the owner, although said property as to its record title was standing in the name of another person who was holding the same and the title thereto in trust for said debtor and not otherwise. The authorities upon which the respondent relies in support of this contention seem fully to sustain the same, particularly the case of *Becker v. Beldt*, 205 Cal. 491, 495, 271 P. 1059, which is a case practically identical with the case at bar, and wherein this court differentiated between the case of *Roberts v. Buckingham*, supra, and like cases, and the case then before it, holding that a creditor suing upon a promissory note and seeking by way of attachment in such suit to create a specific lien upon property alleged to be owned by the debtor, but standing in the name of another

er (section 542, subd. 2, Code Civ. Proc.), is entitled to institute such action, procure such attachment and subject the property so attached to such judgment as he may be awarded, and is not required to first obtain a judgment in a prior action against his debtor before becoming entitled to sue and obtain his relief as against the property of the debtor so held and so subjected to the lien of the attachment. This principle finds further support in the case of *Horan v. Varian*, 204 Cal. 391, 397, 268 P. 637, and is given ampler and quite instructive consideration in the recent case of *Platte County State Bank v. Frantz*, 33 Wyo. 326, 239 P. 531. It is true that at the time of the filing of the defendant Rachel Cafiero's general demurrer to the plaintiff's original complaint the said complaint did not, as of course it could not, contain an averment that an attachment had been actually issued and levied upon the specific property involved in said action; but said complaint did therein contain averments showing the action to be one wherein an attachment might properly issue directed against property of the debtor standing in the name of another, and the plaintiff's subsequent amendment to said complaint showing that at the time of the filing of said demurrer such attachment had been actually issued and levied upon said specific property must be held to relate back to the antecedent date thereof so as to cure the defect, if any, in the plaintiff's original complaint.

The appellant makes a further contention predicated upon certain proceedings originated in the District Court of Appeal, in which court the appeal herein was first given consideration. It appears that the respondent, apparently out of excess of caution, undertook while said appeal was still pending in that court to institute a proceeding under the provisions of section 956a of the Code of Civil Procedure to offer evidence in the form of a judgment roll in an action which it had instituted against J. V. De Ryana upon his aforesaid promissory note, and wherein it had obtained a judgment against said De Ryana upon said note subsequent to the institution of the present action, but prior to its determination upon appeal in said appellate court. The respondent's request in that regard was complied with by said court and it also and in the same proceeding permitted the respondent to amend its pleadings in this action so as to include a recital of the entry of such judgment in the other action entered subsequent to the judgment in this action. The appellant complained in her petition for a hearing herein and now complains of the action of the appellate tribunal in the foregoing regard. We do not deem it necessary, however, to pass upon the correctness or propriety of the action of the appellate tribunal in this matter for the reason that whether right or wrong in the abstract the situation of this cause up-

on appeal did not in our opinion require the application of the provisions of section 956a of the Code of Civil Procedure to the case because, as fully set forth in the foregoing portions of this opinion, the plaintiff, in order to maintain this action, was not required to have first secured a judgment against its immediate debtor J. V. De Ryana as a prerequisite to the institution or maintenance of the present action, and hence the effort on the respondent's part to seek application of the code provision above referred to in support of its judgment upon appeal while a precautionary was nevertheless an unnecessary proceeding, the propriety of which we do not deem it necessary to further discuss.

The appellant makes the further and final contention that the evidence produced before the court was insufficient to overthrow the presumption created by section 164 of the Civil Code to the effect that the real estate here in question having been originally conveyed to Mrs. J. V. De Ryana was her separate property which she in turn had a right to transfer to her sister, Rachel Cafiero, prior to the transaction by which her husband, J. V. De Ryana, became a debtor of the plaintiff and respondent herein. The evidence before the trial court in the foregoing regard presents an interesting situation. It would be a waste of time, however, to review in detail this evidence, which in our opinion abundantly shows that throughout the entire period of his rather spectacular career he used the names of his wife and of her sister, Rachel Cafiero, who was at all times an inmate of his family, instead of his own name for the transaction of his business, and that these two women were in fact dummies who signed checks and other documents and took and transferred titles to real estate wholly according to his direction and without knowing aught about the details of his business or about the particular transaction in which their names were used, but in which the real actor was himself. The transaction by which in the year 1922 he acquired the property involved in this action, taking the title thereto in the name of Rosalia and about two years later causing it to be transferred to Rachel without any of the usual indicia of a change of ownership, the said property standing in the name of the latter at the time he perpetrated his fraud upon the plaintiff, securing thereby the sum of \$7,000, a considerable part of which was immediately made use of to pay off an encumbrance upon said property representing a portion of its original purchase price, fully illustrates the real situation as to the status and ownership of the property in question. We think the evidence of these transactions was such as to overcome the presumption and fully justify the finding of the trial court to the effect that J. V. De Ryana was at all times the real owner of the property in question and that said property having been

duly attached should be subjected to the satisfaction of the plaintiff's claim.

We do not deem that any other points upon this appeal merit more detailed discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

210 Cal. 578

SECURITY TRUST CO. v. SILVERMAN et al.

S. F. 13358.

Supreme Court of California.

Oct. 28, 1930.

Fraudulent conveyances ⇨ 168.

Conveyance by insolvent, supported by valuable consideration, *held* not transfer made "voluntarily," within statute which existing creditor could set aside (Civ. Code § 3442).

Civ. Code, § 3442, provides that any transfer or incumbrance of property made or given "voluntarily, or without a valuable consideration," by an insolvent party, shall be fraudulent and void as to existing creditors. It was contended that the section must be construed as written, i. e., in the disjunctive, and that a conveyance either voluntary or unsupported by valuable consideration is void. However, "a 'voluntary' conveyance is one without any valuable consideration. If there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not 'voluntary.'"

[Ed. Note.—For other definitions of "Voluntary" and "Voluntarily," see Words and Phrases].

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Security Trust Company against Esther Silverman and husband. From an adverse judgment, plaintiff appeals.

Affirmed.

Harvey & Heard, of Santa Ana, and Cross & Brandt and Alfred F. Breslauer, all of San Francisco, for appellant.

Charles E. Gould, of San Francisco (Clark D. Dudley and Joseph F. Ferrea, both of San Francisco, of counsel), for respondents.

WASTE, C. J.

Plaintiff, a creditor of the defendant Sam Silverman, appeals from an adverse judg-

ment in an action brought to have declared fraudulent and void a deed transferring from said defendant to his estranged wife an undivided one-half interest in certain real property. The alleged fraudulent deed was executed and delivered to the grantee more than three months prior to the institution of an action in which plaintiff's claim was subsequently reduced to judgment. It is alleged in the complaint that the questioned transfer was purely voluntary, without consideration, made at a time when Silverman was insolvent, and prompted solely by a desire to defraud his creditors, particularly the complainant. Among other things, the trial court found that at the time of making the conveyance Silverman was insolvent; that the grantee was without knowledge of such fact; that the conveyance was made in good faith and without intent upon the part of either party thereto to defraud any one; and that it was supported by a good and valuable consideration. Contrary to appellant's claim, the evidence, which we have examined in detail fully sustains these findings.

Section 3442 of the Civil Code provides, in part, that "any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent * * * shall be fraudulent, and void as to existing creditors." Appellant contends that the transfer here assailed, even if assumed to be supported by a valuable consideration, a point not, however, conceded by it, was nevertheless "voluntary," and therefore fraudulent within the meaning and intent of the Code section. In other words, the appellant argues that the Code section reading in the disjunctive must be construed accordingly, from which it necessarily follows that any conveyance made by an insolvent person which is *either* voluntary in character or unsupported by a valuable consideration is fraudulent and void. The authorities are directly opposed to this line of reasoning. In answer to the query whether the transfer there questioned was void under section 3442 as having been made "voluntarily, or without a valuable consideration, by a party while insolvent," the court, in *Hopkins v. White*, 20 Cal. App. 234, 247, 128 P. 780, 785, declares: "A voluntary conveyance is a conveyance without any valuable consideration. * * * If there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not voluntary." Again, in *Shasta Lumber Co. v. McCoy*, 85 Cal. App. 468, 473, 259 P. 965, 967, the court states that "the provision of section 3442 of the Civil Code 'that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent and void as to existing creditors,' has no ap-

plication to the facts of this case, because the transfer was not voluntary, but was made for a valuable consideration."

The judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; LANGDON, J.



210 Cal. 607

WEBER et al. v. NASSER et al.
S. F. 13577.

Supreme Court of California.
Oct. 30, 1930.

Rehearing Denied Nov. 24, 1930.

1. Appeal and error ⇨781(1).

Supreme Court will not render judgment which can have no practical effect.

2. Appeal and error ⇨781(4).

Questions involved on plaintiff's appeal in action to enforce collective bargaining agreement *held* moot, warranting dismissal, where contract by its terms had expired.

3. Courts ⇨488(1).

Granting of hearing in Supreme Court after decision by District Court of Appeal opens entire cause, and matter stands as though no decision had been rendered by any reviewing court.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Walter A. Weber and others, suing as members of Musicians Union of San Francisco, Local No. 6, American Federation of Musicians, for and on behalf of Musician Union of San Francisco, Local No. 6, American Federation of Musicians, and all of the members thereof, against William J. Nasser and others. From a judgment dismissing action, plaintiffs appeal.

Appeal dismissed.

Superseding opinion of the District Court of Appeal, 286 P. 1074.

Aaron Sapiro and Sapiro & Hayes, all of San Francisco, for appellants.

Nat Schmulowitz, George B. Harris, Gavin McNab, and Schmulowitz, Wyman, Aikins & Brune, all of San Francisco, for respondents.

George O. Bahrs, of San Francisco, *amicus curiae*.

PER CURIAM.

The sole question involved in this cause has become moot, and for that reason the appeal must be dismissed. This arises from the following facts:

Plaintiffs, as members and on behalf of the Musicians Union of San Francisco, Local No. 6, American Federation of Musicians, and all of the members thereof, said organization having for its purpose the regulation of prices, business, and working conditions in the musical profession, brought this suit against certain individuals and corporations identified with what is known as the Allied Amusement Industries of California, to enjoin a breach and enforce the terms of a certain collective bargaining agreement with reference to labor, entered into in writing by said parties on September 30, 1928, and by its terms to terminate on August 31, 1930.

The court below adjudged said contract to be one involving personal services and, therefore, not subject to specific enforcement, hence not one for an injunction to prevent its breach; declined the relief prayed for; sustained a demurrer to the complaint without leave to amend; and later, on June 14, 1929, gave a judgment of dismissal of the action. Notice of appeal to this court was filed by plaintiffs on June 19, 1929. Hearing on appeal was hastened and the cause was submitted to this court on July 3, 1930.

[1, 2] Upon examination of the record we find that any order we might make would be futile, as the contract, by its terms, expired on the above-mentioned date and plaintiffs' cause of action in no event could avail them anything. We have not overlooked the importance of the issue involved, but we must adhere to our long-established rule to the effect that this court does not pass judgments which can have no practical effect.

[3] It is not necessary, of course, to add that in granting a hearing of this case after the decision by the District Court of Appeal, we neither approved nor disapproved the views announced by that court. A hearing in this court sets the entire cause at large and the matter stands as though no decision of any kind has been rendered therein by any reviewing court.

Precedents for our conclusion—appeals where the questions have become moot—are numerous and the citation of authorities is unnecessary. We nevertheless call attention to the following among numerous cases announcing a like rule: *Matter of Guardianship of Ambros*, 170 Cal. 160, 149 P. 43; *Stuart Arms Co. v. City and County of San Francisco*, 203 Cal. 150, 263 P. 218; *Childress v. L. Dinkelspiel Co., Inc.*, 203 Cal. 262, 263 P. 801.

The appeal is hereby dismissed, without costs to either party.

210 Cal. 603

GREEN v. STATE BAR OF CALIFORNIA.

Sac. 4464.

Supreme Court of California.

Oct. 29, 1930.

1. Attorney and client ⚡54.

Refusing continuance of disbarment proceedings, where attorney for respondent in proceedings could not be present, *held* not shown to be prejudicial.

Petitioner had ten days after service of complaint to make his arrangements, but did not file answer thereto, and made no attempt to secure an extension of time, but instead, prior to day of hearing, signed written stipulation acknowledging his readiness to proceed on that date. The committee recessed for a short time on afternoon of hearing to permit him to secure counsel, which he claimed to be unable to do, and, when hearing was later continued for further testimony, he appeared a second time without counsel. Petitioner made no showing of what he expected to prove.

2. Attorney and client ⚡58.

Suspension of attorney for two years *held* ample punishment, where attorney withheld part of money collected for client until disbarment proceedings were commenced.

WASTE, C. J., and SHENK, J., dissenting.

In Bank.

Petition by Samuel W. Green against the State Bar of California to review a resolution of the Board of Governors of the State Bar recommending the disbarment of petitioner.

Order in accordance with opinion.

J. S. Daly and R. Platnauer, both of Sacramento, for petitioner.

John A. Sinclair, of San Francisco, for respondent.

LANGDON, J.

This is a petition to review a resolution of the board of governors of the state bar recommending the disbarment of Samuel W. Green, petitioner herein.

The testimony before the local administrative committee of the county of Sacramento is practically uncontradicted, and establishes the following facts: Petitioner was engaged to act as attorney for Daniel Oliveria in a suit to collect the sum due on a promissory note; the agreement being that, in the event of collection, the fee would be \$400. Some time in February, 1928, the action was successfully concluded, and the defendant paid

the sum of \$1,266.16 to petitioner, which sum petitioner deposited in his single bank account under the name of S. W. Green, trustee. He made no mention of the conclusion of the litigation to Oliveria until October, 1928, when he sent him a check for \$500. On November 11, 1928, he wrote to Oliveria that he was having difficulty in collecting the rest of the money from the adverse party. On January 12, 1929, he sent Oliveria a check for \$350 bearing the date of January 17, 1929, which sum appears to have been the balance due the client, after deducting expenses and the fee. In his accompanying letter he gave the death of his aunt as the reason for his being short of funds, and also promised to send a complete statement in a few days covering "all of the money involved." The check was cashed by Oliveria at the Bank of Italy, Concord branch, on January 22, 1929. It was thereafter returned, marked "Account closed." On two subsequent occasions Oliveria, upon advices from petitioner, deposited the check, with the same result. On February 21, 1929, he placed the matter in the hands of another attorney, who demanded payment. Petitioner wrote back in reply that he had been ill and was trying to raise the money on a loan from friends, and that he appreciated Oliveria's leniency and desired a little more time. The attorney answered, giving him until March 1st. Thereafter, on March 15th, the check was placed in the hands of the district attorney of Sacramento county. Several conferences were held in his office, but his efforts to secure payment were likewise unsuccessful. On September 13, 1929, petitioner was served with a complaint before the local administrative committee of the state bar, verified by Oliveria as complainant, and setting forth the above facts. The next day the money was paid to the bank.

Petitioner's defense, as appears from his answer (filed subsequent to the hearing), is that it had been agreed between his client and himself that, upon collecting the amount of the judgment, he might retain the sum of \$350 as a loan. He testified that the agreement was made orally in a conversation in the courthouse at Stockton, at which one Dennis was present and acting as interpreter for Oliveria, who spoke English imperfectly. The only evidence in support of this defense is petitioner's own statement; and he further testified that no memorandum was ever made, that no time was set for the duration of the loan, and that no interest was specified, although it was in some way understood that \$25 extra should be returned as interest. On the other hand, Oliveria denied any such agreement, and Dennis had no recollection of it. Petitioner declared that he told the district attorney about it; but an officer of the bank, who was present at the conferences, testified that no such discussion took place. Pe-

petitioner was unable to produce any writing mentioning the purported loan, and neither the letter to Oliveria nor the one to his attorney made any mention of such a loan. Each letter, in fact, assigned an entirely different reason for the failure to send the money.

From these facts the committee found petitioner guilty of conduct involving moral turpitude, and recommended his disbarment, which finding and recommendation were approved by the board of governors of the state bar.

[1] Petitioner refused to make any statement in his own behalf at the hearing, called no witnesses, introduced no evidence, and did not cross-examine opposing witnesses. Hence, except for occasional answers which he made to questions put by members of the committee, the record is devoid of support for his alleged defense. He justifies his conduct with the assertion that the proceedings were improper, in that the attorney whom he had selected to represent him was unable to be present at the hearing, and that the committee should therefore have granted his request for a continuance. The committee was, perhaps, in error in denying this request. However, petitioner had ten days after service of the complaint to make his arrangements, and did not even file an answer thereto. He made no attempt to secure an extension of time, but instead, prior to the day of the hearing, signed a written stipulation acknowledging his readiness to proceed on that date. The committee recessed for a short time on the afternoon of the hearing to permit him to secure counsel, which he claimed to be unable to do. When the hearing was later continued for further testimony, from September 25th to October 7th, he appeared a second time without counsel. Nor can we discover what prejudice is believed by petitioner to have been suffered by him from the refusal to grant his first application for a continuance for he made no showing of what he expected to prove.

[2] No other points made by petitioner are worthy of mention, save the one that the punishment meted out is too severe, and should at most have been suspension. We are inclined to agree with this view. It is not established, we think, that he had any intention of keeping the money beyond such time as would be required to raise the necessary funds to pay it back. The utterly incompetent manner in which petitioner handled his case, coupled with the refusal of the committee to permit him to secure proper representation, leads us on this review to take the most favor-

able view to petitioner of this part of his defense. Hence the offense of which petitioner is guilty is of a serious nature, but not of such proportions as has customarily resulted in an order of disbarment. There are a number of cases in which both the board of governors and this court have felt that suspension for a period of years would be adequate punishment, in view of all of the circumstances. A decision much in point here is *In re Petersen*, 208 Cal. 42, 230 P. 124, where the recommendation of disbarment was reduced to an order of suspension. With this case in mind, we think that suspension of petitioner for a period of a two years would be ample punishment for the misconduct of which he has been found guilty.

It is therefore ordered that the petitioner, Samuel W. Green, be suspended from the rights and privileges of an attorney at law for the period of two years from and after the date of the filing of this order.

We concur: PRESTON, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

WASTE, C. J.

I dissent. The record shows conclusively that petitioner appropriated and mingled his client's funds with his own. He withheld the major part of a judgment collected for his client for over six months. He fraudulently, and by misrepresentation, withheld the balance for a year, before he gave his client a check for the amount on a bank in which he knew he had no account. He did not pay the amount until after his client had engaged other counsel, placed the matter in the hands of the district attorney, and filed the accusation with the state bar.

The majority opinion contains a correct statement of petitioner's attitude before the local administrative committee, but I do not believe he was improperly treated. He had no sufficient defense, and, in my opinion, was "stalling for time" in an endeavor merely to postpone what he must have known would be an unfavorable recommendation in his case. The majority opinion points to "the utterly incompetent manner in which petitioner handled his case" before the local committee, which, to my mind, is but further evidence of the fact that he is unfit to be intrusted with important matters by clients.

The recommendation of the board of governors of the state bar should have been approved, and the petitioner disbarred from the further practice of the law.

I concur: SHENK, J.

210 Cal. 504

**SAN DIEGO & CORONADO FERRY CO. v.
RAILROAD COMMISSION OF CALI-
FORNIA et al.**

S. F. 13900.

Supreme Court of California.

Oct. 20, 1930.

Rehearing Denied Nov. 17, 1930.

1. Ferries ☞14.

Statement, in commission's opinion, that, since existing company was operating new boat, ferry capacity was adequate, *held* not inconsistent with implied finding that additional service would further public interest, where new boat had been operating only 12 days prior to time entire matter was taken under advisement.

It appeared that on April 21, during the pendency of the proceeding, and twelve days before the submission of the matter to the railroad commission, existing ferry company had put into service a new boat; that applicant for certificate of public convenience had made definite progress in proposing to establish a competitive ferry by obtaining franchises, etc., before existing company had placed its order for the new boat; and that, prior to the putting into operation of the new boat, existing carrier had not rendered adequate service to the public.

2. Ferries ☞14.

Record *held* to sustain conclusion that granting of certificate of public convenience for operation of ferry was in public interest, and that existing and new companies could operate at profit.

3. Public service commissions ☞35.

Supreme Court may not weigh evidence, and is concluded by railroad commission's fact findings and conclusions (St. 1915, p. 115, § 67).

4. Public service commissions ☞6.

Railroad commission has broad discretionary power to grant or withhold certificates of public convenience and necessity (St. 1915, p. 115).

5. Public service commissions ☞35.

That reasonable minds might differ as to wisdom of order granting certificate of public convenience *held* not to destroy order supported by sufficient record.

In Bank.

Petition by the San Diego & Coronado Ferry Company for a writ of review to annul an order of the Railroad Commission granting a

certificate of public convenience and necessity to the Automobile Ferry Company of Coronado.

Order affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for petitioner.

Arthur T. George, Ira H. Rowell, and Roderrick B. Cassidy, all of San Francisco, for respondents.

Stearns, Luce & Forward and Charles H. Forward, all of San Diego, for automobile Ferry Co. of Coronado.

SHENK, J.

Petition for writ of review to annul an order of the railroad commission granting a certificate of public convenience and necessity to Automobile Ferry Company of Coronado to operate a public ferry service for compensation across San Diego bay between the cities of San Diego and Coronado.

The petitioner, the San Diego & Coronado Ferry Company, is a public utility and has for many years operated a public passenger and vehicle ferry service across San Diego bay between the cities of San Diego and Coronado and is therefore subject to the jurisdiction of the railroad commission under the provisions of the Public Utilities Act (Stats. 1915, p. 115). On January 3, 1929, Automobile Ferry Company of Coronado filed with the commission an application for a certificate declaring that public convenience and necessity require the operation of another ferry across San Diego bay between said cities in competition with the petitioner's service. Public hearings were held at San Diego on April 2, 3, and 30, and on May 1 and 2, 1929, at which all parties entitled to be heard participated. The petitioner appeared and took an active part as a protestant at said hearings. On January 30, 1930, the commission filed its opinion and order granting the application. A rehearing was denied and the present petition was filed April 10, 1930. As a return to the writ the commission filed an answer and submitted for our consideration the entire record, which consists of a voluminous transcript of the testimony and over one hundred exhibits and documents. The petitioner states that it is unnecessary to refer to the evidence before the commission for the reason, so it is claimed, that the opinion and order shows its invalidity on its face. The commission relies upon the record, including the evidence in support of its action. In the opinion of the commission the entire situation is extensively treated. Some of it is discussion not amounting to findings, and other portions thereof may properly be considered findings of fact.

It appears that the only ferry service conducted across San Diego bay between San Diego and Coronado prior to the granting of the

present certificate was that provided by the petitioner herein; that from October, 1920, to April, 1929, that company operated two ferryboats, viz., the Ramona, having a carrying capacity of about 14 automobiles, and the Morena, with a capacity of 38 average cars; that the applicant has obtained the necessary franchise from the county of San Diego and the cities of San Diego and Coronado to authorize it to operate the proposed ferry line; that the applicant proposes to commence operations with one boat, to cost about \$325,000 and having a carrying capacity of about 50 automobiles; that this service will accommodate local vehicular traffic between the cities of San Diego and Coronado, as well as through traffic between the Mexican border and points north of San Diego via the Coronado strand; that the new ferry line extends from the foot of Kettner boulevard in San Diego to B street in Coronado and will operate about 500 feet easterly of the route over which the boats of the petitioner have been and are operated; that on April 21, 1929, or twelve days before the submission of the matter to the railroad commission, the petitioner herein put into service a new boat called the Coronado, with 50 to 60 automobile capacity, and retired the Ramona for stand-by service.

In its opinion the commission stated that it was apparent from the record that the applicant for the certificate had made definite progress in proposing to establish a competitive ferry by obtaining franchises, etc., before the petitioner herein had placed its order for the new boat Coronado, and that prior to the time this new boat was put into operation on April 21, 1929, the petitioner was not doing its full duty to the public and its service to the public was inadequate. The opinion further states: "For this commission to protect a utility which has allowed its service to run down, as the record shows has been the case here, until competition knocks at the door, is not conducive to good service and to public interest. It is incumbent upon every utility in this state to be abreast with public needs, regardless of whether there is competition facing it or not. A utility must assume the obligation of providing reasonably good service to its patrons if it expects to hold the field; to hold otherwise is not conducive to the growth and welfare of the community."

[1, 2] It is contended, however, that the force of the findings of the commission in support of its conclusion that the certificate should be granted is entirely dispelled by the further statement in the opinion as follows: "It appears, however, that subsequent to the time the new boat 'Coronado' has been put in operation, the ferry capacity was adequate to accommodate all the traffic offered for transportation without delay." This statement, it is claimed, renders the order granting the certificate void on its face on the theory that it constitutes a finding that further ferry

service is unnecessary, and, therefore, the conclusion of the commission that public convenience and necessity require the granting of the certificate applied for is unsupported. We do not so construe the statement of the commission, assuming it to be a finding. Undoubtedly the statement had reference to the twelve-day period, in an "off month" from the standpoint of traffic, and which was the period from the day the new boat was put in operation to May 2d, when the entire matter was taken under advisement by the commission. The statement is not inconsistent with the implied finding of the commission, justified by the record, that, taking into consideration the periods of heavier travel and the requirements of future service and the present and future growth of the community, the additional ferry service would further the public interest. The commission stressed the importance of service in which the petitioner herein had been found wanting, but based its conclusion also on the estimates of future business available to both companies. These estimates, submitted by engineers and other witnesses for the respective parties, were not in accord. This might be expected in the ordinary course of such a hearing. The necessary inference from the opinion of the Commission on this phase of the matter is that no injustice would be meted out to the petitioner herein by the installation of the new service. This implied finding is attempted to be utterly destroyed by the statement of the commission that, from an analysis of the estimates on probable future business, "there arises some question as to whether or not sufficient additional traffic can be developed, with the two companies operating, so that each will enjoy a profitable business." Obviously there was a question presented to the commission on that issue, and, while the finding thereon is not as definite as might be desired, there is sufficient in the record to justify the conclusion that under all the circumstances appearing in the case, both from the standpoint of service and future business, the public interest would be subserved by the granting of the certificate, and that each company could operate at a profit.

[3] It is vital, then, to consider the scope of the power vested in this court to set aside an order of the commission under the record here presented. Upon the reorganization of the Railroad Commission in 1911 by the adoption of sections 22 and 23 of article 12 of the Constitution and the re-enactment of the Public Utilities Act in 1915 (Stats. 1915, p. 115), a new policy with reference to the regulation and control of public utilities in this state was promulgated. The new policy proceeded generally on the theory of regulated monopoly. But it did not go the length of guaranteeing monopoly in all cases. Throughout the legislation runs the unbroken thread that the public interest is first to be con-

sidered. The administration of the new law was placed in the hands of the railroad commission, unhampered and uncontrolled by court interference, except to a specified and limited extent. Section 67 of the Public Utilities Act, with reference to the powers of this court, provides in part: "The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States, or of the State of California. The findings and conclusions * * * on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. * * * No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission. * * *" In *Clemmons v. Railroad Commission*, 173 Cal. 254, at page 258, 159 P. 713, 714, it was said that "the Legislature might have withheld from the courts of the state any power of reviewing the acts of the Commission. *Pacific Tel. & Tel. Co. v. Eshleman*, supra [166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822]. The power of review which is given must be exercised within the limits and upon the conditions which the Legislature has seen fit to fix." In *Oro Electric Corporation v. Railroad Commission*, 169 Cal. 466, at page 471, 147 P. 118, 119, this court said: "The validity of section 67 of the Public Utilities Act, in so far as it limits the scope of review by state courts of the acts of the Commission, must be regarded as finally settled by the *Telephone Company Case*. By that section, the findings and conclusions of the Commission on questions of fact are made final and not subject to review. Here the Commission found the ultimate fact that the public convenience and necessity did not require the exercise of the privileges in controversy, and neither the sufficiency of the evidence, nor the soundness of the reasoning, upon which that finding was based, can be considered on this proceeding." Again, referring to said section 67, it was said in *Sexton v. Atchison, etc., Ry. Co.*, 173 Cal. 760, 161 P. 748, 749: "The clear intent of the provision as a whole is to place the commission, in so far as the state courts are concerned, in a position where it may not be hampered in the performance of any official act by any court, except to the extent and in the manner specified in the act itself." See, also, *Truck Owners, etc., Inc., v. Superior Court*, 194 Cal. 146, 228 P. 19.

Counsel for the petitioner rely on the cases of *Marin Water, etc., Co. v. Railroad Commission*, 171 Cal. 706, 154 P. 864, Ann.

Cas. 1917C, 114; *Allen v. Railroad Commission*, 179 Cal. 68, 175 P. 466, 8 A. L. R. 249; and *Traber v. Railroad Commission*, 183 Cal. 304, 191 P. 366, 368, as laying down the rule applicable to the present case. In the *Traber Case* this court said: "Notwithstanding the declaration of section 67 that the commission's determination of matters of fact are not subject to review, it must be held that its determination upon the question whether or not the facts existing are sufficient to bring the case within the scope of its powers must be subject to review, so far as they present a question of law bearing upon that subject, and that the provision that the 'conclusions' of the commission on the facts are final does not apply to facts necessary to the existence of the jurisdiction of the commission to act. *Del Mar, etc., Co. v. Eshleman*, 167 Cal. 677, 140 P. 591, 948. But if the evidence in proof of such facts is substantial in character, and justifies the inference or conclusion that the facts necessary to the jurisdiction of the commission did exist, then, under the general principles of law regarding the proceeding in certiorari, its decision as to the effect of such evidence is binding and conclusive on the reviewing court." But here no question as to the jurisdiction of the commission to proceed is involved. The power of the Commission to entertain the application for the certificate cannot be disputed.

From other jurisdictions the petitioner cites cases, first from Illinois, which it claims supports its contentions. In that state the Illinois Commerce Commission Act was passed in 1921 (Laws 1921, p. 702). Sections 68 and 69 of that act provide for an appeal to the circuit or superior court "for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined. * * * The findings and conclusions of the Commission on questions of fact shall be held prima facie to be true and as found by the Commission." It then provides that any order or decision of the commission shall not be set aside "unless it clearly appears that the finding of the Commission was against the manifest weight of the evidence * * * or that the same was without the jurisdiction of the Commission. * * * Appeals * * * shall be governed by the rules applying to chancery cases appealed to said Supreme Court, except that formal pleadings shall not be required." In the cases applying that law the court proceeded to and did pass upon the weight of the evidence and the reasonableness of the order or decision. But the powers of our court are much more restricted and circumscribed. We may not thus weigh the evidence.

Cases cited from other states expounding theories of regulated monopoly or restricted competition under particular statutes are likewise not helpful in defining the powers of the

respondent commission and of this court under our law. There is a clear distinction between a law which permits the court to review the evidence and one which so plainly prohibits it.

[4] The phrase "public convenience and necessity" cannot be defined so as to fit all cases. The word "necessity" must be taken in a relative sense. The Supreme Court of Illinois has well expressed its meaning in *Wabash, C. & W. Ry. Co. v. Commerce Commission*, 309 Ill. 412, 141 N. E. 212, 214, where it was said: "When the statute requires a certificate of public convenience and necessity as a prerequisite to the construction or extension of any public utility, the word 'necessity' is not used in its lexicographical sense of 'indispensably requisite.' If it were, no certificate of public convenience and necessity could ever be granted. The first telephone was not a public necessity under such a definition, nor was the first electric light. Even the construction of a waterworks system in a village is seldom necessary, though highly desirable. However, any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary. If it is of sufficient importance to warrant the expense of making it, it is a public necessity. *Park & Boulevard Com'rs v. Moesta*, 91 Mich. 149, 51 N. W. 903. A thing which is expedient is a necessity. *Warden v. Madisonville, H. & E. R. Co.*, 128 Ky. 563, 108 S. W. 880. Inconvenience may be so great as to amount to necessity. *Lawton v. Rivers*, 2 McCord (S. C.) 445, 13 Am. Dec. 741. A strong or urgent reason why a thing should be done creates a necessity for doing it. *Todd v. Flcurnoy*, 56 Ala. 99, 28 Am. Rep. 758. The word connotes different degrees of necessity. It sometimes means indispensable; at others, needful, requisite, or conducive. It is relative rather than absolute. No definition can be given that would fit all statutes. The meaning must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found. *Wisconsin Teleph. Co. v. Railroad Commission*, 162 Wis. 383, 156 N. W. 614, L. R. A. 1916E, 748, P. U. R. 1916D, 212. The Commerce Commission has a right to, and should, look to the future as well as to the present situation. Public utilities are expected to provide for the public necessities, not only to-day, but to anticipate for all future developments reasonably to be foreseen. The necessity to be provided for is not only the existing urgent need, but the need to be expected in the future, so far as it may be anticipated from the development of the community, the growth of industry, the increase in wealth and population, and all the elements to be expected in the progress of a community."

The respondent commission has discussed

at length its views with reference to the new policy of the law in this state advanced by the Constitution and the statute on the question of regulated monopoly and competition. *Pacific Gas and Electric Co. v. Great Western Power Co.*, 1 C. R. C. 203; *In re Oro Electric Corp.*, 2 C. R. C. 738, and *In re United Parcel Service*, 32 C. R. C. 82. There is nothing in their declarations of policy inconsistent with the order now under attack. The policy as declared by the statute and applied by the Commission has never gone to the length of guaranteeing monopoly in all cases, but has at all times deemed the public interest as of paramount importance. It has announced that, when an existing utility has fallen short of its full duty to the public, it will not necessarily be protected against competition, and that its activities before and at the time competition knocks at the door may be taken into consideration, notwithstanding protestations of better behavior in the future. The commission has never foreclosed itself, even if it could, from acting favorably on an application for a certificate, the consideration of which is so peculiarly within its own jurisdiction. The discretion of the commission in such matters is very broad. In discussing this question with reference to the powers of a similar commission, the Supreme Court of Kansas said: "The discretionary power of the commission to grant or withhold certificates of convenience to public utility companies is broader than its power to govern rates and services of such companies. In the exercise of the latter powers, the lawful scope of the commission's orders is hedged about by statutory and constitutional guaranties and inhibitions. In the granting or withholding of certificates of convenience, no justiciable question touching confiscation of property or impairment of vested rights can well arise. Time and again this court, in consonance with the prevailing attitude of courts throughout the country, has declared that it will not substitute its judgment for that of some administrative tribunal created by legislative authority for dealing with matters of nonjudicial character; and certainly the question whether a competing gas company should be licensed to serve industrial plants in and around Wichita and Hutchinson is peculiarly a question for an official board to determine and one with which a judicial tribunal should be slow to meddle." *Kansas, G. & E. Co. v. Public Service Commission*, 122 Kan. 462, 251 P. 1097, 1099.

[5] That reasonable minds might differ as to the wisdom of the order, illustrated by the fact that three members of the commission voted for the same with two dissenting, would tend to uphold rather than to destroy the order. We conclude that there is sufficient in the record to justify the decision, and

that the findings are not inconsistent with the order made.

The order is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

210 Cal. 564

ASADOORIAN v. KLUDJIAN.
S. F. 13352.

Supreme Court of California.
Oct. 27, 1930.

1. Fraudulent conveyances ⇨308(1).

Whether transfer is in fraud of creditors is question of fact and not of law.

2. Fraudulent conveyances ⇨273.

One attacking validity of transfer as in fraud of creditors has burden, where transfer is for consideration, of establishing actual fraudulent intent.

3. Fraudulent conveyances ⇨295(1).

Fraud, as respects validity of transfer, must ultimately be proved by preponderance of evidence, regardless of prima facie case (Civ. Code, § 3439).

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action to quiet title by Zaroohi Asadoorian against S. Kludjian. Decree for plaintiff, and defendant appeals.

Affirmed.

Stanley Moffatt, G. L. Aynesworth, and L. N. Barber, all of Fresno, for appellant.

M. F. McCormick, of Fresno, for respondent.

LANGDON, J.

This is an action to quiet title to certain property. In another action commenced prior to this one, Kludjian, the defendant herein, sued Mr. and Mrs. Kandarian, respectively the stepfather and the mother of Mrs. Asadoorian, plaintiff herein, for money due under a promissory note. This suit was filed on February 6, 1928. It appeared that on February 3, 1928, Mrs. Kandarian had trans-

ferred the property in question to her daughter, Mrs. Asadoorian. Kludjian levied an attachment on this property, standing in the name of Mrs. Asadoorian, on the theory that the transfer to her was a conveyance in fraud of creditors. Mrs. Asadoorian then brought the present action to quiet title. Defendant Kludjian set up in his answer the facts concerning the other suit and attachment, and alleged that the deed from Mrs. Kandarian to Mrs. Asadoorian was made without consideration, and with the intent to hinder, delay, and defraud the creditors of Mr. and Mrs. Kandarian. The trial court found against the defendant on this issue, and gave a decree quieting plaintiff's title.

[1-3] Defendant's appeal is based upon the ground of insufficiency of the evidence to sustain the findings of the court. In this connection it is urged that from the evidence there appear various "badges" or "indicia" of fraud, which were sufficient to make out a prima facie case for the defendant, and to shift to the plaintiff the burden of proof as to the validity of the transaction. It is unnecessary to review these instances of suspicious conduct set forth by defendant, for it may be conceded that there are circumstances surrounding the transfer which might, if unexplained, compel the conclusion that the conveyance was fraudulent. Explanation was offered, and the result was a conflict in the evidence. It has been frequently held by this court that whether a transfer is in fraud of creditors is a question of fact and not of law, and, where the transfer is for consideration, as the court found in the instant case, it is necessary for the party attacking the validity of the transfer to establish an actual fraudulent intent. The burden of proof is on him, and, though the burden of going forward with the evidence may shift when a prima facie case is made out, fraud must ultimately be proved by a preponderance of the evidence. Civ. Code, § 3439; *Rossen v. Villanueva*, 175 Cal. 632, 166 P. 1004; *Roberts v. Burr*, 135 Cal. 156, 67 P. 46; *Scholle v. Finnell*, 167 Cal. 90, 138 P. 746; 12 Cal. Jur. 1045, § 87; 1057, § 96; 1059, § 97. The trial court resolved the conflict in the evidence in favor of the plaintiff, and an examination of the record discloses no ground upon which we would be justified in disturbing its conclusion.

The judgment is therefore affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; PRESTON, J.

210 Cal. 546

WAGNER v. ATCHISON, T. & S. F. RY. CO.

S. F. 13370.

Supreme Court of California.

Oct. 24, 1930.

Rehearing Denied Nov. 20, 1930.

1. Railroads ⇨327(12).

Passenger need not exercise same degree of observation as driver, but must protest against negligence or recklessness of driver, depending on circumstances.

2. Railroads ⇨350(2f).

Contributory negligence of passenger on truck struck by train *held* for jury under evidence.

Evidence disclosed that passenger's view of approaching train, which was approaching on passenger's right, was obstructed by trees, and that passenger looked only to left. Passenger testified that driver of truck always looked to right when approaching crossings, and that passenger could not see train from his position on truck.

3. Railroads ⇨350(32).

Whether truck driver's negligence proximately caused collision of train and truck at crossing *held* for jury under conflicting evidence as to obstruction of view and warning signals.

4. Witnesses ⇨329.

Cross-examination of railroad claim adjuster concerning signals at places other than place of accident, to test accuracy of adjuster's observation at place of accident, testified to on direct examination, *held* properly admitted.

Claim adjuster of railroad company sued for injuries sustained in collision with truck at crossing testified on cross-examination concerning observations made at scene of accident day after it occurred. On cross-examination, adjuster was asked whether he observed wigwag signals and red disc at crossing other than place where accident occurred and concerning visible surroundings of crossing. Plaintiff offered no evidence on question whether defendant railroad was negligent in failing to provide signals at crossing where accident occurred, and did not attempt to use answers of witness in argument. Court in its instruction stated that Railroad Commission had exclusive power to determine protection to be installed at crossing, and that there was no evidence that anything had been prescribed at crossing where accident occurred.

5. Trial ⇨207.

Testimony competent for any purpose, may be admitted, though inadmissible for another purpose, if purpose is appropriately limited.

6. Trial ⇨43.

Rule admitting evidence competent for one purpose, though inadmissible for another purpose, is particularly applicable to cross-examination.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Raymond Wagner, a minor, by and through his guardian ad litem, Robert Wagner, against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Robert Brennan, H. K. Lockwood, Leo E. Sievert, E. T. Lucey, and M. W. Reed, all of Los Angeles, for appellant.

Ford, Johnson & Bourquin and Ford & Johnson, all of San Francisco, and Jesse E. Nichols, of Oakland, for respondent.

LANGDON, J.

This is an appeal by defendant from a judgment of the superior court of Alameda county, in favor of plaintiff, for damages for personal injuries.

The accident occurred at about 11 a. m. on August 2, 1927, in the city of Berkeley, at the intersection of the tracks of defendant company with Blake street. The street runs east and west, and the tracks cross it at an angle, running northwesterly and southeasterly. On the morning of the accident, plaintiff's older brother, Alfred Wagner, employed to make deliveries by a local ice company, was driving his truck on his business. Plaintiff, a boy of 14, who occasionally rode with him and assisted, sat on the right hand of the driver. They proceeded in an easterly direction on Blake street and approached the crossing at a speed of about 8 to 10 miles per hour. A train operated by defendant company was at the time approaching Blake street from the south at a speed of about 25 miles per hour. The driver did not see the train until he was about 15 feet from the tracks, and, upon sighting it, swerved suddenly to the left and applied the brakes, but failed to avert the collision. He was unhurt, but plaintiff sustained serious injuries.

The case was tried before a jury, and a verdict was returned in favor of plaintiff in the sum of \$12,500.

As its first ground of appeal, defendant urges that its motion for a nonsuit should

have been granted because plaintiff was guilty of contributory negligence as a matter of law. The evidence shows that both the driver and plaintiff were familiar with the crossing and aware of the fact that they were coming to it. This being so, it is contended that it was the duty of plaintiff, as well as the driver, to keep a lookout for approaching trains. Plaintiff testified that he looked to the left, but not to the right. Upon this single piece of evidence rests the claim of negligence as a matter of law.

[1] This point is without support, either in the law or the facts. The law does not demand of a passenger the same high degree of observation as it requires of the driver, for the passenger has not, in the ordinary case, any actual control over the driver. He is normally bound to protest against actual negligence or recklessness of the driver, but the extent of his duty depends upon the particular circumstances of each case, and is a question for the jury. *Marchetti v. Southern Pacific Co.*, 204 Cal. 679, 269 P. 529; *Curran v. Earle C. Anthony, Inc.*, 77 Cal. App. 462, 247 P. 236. Moreover, plaintiff explained why he did not look to the right. It appears that there were two trees on Blake street which one's eyes encountered in looking to the right, and plaintiff declared: "You couldn't see where I was sitting." He also testified, on cross-examination, as follows:

"Q. You did not look to your right or south to see if there was a train coming? A. No, my brother always looked that way, he looks one way and I look the other. He looks both ways.

"Q. You saw your brother looking to the right, and you thought it was not necessary for you to look that way; is that right? A. Yes, sir."

[2] Under the circumstances, it is apparent that the question of contributory negligence was properly left to the jury.

[3] Defendant also contends that the court should have granted its motion for a directed verdict, on the ground that the evidence positively establishes defendant's freedom from negligence and points to the negligence of the driver of the truck as the proximate cause of the accident. We have read the record, and have arrived at no such conclusion. The evidence is sharply conflicting on the extent to which the trees obscured the view of the driver and on the question whether the proper warning signals were given by the train. This issue, like that of contributory negligence, was properly left to the jury.

Defendant assigns as error the giving of certain instructions, as well as the refusal to give others; and various rulings of the court on the admissibility of evidence are also attacked. No useful purpose would be served by an extensive comparison of the numerous instructions requested by defendant with

those actually given by the court. We have carefully examined them all, and we believe that no prejudicial error was committed by the court in this connection. Nor do we find any suggestion of substantial error in the rulings on evidence. Of these rulings, the one chiefly complained of here is the admission of testimony with regard to wigwag signals, under the following circumstances: Defendant called as a witness one of its claim adjusters, who gave testimony concerning his observations and photographs made at the scene of the accident the day after it occurred. On cross-examination, counsel for plaintiff questioned him in some detail as to his recollection of the matters on which he had given evidence on direct examination, and particularly on the physical surroundings of the crossing. During this question, the following occurred:

"Q. Where did you make your observations from, the two observations you now speak of? A. About 125 feet south of Blake street, and the edge of Parker street.

"Q. What were you standing on when you made the observation at Parker street? A. The roof of a coach.

"Q. Oh, you were on a train? A. I was.

"Q. I see. And when you were up there on that coach at Parker street did you observe any warning signal? A. I did not notice anything.

"Q. Didn't you notice a wig-wag signal, a red disc, swinging back and forth when the train comes?

"Mr. Lockwood: That is objected to as not proper cross-examination, and irrelevant, incompetent and immaterial.

"A. I did.

"The Court: Overruled.

"Mr. Johnson: Q. As you look from 125 feet—at that point up the railroad track, the next street beyond Blake is Dwight, and the crossing is right out in kind of a hayfield at Dwight way, isn't it? A. No, I don't think there is any hayfield there.

"Q. Are there any houses built up close? A. Yes, there is some.

"Q. Is there any house there close to the track on the west of the Santa Fe, at Dwight way, the next block to the north? A. Yes, sir.

"Mr. Lockwood: That is objected to as irrelevant, incompetent and immaterial, and not proper cross-examination.

"The Court: Overruled.

"Mr. Johnson: Q. And at Dwight way you likewise saw a big automobile disc when you came along with your coach, swinging back and forth, indicating the approach of a train, didn't you?

"Mr. Lockwood: That is objected to as irrelevant, incompetent and immaterial, not

proper cross-examination, and no bearing upon any of the issues in this case.

"The Court: Overruled.

"A. I did not notice it. I never paid any attention to it.

"Mr. Johnson: Q. Well, don't you know it is there, from your observations?

"Mr. Lockwood: The same objection, and for the further reason that it is prejudicial, and irrelevant, incompetent and immaterial, and not proper cross-examination.

"The Court: Overruled.

"A. Yes, I know it is there."

Similar questioning was directed by counsel for plaintiff to the witness Fenton, fireman of the train, with respect to his recollection of what occurred and what he observed in the locality just prior to the accident; and similar testimony was elicited.

[4] Defendant asserts that the admission of this testimony constituted prejudicial error, which could not be cured by any subsequent instruction by the court. It may be conceded that, in the absence of a proper foundation, evidence of the signals or other precautionary devices maintained at other places would be inadmissible to show a lack of care on the part of the defendant in failing to maintain such devices at the crossing involved in the present action. Such was not, however, the purpose of the questioning. Plaintiff raised no issue in the pleadings, and offered no evidence on the question whether defendant was negligent by reason of failure to provide wigwag signals at the crossing. The cross-examination was conducted with the asserted object of testing the accuracy of the observations made by defendant's witnesses. Many searching questions were asked of these witnesses, and in several instances they could not remember distances nor objects observed. It even appears that they were at first uncertain as to whether there were such signals at the other streets.

[5, 6] It has always been the law that testimony may be admissible, if competent, relevant, and material for any purpose, even though it might be inadmissible for another purpose, provided that the court sufficiently limits its purpose by an appropriate instruction to the jury. A full discussion of this proposition may be found in *Adkins v. Brett*, 184 Cal. 252, where Mr. Justice Olney says on page 256, 193 P. 251, 253: "The rule upon this point, which is one of well-nigh everyday application in actual trial, is thus stated by Wigmore (volume 1 p. 42): 'In other words, when an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some

other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks, is indispensable as a practical rule.'" See, also, 10 Cal. Jur. 813, § 105. The rule should be particularly applicable to cross-examination, where a wide latitude is generally allowed, and the court's discretionary power is very broad. See 27 Cal. Jur. 97, § 76.

Counsel for plaintiff made no attempt to use the answers thus elicited in his argument, and the court instructed the jury on the point as follows: "Under the laws of the State of California, the railroad commission is given the exclusive power to determine and prescribe the protection to be installed at each crossing of a street by a railroad, or a railroad by a street. There is no evidence that the commission has prescribed or required the installation by the railway company of any protection at the Blake street crossing." By this unequivocal instruction, the court properly restricted the purpose of examination, and, under the circumstances, we must conclude that no error is shown. Other errors assigned are without merit.

The judgment is therefore affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

210 Cal. 569

MILO v. PRIOR.
S. F. 13864.

Supreme Court of California.
Oct. 28, 1930.

1. Judgment ☞197.

Judgment without prejudice is not proper, where cause is tried and submitted on merits.

2. Appeal and error ☞14(2).

Appeal may be taken from judgment entered pursuant to direction of appellate court.

3. Judgment ☞197.

Without prejudice provision in judgment held not severable from entire judgment, and to qualify every part thereof.

4. Appeal and error ☞839(1).

Where appeal was from "without prejudice" provision in judgment, held appellate court could review entire judgment; portion appealed from not being severable.

5. Appeal and error $\hookrightarrow$ 1176(1).

Where plaintiff waived findings and conclusions when court erroneously announced judgment "without prejudice," *held* judgment should be reversed, with direction to enter new judgment upon merits.

Had plaintiff known that judgment was to go, upon appeal, for defendant without reservation or qualification, plaintiff undoubtedly would have insisted on findings so as to be able better to present case on appeal. Having thus prejudiced herself by reason of trial court's error, she should not now be penalized by being required to appeal from judgment unsupported by findings, and judgment should be reversed, and trial court directed to enter judgment upon merits between parties upon evidence and record before it when cause was submitted for decision.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Hazel Milo, by A. Milo, her guardian ad litem, against Leland S. Prior. From that portion of the judgment for defendant stating that judgment is without prejudice, defendant appeals.

Reversed, with directions.

Superseding opinion of District Court of Appeal in 284 P. 701.

Corbet & Selby, of San Francisco, for appellant.

Hubbard & Hubbard, of San Francisco, for respondent.

WASTE, C. J.

This is an action for damages for personal injuries suffered by the plaintiff in an automobile collision alleged to have been caused by the negligence of the defendant. Two other actions between other parties, based upon the same collision, were consolidated with this action for trial, all being tried upon the same evidence by the court sitting without a jury. The court gave judgment in each case, denying relief to each of the several plaintiffs and cross-complainants. In this action, judgment was announced for the defendant "without prejudice." The parties to this action waived findings of fact, and, in conformity with its pronouncement, the court gave judgment for the defendant "without prejudice to plaintiff's bringing a new action herein, if so advised." Defendant prosecutes this appeal from the quoted portion of the judgment, contending that, the action having been fully tried and submitted on the merits, the judgment should have been a final judgment between the parties, and not merely a judgment without prejudice.

[1, 2] The court below erred in entering such a judgment. A cause tried and submitted on its merits should never result in a judgment without prejudice. *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. 806. The real issue between the parties upon this appeal concerns the order to be made by this court. The appellant argues that the judgment as entered is, in effect, a judgment in his favor, and that this court should therefore modify the same by striking therefrom a surplusage that portion declaring it to be without prejudice. In advancing this contention the appellant asserts that the objectionable part of the judgment is clearly severable from the remainder of the judgment, which has not been appealed from, and should, therefore, be stricken therefrom. In order to protect the respondent's rights in the premises, appellant suggests that, as a part of the order of modification, we should reserve to the respondent the right, to be exercised within the statutory period, if she be so advised, to move for a new trial or to appeal from the judgment entered pursuant to our direction. That an appeal may be taken from a judgment entered pursuant to the direction of an appellate court is well settled. *Tuffree v. Stearns Ranchos Co.*, 124 Cal. 306, 310, 57 P. 69; *Sala v. City of Pasadena*, 162 Cal. 714, 722, 124 P. 539.

[3, 4] However, we are not prepared to conclude that the objectionable part of the judgment is severable. While the court should have given judgment on the merits without reservation or qualification, it is impossible to ascertain upon the record now before us whether or not the trial court, were it cognizant of its inability to enter a judgment "without prejudice," would have given judgment for the defendant. In other words, we cannot say upon this appeal that a judgment for appellant is the only judgment on the merits warranted by the evidence, nor that the trial judge was of the opinion that appellant was entitled to a judgment upon the merits. This being so, we must assume that the reservation must, of necessity, enter into and qualify each and every part of the judgment. The judgment is an entirety. *Wanzer v. Self*, 30 Ohio St. 378. Though the entire judgment has not been appealed from, it may, nevertheless, be reviewed by an appellate court when the portion appealed from is not severable. *In re Yoder*, 199 Cal. 699, 704, 251 P. 205; *Whalen v. Smith*, 163 Cal. 360, 362, 125 P. 904, Ann. Cas. 1913E, 1319.

[5] However, even if we were to assume that the objectionable part of the judgment is severable, appellant's proposal that there be reserved to respondent the right to move for a new trial or to appeal from the modified judgment does not protect her. After the judgment has been modified, as suggested by appellant, it is conceivable the record may be such that an order granting a new trial would

amount to a gross abuse of discretion upon the part of the trial court, subject to reversal upon an appeal therefrom. Nor do we think an appeal from the modified judgment solves the problem. As a result of the trial court's oral pronouncement that judgment would be given for the appellant "without prejudice" to the filing of a new suit, the respondent, apparently relying thereon, waived findings of fact and conclusions of law. In an action tried without a jury, findings are all important to a potential appellant. Had respondent known that judgment was to go for the appellant without reservation or qualification, undoubtedly she would have insisted on findings so as to better present her case on appeal from such unqualified judgment. Having thus prejudiced herself by reason of the trial court's error, she should not now be penalized to the extent of being required to appeal from a judgment unsupported by findings.

The judgment is therefore reversed and the trial court is directed to enter a judgment upon the merits between the parties hereto upon the evidence and record before it when the cause was submitted to it for decision.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

Superseding opinion of District Court of Appeal in 289 P. 181.

Culver & Nourse and Paul Nourse, all of Los Angeles, and Emmons, Aldrich & Mack, of Bakersfield, for appellant.

Victor A. Dunn, of Oakland, and Siemon & Garber, of Bakersfield, for respondent.

PER CURIAM.

This is an action for damages for personal injuries sustained by the plaintiff when the automobile he was driving collided with the rear end of the defendant's truck and trailer which were headed in the same direction as the plaintiff's car. The answer interposed the plea of contributory negligence. The jury found negligence on the part of the defendant and against the plea of contributory negligence. The defendant appeals from a judgment on the verdict in favor of the plaintiff.

Two major points are urged for reversal: First, that the evidence fails to establish the negligence of the defendant; and, secondly, that the evidence establishes the negligence of the plaintiff as matter of law.

[1, 2] As to the defendant's alleged negligence, the evidence was substantially in conflict. The accident occurred about 2 a. m. on November 29, 1926. At that time the plaintiff was driving his automobile in a northerly direction on the Ridge road toward Bakersfield. According to the evidence favorable to the plaintiff, the defendant's truck and trailer were parked entirely on the paved portion of the highway. Directly opposite the defendant's truck and trailer, and on the other side of the highway, facing southerly, stood another parked truck, the property of a third person. The headlights on this second truck were shining brightly and blinded the plaintiff for a distance of about 150 feet behind the defendant's trailer. The plaintiff was traveling at a speed of about 25 miles per hour when his car entered the blinding rays of light from the second truck and he slowed his speed down to 15 miles per hour, at which rate he was traveling when he first saw the defendant's trailer. He then swerved to the left and applied his brakes to the utmost of their capacity. He was within about 4 feet of coming to a dead stop when he ran into the pipes extending from the rear end of the defendant's trailer. The defendant's negligence is clearly shown, and, under the facts appearing in the record, a brief outline of which is given above, we are of the opinion that it was a question of fact for the jury whether the plaintiff did everything that a reasonable man would have done under like circumstances to safeguard the life and property of others and to avoid injury to himself.

The case of Hatzakorjian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 716, 41 A. L.

210 Cal. 524

SKAGGS v. WILLHOUR. L. A. 12495.

Supreme Court of California.
Oct. 24, 1930.

Rehearing Denied Nov. 20, 1930.

1. Automobiles ⇨244(14).

In action for personal injuries sustained when plaintiff's automobile collided with rear of defendant's parked truck and trailer headed in same direction at night, evidence held to establish defendant's negligence.

2. Automobiles ⇨245(83).

Whether plaintiff suing for personal injuries sustained when automobile collided with rear end of defendant's parked truck and trailer headed in same direction at night was contributorily negligent held for jury under evidence.

In Bank.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by James E. Skaggs against Walter Willhour. Judgment for plaintiff, and defendant appeals.

Affirmed.

R. 1027, is not controlling. There the court on appeal concluded that the plaintiff's intestate was entirely free from negligence; that the defendant's employee was guilty of negligence, and that the findings of the trial court to the contrary were unsupported by the evidence. It was there said that after the glare of the approaching headlights first obscured his vision the defendant's employee proceeded on with a degree of recklessness and indifference "closely approaching, if indeed, not amounting, under the circumstances as revealed by his own testimony, to gross negligence." We cannot so characterize the conduct of the plaintiff herein, nor, under the evidence, hold him guilty of contributory negligence as a matter of law. No other points require discussion.

The judgment is affirmed.

109 Cal. App. 259

WEBER et al. v. SUPERIOR COURT et al.
Civ. 7586.

District Court of Appeal, First District, Division 2, California.

Oct. 28, 1930.

Rehearing Denied Nov. 26, 1930.

1. Prohibition ⇨5(3).

Prohibition was not proper remedy to prevent hearing of proceedings to punish for contempt of injunction pendente lite.

2. Injunction ⇨231.

Petitioners filing notice of appeal from order of injunction pendente lite thereby transferred to Supreme Court jurisdiction to determine validity of order relating to contempt.

Application for writ of prohibition by Walter A. Weber and others against the Superior Court and others to restrain respondent from proceeding on an order to show cause why petitioners should not be punished for contempt of an injunction pendente lite.

Petition denied, and proceedings dismissed.

Milton D. Sapiro, John J. Taaffe, Henry Heidelberg and Harry Mackenzie, all of San Francisco, for petitioners.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Nat. Schmulowitz, and George B. Harris, all of San Francisco, for respondents.

NOURSE, P. J.

The petitioners here seek an original writ of prohibition to restrain the respondents from proceeding on an order to show cause why the petitioners should not be punished for contempt of an injunction pendente lite previously issued by the respondent.

[1] The petitioners do not attack the preliminary papers upon which the order to show cause was issued, but base their case in an attack upon the validity of the injunction pendente lite, which injunction was issued on July 22, 1930. The petition herein for prohibition was filed August 25, 1930, and, aside from the fact that it is a collateral attack upon the order of the respondent court made July 22, 1930, the petitioners have mistaken their remedy in thus proceeding in prohibition to prevent the hearing of the contempt proceedings. The rule applicable here is found in *Wessels v. Superior Court*, 200 Cal. 403, 253 P. 135, where the Supreme Court say: "The remedy of the petitioner is to first present his defense upon the hearing of the contempt proceedings, and then, if found guilty of the contempt, to apply to a higher court for a writ of certiorari or habeas corpus. *Commercial Bank v. Superior Court*, 192 Cal. 395, 397, 220 P. 422; *Drew v. Superior Court*, 43 Cal. App. 651, 655, 185 P. 680."

[2] The reason for the foregoing rule is emphasized by the proceedings in this case, which show that on September 20, 1930, the petitioners filed their notice of appeal to the Supreme Court from the order of injunction pendente lite, thereby transferring to the latter court full jurisdiction to determine the validity of the order which they here seek to attack.

For these reasons the petition is denied and the proceedings dismissed.

We concur: STURTEVANT, J.; SPENCE, J.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

109 Cal. App. 60

WEINREICH et al. v. VERNON et al.
Civ. 6007.District Court of Appeal, Second District,
Division 1, California.
Oct. 14, 1930.**Landlord and tenant** ⇨214.

Payment of advance rent under lease not requiring return by lessor cannot be set up in action on note given for rent.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by I. J. Weinreich and another against J. R. Vernon and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Homer C. Mills, of Long Beach, for appellants.

Henry M. Lee, of Los Angeles, for respondents.

YORK, J.

This is an action on a promissory note which apparently was given by the defendants to plaintiffs in payment of rent for the month of June, 1925. The defendants alleged by way of answer to the complaint that said note "has been fully paid by reason of the retention by the plaintiffs of certain sums of money held on deposit by them to secure the performance of a certain lease theretofore entered into between the plaintiffs and defendants."

On trial, objection was made by plaintiffs to the introduction of any evidence to sustain said allegation of payment, which objection was sustained by the court. This appeal is taken from a judgment in favor of the plaintiffs. It is contended by appellants that the trial court erred in making its findings of fact and conclusions of law, in rendering judgment for the plaintiffs, and also in sustaining the objection above referred to.

The only reference made in the lease to the sums of money alleged to have been held on deposit by the plaintiffs is as follows: "And receipt of the sum of \$4,080 was and for the first month and the last four months of the term is hereby acknowledged by first parties." The words "was and for" should be read "as and for." From this it appears that the money was received by the lessor as being in full payment of the first month and the last four months of the term, or advance rent. No contingencies are recited in the lease whereby it should be returned to the lessee; in fact, nothing more than the sentence above quoted is said regarding it.

"Where the lessee makes an advance pay-

ment in cash and notes for the last two months' rent of the premises and is dispossessed for default in the payment of rent, he cannot, in actions on the notes and for unpaid rent, set up the advance payment as a counterclaim on the theory that it is a deposit to secure the payment of rent." *Forgotston v. Brafman* (Sup.) 84 N. Y. S. 237. The case of *Wetzler v. Patterson*, 73 Cal. App. 527, 238 P. 1077, 1078, holds: "The general rule deducible from the authorities is that rent paid in advance cannot be recovered by the tenant upon the termination of the lease for condition broken, when such termination was not brought about by the wrongful act of the landlord. [Citing cases.] * * * 'Provision is sometimes made in a lease for the payment in advance of the rents of the last or later periods of the lease, and such a provision has been held not to be a security merely for the lessee's performance of his agreements in the lease, but purely a payment of rent in advance, and therefore may be retained by the lessor though he terminates the lease for the default of the lessee as provided for in the lease.' 16 R. C. L. p. 931."

For the reasons stated, it was not error for the trial court to sustain the objection to the offered evidence.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

SLATER v. PACIFIC AMERICAN OIL CO.*
Civ. 217.District Court of Appeal, Fourth District,
California.
Oct. 21, 1930.

As Modified on Denial of Rehearing
Nov. 15, 1930.

Hearing Granted by Supreme Court
Dec. 18, 1930.

1. Waters and water courses ⇨45.

Several companies contributing substances injuring plaintiff's land *held* separate tortfeasors.

2. Torts ⇨22.

Court may exercise liberal hand in determining contribution to injury between several tortfeasors from evidence.

3. Waters and water courses ⇨45.

Where land was injured by substances contributed by several companies, defendant would be liable only for portion of damage which its contribution to whole bore to injury.

Plaintiff's land was damaged by deposit on land of oil, salt, and hydrocarbon sub-

stances negligently permitted to run down ravine onto plaintiff's land and contributed by several companies whose wells drained into ravine. Evidence did not disclose quantity of oil, salt, or hydrocarbon substances flowing into ravine from defendant's wells, and that were washed down on plaintiff's lands, but disclosed that some of said substances reached ravine from defendant's property.

4. Waters and water courses ⚡49.

Evidence that defendant contributed some of substances damaging land, but not showing basis for determining proportion, did not support finding that defendant's contribution caused certain amount of injury and for injunction.

5. Waters and water courses ⚡49.

Plaintiff suing for damages to land by injurious substances contributed by several companies must show quantity contributed by defendant compared to total volume causing injury.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by W. F. Slater against the Pacific American Oil Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Ben S. Hunter and James Farraher, both of Los Angeles, for appellant.

Charles D. Swanner, of Santa Ana, for respondent.

WARMER, Justice pro tem.

This is an appeal by the defendant Pacific American Oil Company from a judgment entered by the trial court in an action for damages. Respondent was the owner of 60 acres of valuable farm land near Huntington Beach, Cal. South of respondent's land and extending in a general easterly and westerly direction is a range of hills which slope to the north and extend to approximately the southern line of respondent's land. Originating on the northerly slope of said hills and extending therefrom in a general northerly direction and to the southerly line of respondent's land, there exists a ravine, which is a natural watercourse, and during the rainy season of each year the rain that falls upon the hills naturally drains and runs into said ravine and is conducted thereby to the southerly line of respondent's land, at which place the water flowing in said ravine naturally flows upon, over and across the respondent's land. There is a small ravine running down from said hills and adjoining the large ravine on appellant's property at about the point where the sump holes hereinafter mentioned were

located. During the year of 1927 appellant was operating oil wells upon said range of hills on which several other companies were also operating oil wells. At the foot of said ravine, and adjoining respondent's property, there were several sump holes that were filled with oil, from the wells of appellant and other companies operating wells on said range of hills. There was a storm in February, 1927, and the rainwater falling upon said hills during said storm naturally flowed down the range of hills and down said ravine, carrying oil, salt, and other hydrocarbon substances from said ravine and sump holes over upon the respondent's property, where it was deposited, and the damage from which is herein sought to be recovered.

The complaint alleges that plaintiff was damaged by the deposit on his land of oil and salt and hydrocarbon substances; that the defendant corporation negligently permitted same to run down the ravine and onto the lands of the plaintiff; and prays for an injunction and damages. The answer denies the allegations of the complaint as to damages and negligence and sets up a separate defense, alleging that the damages to plaintiff's land, if any were sustained, were due to the joint acts and omissions of certain other corporations, and that said companies had paid plaintiff in full for all of the damage sustained and said companies had been released from all claim or demand growing or arising out of the facts alleged in the complaint. Appellant urges that the evidence is insufficient to support the findings, making a number of specifications in this regard. The evidence shows there were about 30 oil wells draining into the ravine; that defendant company owned and operated two of such wells; that the oil that was in the ravine was an accumulation from all of the oil wells. The evidence does not disclose the quantity of the flow of oil, salt, or hydrocarbon substances from the wells of the defendant into the ravine that were washed down upon the plaintiff's lands. The evidence as to the flow of oil, salt, and hydrocarbon substances from the appellant's wells and sumps on the occasion complained of in this action is not from the testimony of eyewitnesses who saw the same drained into the ravine or the sumps overflowing, but is from the testimony of witnesses who testified to seeing evidences of overflow from the defendant's sumps shortly subsequent to the storm that caused the oil, salt, and hydrocarbon substances to be washed down on the plaintiff's property, and while not very clear and convincing, yet there is some evidence of the fact that some of said substances reached the ravine from the sumps of the defendant company.

[1] The respondent admits that the defendant is only one of a number of contributors

to the flow that caused the damage, but maintains that the defendant was a separate tortfeasor. This position of the respondent is not directly challenged by the appellant, nor could it be successfully, for, as said in *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 P. 550, 551, 22 Am. St. Rep. 254: "It is clear that the rule, as established by the general authorities, is that an action at law for damages cannot be maintained against several defendants jointly when each acted independently of the others, and there was no concert, or unity of design, between them. It is held that, in such a case, the tort of each defendant was several when committed, and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons."

The record discloses that plaintiff's land was damaged by a deposit thereon of oil, salt, and hydrocarbon substances; that the total volume of the oil, salt, and hydrocarbon substances that caused said damage came from several independent sources.

There is no evidence as to the total quantity of oil, salt, and hydrocarbon substances that caused the damage or as to the quantity that defendant contributed to the total volume. Neither is there any evidence as to the percentage that the defendant's contributions bore to the whole.

Stating it in another way, plaintiff's land was injured by a deposit thereon of oil, salt, and hydrocarbon substances that came from a ravine, along the banks of which were 30 wells that contributed in some degree, more or less, to the full quantity of the injurious substances so deposited on the plaintiff's lands. Plaintiff proved the injury to his lands caused by said injurious deposits, but offered no evidence to prove the percentage of contribution by the defendant. However, the court finds that for its separate tort the defendant caused damage to the plaintiff in the sum of \$3,200, and granted an injunction. Defendant contends that without evidence as to the proportion of contribution by the defendant, or evidence from which the proportion of the contribution of the defendants could be computed, the evidence is insufficient to sustain the finding. Respondent relies upon the case of *California Orange Co. v. Riverside Portland Cement Co.*, 50 Cal. App. 522, 195 P. 694, 695, as authority for the court to make such a finding. In that case the orange orchard was located on a piece of high bench land situated on the northerly bank of the Santa Ana river in Riverside county, about midway between the defendant's cement mill and the cement mills of the California Portland Cement Company. There was no question but that cement in considerable quantities from the mills of the California Portland Cement Company, as well as from the defend-

ant's mill, settled upon the plaintiff's orange trees, coating the leaves with a white ash and dust which incrustrated from the action of dew and moisture, so that it neither could be washed off by the rains, nor blown off by the winds, but remained on the leaves for the period of their life, that is, for two or three years. The court said, in determining the amount of damages that should be assessed against this defendant:

"The trial court was at liberty to estimate as best it could, from the evidence before it, how much of the total damage caused by the operations of the two cement companies was occasioned by defendant's plant, and in doing so might measure with a liberal hand the amount of damage caused by defendant's mill. (Citing cases.) Though in cases of this sort entire accuracy is impossible, and the difficulty of accurately proportioning and assessing the damage done by defendant's mill is great, still that difficulty would have been avoided had defendant but taken care that no occasion should arise requiring such proportioning and assessing of the whole damages."

[2, 3] The court particularly points out that there was no question raised by the appellant cement company in that case, that it was charged with more than its total proportion of the damages caused by the plants of the two companies. This point was not raised. In that case the evidence showed an estimate of the quantity of the cement dust attributable by the several contributors to the deposit of cement dust on the plaintiff's land, and in addition thereto, there is direct testimony as to the contribution to the whole. Applying the rule stated in *California Orange Co. v. Riverside Portland Cement Co.*, supra, it would appear that the exact contribution as between several tortfeasors may be difficult of exact admeasurement, and a court may exercise a liberal hand in arriving at a judgment in the matter; yet the court must arrive at the judgment from the evidence before it. The defendant is liable only for such portion of the total damage resulting from the commingled oil, salt, and hydrocarbon substances, which its contribution to the whole bore to the injury. *Miller v. Highland Ditch Co.*, supra.

[4] Assuming that the total amount of oil, salt, and hydrocarbon substances deposited upon the plaintiff's land had been by actual measurement 100 barrels, that the defendant made some contribution thereto, and that the total injury done was \$10,000, could it be said that a court, without any knowledge whatsoever as to the contribution by the defendant, and upon the statement alone that there was some contribution, could apportion the damages as between the several wrongdoers? We think not.

There being no evidence in the record upon which the court could make any finding as to

the quantity of oil that came from the appellant's sumps and wells through the ravine and finally was deposited upon the plaintiff's land to its injury, and there being no evidence in the record to show the proportionate contribution of the defendant to the whole of the injurious substances so deposited on the plaintiff's land, there is no evidence to support the finding that the injury caused by the defendant's contribution was in the sum of \$3,200 or for an injunction.

[5] In actions of this character a plaintiff must produce evidence as to the quantity of oil, salt, and hydrocarbon substances that the defendant contributed to the total volume that caused the injury to the plaintiff's land, in order to sustain a judgment for damages or injunction.

For the foregoing reasons the judgment is reversed.

We concur: CARY, P. J.; BARNARD, J.

109 Cal. App. 111

PEOPLE v. HARVEY.
Cr. 1982.

District Court of Appeal, Second District,
Division 2, California.
Oct. 21, 1930.

1. Criminal law $\S$ 814(17), 1172(6).

General instruction, in murder prosecution, on circumstantial evidence, was improper, where killing was admitted, but was not reversible error.

2. Homicide $\S$ 230, 231.

Evidence of fight in which deceased received blow causing death did not show intent to kill and malice as to make killing murder.

3. Homicide $\S$ 250.

Evidence of fight in which defendant struck deceased with pipe, causing death, supported finding of manslaughter.

4. Criminal law $\S$ 922(2).

Error in refusing instruction that evidence did not warrant conviction of murder in first or second degree held not to warrant new trial (Pen. Code, $\S$ 1181).

5. Criminal law $\S$ 1184.

Judgment of murder in second degree may be modified to manslaughter by appellate court, where evidence supported only finding of manslaughter (Pen. Code, $\S$ 1181).

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

William Ernest Harvey was convicted for murder in the second degree, and he appeals.

Modified and remanded, with directions to enter judgment of manslaughter.

Charles J. Orbison, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

SCHMIDT, Justice pro tem.

Appellant appeals from his conviction in the trial court of murder in the second degree and from the judgment thereon and the order denying his motion for a new trial.

The killing is admitted. The facts and circumstances surrounding the killing rests entirely upon the extrajudicial statements of appellant and his wife given the police and the testimony of appellant and his wife given at the trial. There is substantially no conflict and very slight variance in the statements.

In the year 1927 the victim, Raymond Gottshal, and Lillian Harvey, wife of appellant here, were sweethearts, and in the latter part of that year lived together as man and wife without the formality of marriage. At that time Mrs. Harvey's name was Lillian French, but she was known and recognized by the name of Lillian Gottshal. Gottshal and Mrs. Harvey lived together until April or May, 1929, when Mrs. Harvey left Gottshal. In the latter part of the year 1928 Mrs. Harvey purchased with her own funds, taking title in the name of Lillian Gottshal, a lot located at Eighty-Ninth and Denker streets in the city of Los Angeles, upon which was built a double bungalow. After its completion Raymond and Lillian French, then known as Lillian Gottshal, moved into that part of the bungalow facing Eighty-Ninth street, and continued to live there until the separation hereinbefore stated. Lillian B. French, then known as Lillian B. Gottshal, at that time owned certain furniture which was placed in the house and was part of the furniture used by her and said Gottshal.

In June, 1929, said Lillian B. French commenced to "keep company" with appellant, and on September 1, 1929, married him, and continued to live with him as husband and wife up to the time of the fatal affray involved herein.

In the latter part of 1929 Lillian Harvey made efforts to eject Gottshal from the premises on Eighty-Ninth street, and for that purpose transferred the title to a niece, who brought legal proceedings to oust Gottshal, which proceedings were still pending at the time of the affray. Between the time of the marriage of Mr. and Mrs. Harvey and the affray which resulted in the death of Gottshal, Gottshal had made numerous threats

against appellant and his wife. No good purpose can be gained by setting out these threats in detail. In spite of these threats, appellant and his wife on the evening of March 1, 1930, drove to the Eighty-Ninth street premises in a Ford truck, believing Gottshal out of the city. Finding the house locked, a window in a French door was broken by appellant with a piece of pipe procured from his truck, which piece of pipe was claimed by appellant to be used by him to separate bundles in his delivery and collection of laundry, he being engaged in the laundry business as a route man. After breaking the window, appellant entered through the window, and his wife went around to the front of the house carrying the iron pipe, as stated by her, with the purpose of putting the same on the truck; but before she reached the truck appellant had opened the front door, and Mrs. Harvey dropped the iron pipe near the walkway which led from the porch to the sidewalk. Appellant and Mrs. Harvey then proceeded to collect the articles claimed by Mrs. Harvey to belong to her and to place them on the truck. They had hardly completed the removal of the articles to the truck when the decedent, Gottshal, drove up in another truck, jumped out, and rushed immediately toward appellant, who was at that time standing on the walkway, either by his truck or near same, used an opprobrious epithet in addressing appellant, and therewith struck appellant on the jaw, staggering him by reason of the force of the blow; almost simultaneously with this act of Gottshal Mrs. Harvey shouted to appellant, "Look out for the gun, he has got a gun." At this particular time the iron pipe was lying on the ground where left by Mrs. Harvey. Appellant picked up same and struck Gottshal with it. He (Harvey) testified that he feared for his own life as well as the life and safety of his wife. As a matter of fact, Gottshal did not have a gun on his person at the time, but it was undisputed that he usually carried his gun on Saturday evenings at the time he was making his laundry collections (the affray here involved took place on a Saturday evening). There is no dispute that Gottshal possessed a gun, same having been theretofore given to him as a Christmas present by Mrs. Harvey while she was living with him. Following the blow with the pipe, the two men continued to fight and struggle over the possession of the pipe, resulting in appellant's being struck several times on the legs by Gottshal while the pipe was in his possession. As the struggle continued, the pipe was abandoned and the men fought into the house, where they finally ceased fighting, when Gottshal requested a drink of water. Upon his release by appellant, Gottshal ran into his bedroom, whereupon Mrs. Harvey shouted to appellant that Gottshal was going after his gun and for appellant to run, whereupon both appellant and

Mrs. Harvey ran out of the house, followed shortly by Gottshal, who, after reaching the door, fired four shots, none of which took effect. Appellant disappeared, and after Gottshal, with the assistance of a neighbor, had carried all the furniture and other articles back into the house, Mrs. Harvey drove the truck away. Gottshal, in company with a neighbor, went to a doctor to have his wound dressed. Upon leaving the doctor, he became unconscious, was taken to his home, and subsequently to the hospital, where he died three days after the affray. Appellant had not known or seen Gottshal until the time of the affray. Appellant further testified that he had no intent to kill Gottshal.

Error is claimed first in the insufficiency of the evidence to warrant a conviction even of manslaughter, it being claimed that appellant acted in self-defense, and, secondly, upon errors committed in failing to instruct the jury as requested by appellant and in the giving of certain instructions.

[1] Appellant claims that the general instruction on circumstantial evidence should not, under the facts of this case, have been given. With this we agree. The case at bar is very similar to *People v. Smith*, 164 Cal. 451, where at page 463, 129 P. 785, 790, it is said:

"The court instructed the jury upon the distinction between direct and circumstantial evidence. There was not only direct evidence of the homicide in this case, but it was admitted. There was, therefore, no occasion to instruct upon the character and value of circumstantial evidence."

Appellant predicates error on the wording of some of the instructions given by the court on the subject of self-defense, and claims also that some of the instructions on self-defense as given should not have been given, and that certain instructions on that subject-matter requested by appellant and refused by the court should have been given. A recital of these instructions in detail cannot be of any benefit. It is sufficient to say that we have examined each and all of these instructions carefully, and find that the trial court correctly instructed the jury on self-defense, and further that the substance of the instructions refused were sufficiently embodied in the instructions given, and that appellant could not have been prejudiced by the giving of any of the instructions to which complaint is directed.

[2] Further error is claimed in the failure of the court to give two instructions requested by appellant to the effect that the evidence was insufficient to warrant a finding that appellant was guilty of murder in either the first or second degree, and in giving full instructions concerning murder and its various degrees. A careful reading of the entire

transcript leads to the conclusion that there was no intent to kill and no malice shown so as to make the killing murder either in the first or second degree.

[3, 4] However, the evidence clearly supports a finding that appellant was guilty of manslaughter. Neither the error in giving the instruction on circumstantial evidence nor the error in the refusal to instruct that the evidence was insufficient to warrant a conviction of murder in either degree and the giving of the instructions on murder, in view of the entire record, is of such character as to warrant the granting of a new trial.

We find no error either in the giving or failing to give other instructions called to our attention by appellant.

[5] Following the Supreme Court in its interpretation of section 1181, Penal Code, as stated in *People v. Kelley*, 208 Cal. 387, 281 P. 609, it is ordered that the judgment of the lower court of murder in the second degree be modified, and the cause remanded to the trial court, with directions to enter a judgment against appellant finding him guilty of manslaughter, and thereupon to pronounce judgment accordingly.

We concur: WORKS, P. J.; CRAIG, J.

108 Cal. App. 271

GRAY v. GIESEKE et al.
Civ. 3996.

District Court of Appeal, Third District,
California.
Oct. 13, 1930.

Hearing Denied by Supreme Court
Nov. 10, 1930.

1. Appeal and error ⇨926(1).

Appellate court, in event of new trial, must presume that trial court will properly determine all questions of evidence presented to it.

2. Justices of the peace ⇨59.

Authority of justice's court is entirely statutory, with nothing presumed in favor of its jurisdiction.

3. Statutes ⇨225.

Latest expression of Legislature upon subject prevails in case of irreconcilable conflict between statutes.

4. Justices of the peace ⇨135(2).

Clerk of justice's court in county of fourth class was without right to issue writ of exe-

cution without justice's signature (Code Civ. Proc. §§ 91, 103a, 903, and § 902 as amended by St. 1921, p. 123, § 1, and § 905 as amended by St. 1929, p. 642; Pol. Code, § 4185).

5. Justices of the peace ⇨135(2).

Statute relating to issuance of legal process by justice's clerk on order of presiding justice has no general application to justices' courts (Code Civ. Proc. § 91).

6. Justices of the peace ⇨135(2).

County clerk's certificate to writ of execution for service in another county, failing to certify there was any justice of the peace or acting justice at date of writ, was fatally defective (Code Civ. Proc. § 902, as amended by St. 1921, p. 123, § 1, and § 905, as amended by St. 1929, p. 642).

It appears that at time writ was issued there were several justices of the peace within county, and for aught that appears in the certificate, the justice of that township where the case was tried may have resigned or died and office may have become vacant so that clerk of justice signing execution may have been accommodating clerk of justice of another bailiwick who had no jurisdiction in particular case.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

On rehearing.

Petition denied.

For former opinion, see 291 P. 590.

John Gray, in pro. per.

Gumpert & Mazzera, of Stockton, for respondent.

PER CURIAM.

Both parties have petitioned for a rehearing.

[1] The plaintiff's petition is without merit. He now asks this court to anticipate the rulings of the trial court and fix a measure of damages. In the event of a new trial we must presume that court will properly determine all questions of evidence which are presented to it.

The respondent calls attention to section 103a of the Code of Civil Procedure, which was enacted in 1915, and insists that it authorizes the clerk of a justice's court in counties of the twelfth class, to which Kern county belongs, to issue writs of execution without the justice's signature. That section provides: "In every township wherein provision is made by law for a clerk * * * for the justice of the peace, * * * said clerk * * * shall have power to * * * is-

sue summons and other writs in civil actions.
* * *

[2] Justices' courts are of inferior jurisdiction. Their authority is entirely statutory. Nothing is presumed in favor of their jurisdiction.

[3, 4] Section 4185 of the Political Code provides that "Justices of the peace must perform such duties as are prescribed in title eleven, part two, of the Code of Civil Procedure." This title (Code Civ. Proc. §§ 831h-927g) has particular application to "Proceedings in Justices' Courts." Chapter 9 of this title (sections 901-905) specifically applies to "Executions from Justices' Courts." Section 902 is found in this last-mentioned chapter and provides in clear and unambiguous language that: "The execution * * * must be subscribed by the justice and bear date the day of its delivery to the officer." This section was amended in 1921 (St. 1921, p. 123, § 1). It is a general provision which appears to apply to all justices of the peace, except those of "Cities and Counties," so far as the issuing of executions is concerned. Section 103a was enacted in 1915. If these two sections are in irreconcilable conflict with respect to the issuing of executions, section 902 will prevail, since it is the latest expression of the Legislature upon that subject. 23 Cal. Jur. 693, sec. 83; 25 R. C. L. 1063, § 286. These two sections may, however, be reconciled. Section 103a does not specifically authorize the justice's clerk to issue executions. It does authorize the clerk "to issue summons and other writs." In supporting both of these sections, it may be held that section 902, which deals specifically with the subject of executions, requires the justice to subscribe in person an execution which is issued from his court. But writs other than that of an execution, which are authorized by law to be issued from a justice's court, may be signed by a clerk in townships where the law provides for the appointment of such officer. This construction of the statute which requires the justice to personally subscribe the execution is given added force by reference to sections 903 and 905 of the same Code. Section 903 provides that: "An execution may * * * be renewed * * * by the word 'renewed' written thereon, with the date thereof, and subscribed by the justice." Section 905 provides in part: "Where an execution * * * is to be served out of the county in which it was issued, the execution shall have attached to it a certificate under seal, by the county clerk of such county to the effect that the person issuing the same was an acting justice of the peace of said county at the date of the writ." This last-mentioned section was amended in 1929 (St. 1929, p. 642) by adding after the words "justice of the peace" the following language, to wit: "Or a clerk of the justice's court." The amendment was enacted too late to affect

the validity of the execution involved in the present case. The very fact that the Legislature amended this section 905 indicates that it recognized the defect in the law prior to this change. The execution in this case was not properly executed or authenticated.

[5] Section 91 of the Code of Civil Procedure provides that: "All legal process of every kind * * * in said justices' court * * * shall be issued by the said justices' clerk upon the order of the presiding justice." This section has no general application to justices' courts. It refers only to courts of a particular class, to wit, those of political subdivisions termed "cities and counties." This section is found in article 1, chapter 5, title 1, part 1, of the Code (Code Civ. Proc. §§ 85-102b), which is headed "Justices' Courts in Cities and Counties." It is distinguishable from the provisions of section 902. For this reason the case of *Helms v. Dunne*, 107 Cal. 117, 40 P. 100, held that section 844 of the same Code, with reference to the issuing of summons, had no application to justices' courts in cities and counties, and therefore did not conflict with section 91. This is not true with relation to the provisions which appear under the caption "Justices' Courts in Townships" (article 2, c. 5, tit. 1, pt. 1 [sections 103-107]), for the reason that some of these courts have clerks, and others do not.

[6] Regardless of the construction of section 902, the execution was invalid for service in another county, since the county clerk's certificate was fatally defective.

Even though this amendment to section 905 had been in force at the time of issuing the execution in this case, the county clerk's certificate was fatally defective for the reason that it failed to certify there was any justice of the peace of that particular township, or that there was any acting justice who could give validity to the execution "at the date of the writ." The certificate merely recited that "Rose Goldstein * * * was, at the date of same, and is now, a justice of the peace's clerk in and for said county." There were then several justices of the peace in Kern county. For aught that appears in the certificate the justice of the township where the case was tried may have resigned or died. That office may have become vacant. Rose Goldstein may have been the accommodating clerk of the justice of another bailiwick who had no jurisdiction in that particular case. It is not possible that the mere certificate that a named individual is a justice's clerk somewhere in the county conforms to the law or gives authenticity to a process issuing from a justice's court. We are of the opinion that the execution was not legally issued or properly authenticated. It furnished no authority to support the levy or sale of the bees.

The petitions for rehearing are denied.

109 Cal. App. 260

BARCELOUX v. DONOHUE et al.

Civ. 4007.

District Court of Appeal, Third District,
California.

Oct. 30, 1930.

Rehearing Denied Nov. 28, 1930.

Hearing Denied by Supreme Court
Dec. 29, 1930.**1. Banks and banking** ⇨40.

Agreement to purchase bank stock, with attached agreement to pay buyer depreciation if bank loses pending suits, *held* single agreement of sale for conditional purchase price, not "indemnity" agreement (Civ. Code, § 2772).

The bank lost the pending suits because the transactions were based on illegal contracts, and in this action by the buyer of the bank stock against the sellers for a refund of the purchase price to the extent of the depreciation, up to the limit set by the agreement, sellers contended that the agreement to pay such depreciation was an indemnity agreement, purporting to indemnify buyer against acts constituting a felony committed by third person, and was therefore void and unenforceable.

[Ed. Note.—For other definitions of "Indemnity," see Words and Phrases.]

2. Banks and banking ⇨40.

Legal effect of contract to purchase bank stock with agreement to make good to buyer depreciation, if bank loses pending suits, must be construed as if still executory.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by George A. Barceloux against C. L. Donohoe and others. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Werner Olds and Joseph E. Bien, both of San Francisco, for appellants.

R. M. Rankin, of Willows, for respondent.

FINCH, P. J.

[1, 2] This action arises out of a sale by the defendants to the plaintiff of a part of the capital stock of the Bank of Orland. The defendants executed a written option to sell their shares of stock to the plaintiff at prices per share stated in the option. The option contained the following:

"It is expressly understood and agreed that should the sale of this bank stock hereinbefore mentioned, be consummated and completed hereunder, that upon the payment for the same as herein provided by the party of the second part, the parties of the first part will sign, execute and deliver to the party of the second part that certain agreement, a copy

of which is attached hereto and marked 'Exhibit A' and made a part hereof * * * the execution of the said agreement by the parties of the first part * * * being part of the consideration for the sale of the said capital stock and the purchase thereof by the party of the second part."

The agreement referred to contained the following:

"Whereas, there is now pending in the Superior Court, State of California, County of Glenn, two law suits in which the Bank of Orland is plaintiff, and T. W. Harlan is defendant, the amount involved in the said two suits being the sum of \$10,000., and the said \$10,000., being equal to the sum of \$20., per share of all of the capital stock of the Bank of Orland, and

"Whereas, the loss to the Bank of Orland of the said \$10,000., the amount involved in the said two suits or any portion thereof, will depreciate the value of the capital stock of said bank which may be sold under said option agreement to said George A. Barceloux proportionately as the amount of said loss which said bank may sustain in said suits bears to the whole capital stock of said bank.

"Now, therefore, we, the undersigned, respectively undertake and agree to pay to George A. Barceloux, at the conclusion of said litigation hereinbefore mentioned, whatever sum per share the whole capital stock of said Bank of Orland may have been depreciated by reason of loss of the said sum or any part of said sum of money involved in said two suits to said Bank of Orland on the said stock sold by us respectively to him under said option, provided, however, that said sum shall not exceed \$11.34 per share on each share of stock of the Bank of Orland so sold to him."

These instruments were delivered to the plaintiff, together with the capital stock referred to therein, and he thereupon paid the full purchase price of the stock agreed upon between the parties. The two suits of the Bank of Orland v. Harlan, referred to in the agreement, terminated without any recovery by the bank, for the reasons stated in *Bank of Orland v. Harlan*, 188 Cal. 413, 419, 206 P. 75, in which it was held that the transaction between the bank and Harlan, upon which the suits were based, was in violation of law constituting a felony, and that therefore no recovery could be had thereon.

The court found, on uncontradicted evidence, "that by reason of the said final judgment entered in the Harlan lawsuits, the said Bank of Orland did lose the same and failed to recover anything therein, and that the actual loss to the Bank of Orland by reason of the loss of said two lawsuits was and is the sum of \$8,810, besides cost of suit, attorney's fees, witness fees, and other expenses. That the said loss of \$8,810, by the Bank of Orland

did depreciate the value of the capital stock of said bank in the amount of \$17.62 per share on each share of the stock of said Bank of Orland sold by defendants to plaintiff."

Judgment was entered in favor of the plaintiff against the respective defendants for the amount of the depreciation of their respective shares of stock at the rate of \$11.34 per share. The defendants have appealed from the judgment.

The appellants' principal argument is that the agreement attached to the option contract "is an indemnity agreement and purports to indemnify plaintiff against acts constituting a felony committed by the Bank of Orland and T. W. Harlan and is therefore void and unenforceable," under the provisions of section 2772 of the Civil Code. Appellants arrive at this conclusion by treating such agreement attached to the option contract as an independent agreement. Plainly, it is not such. The terms of the two instruments must be construed together as a single contract, and upon the consummation of the transaction constituted an agreement of sale for a conditional purchase price dependent upon the outcome of the Harlan suits. The fact that Barceloux paid to the defendants the conditional part of the purchase price, instead of retaining it until the litigation was ended, is wholly immaterial. The agreement between the parties must be construed to the same effect as if it still remained executory, in which case no one would contend that it constituted anything other than an agreement of sale at a conditional purchase price.

The other points made by the appellants are so obviously without merit that no discussion thereof is deemed necessary.

The judgment is affirmed.

All concur.

109 Cal. App. 248

DENNIS et al. v. COWAN.
Civ. 6441.

District Court of Appeal, Second District,
Division 2, California.

Oct. 28, 1930.

1. Appeal and error ⇨1011(1).

Finding of trial court on conflicting evidence will not be disturbed.

2. Attorney and client ⇨143.

Client discharging attorney was liable on agreement entered into at such time to pay for services rendered in lieu of compensation under original employment.

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

Suit by Alfred E. Dennis and another against H. D. Cowan. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Victor Ford Collins, of Los Angeles, for appellant.

C. E. Spencer, of Beverly Hills, for respondents.

SCHMIDT, Justice pro tem.

Respondents brought suit in the lower court on a promissory note in the sum of \$1,250 alleged to have been given in payment of legal services rendered. By answer appellant set up the defense of want of consideration and failure of consideration in that the attorneys acted against the interests of appellant, and in that the services were rendered under a written agreement that a fee should be charged only if at the conclusion of a trusteeship of appellant's property for the benefit of creditors there was any salvage. Appellant was the owner of a showcase and fixture factory and was in financial difficulties. Pursuant to a recommendation of one of his creditors, appellant consulted respondents, who at that time were the attorneys for Charles E. Clifford Company, a creditor of appellant, and as such attorneys for said creditor were threatening attachment proceedings against appellant. After consultation between appellant and respondent Spencer, an employment was agreed upon whereby appellant paid to respondent Spencer \$75, and, upon the recommendation of respondent Spencer, appellant assigned all of his property for the benefit of creditors to three trustees, one of whom was respondent Spencer, with the understanding that Spencer "will act as one of the trustees and will keep in close touch with your (appellant's) business as he has been doing for the last few days; he will counsel and advise you whenever necessary in connection with the matter and assist in working out your finances."

"At the conclusion of the trusteeship if there is any salvage and property returned to you, you shall at that time pay us a reasonable fee for all services rendered, which fee shall not be less than \$2,500.00, and may be more if the services which are rendered are reasonably worth more."

During the course of the trusteeship appellant apparently became dissatisfied with the services rendered by respondent Spencer and employed other counsel, after which a compromise was reached between appellant and his creditors. Respondent Spencer, acting on behalf of the Charles Clifford Company, declined to sign the compromise or per-

mit the Charles Clifford Company to sign same until all other creditors had signed and until appellant had paid him in cash the sum of \$500 and executed the promissory note sued upon. It must be borne in mind that at this juncture appellant was being counseled by another attorney and actually did pay to respondent Spencer said sum of \$500 and did execute the promissory note sued upon. Subsequently two payments were made upon the note of \$50 each. When no other payments were made suit was brought.

At the conclusion of the trial the court rendered judgment in favor of respondents, making findings of fact, finding, among other facts, "plaintiffs were employed by defendant to render services as attorneys and also to render other services to defendant, and they did render such services, and that defendant paid them therefor the sum of \$500 at the conclusion of said services and delivered to them the promissory note sued upon here; that at said time defendant was represented by other counsel and the consideration for said note and for said cash payment was adequate."

[1] The evidence was conflicting as to the services rendered and the value thereof. The court having found in favor of respondents upon the conflict, this court will not disturb such finding.

[2] Appellant claims that by reason of the original employment, to wit, the payment of the \$75, and that the fee to be paid respondents was conditioned that "at the conclusion of the trusteeship if there is any salvage and property returned" precluded respondents from obtaining any fee whatever. With this we cannot agree, for it was the privilege of appellant to discharge respondents as his counsel and employ other counsel, and it was perfectly proper for appellant to agree to pay respondents a fee for the services rendered up to the time of the discharge, and this in lieu of what respondents might have received, if anything, under the original employment.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

109 Cal. App. 203

**BELL v. MORTGAGE GUARANTEE
CO. et al.**
Civ. 7435.

District Court of Appeal, First District,
Division 1, California.
Oct. 27, 1930.

1. Fixtures ⇨22.

Seller under conditional sales contract, delivering personalty designed for being af-

fixed to land, is presumed to have agreed it may be converted into real property.

While owner of personalty has right to make agreement to sell and deliver possession upon condition that title shall remain in him until property is paid for, rule ceases to prevail when one voluntarily places property in possession and control of buyer with knowledge that, if it were put to use for which it was designed, it would be affixed to land.

2. Fixtures ⇨22.

Where personalty, designed for such purpose, is affixed to realty, it is brought under operation of laws for recording contracts affecting realty.

3. Fixtures ⇨22.

Purchaser under trust deed, ignorant of unrecorded conditional sales contract, held entitled to conclude installed steam plant was part of realty.

At time party, extending loan under trust deed, made inspection of premises and appraised value, plant was completely installed in apartment house and providing heat and hot water, and boiler unit was set in basement upon brick foundation built to receive it and cemented in at base.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action in claim and delivery by George C. Bell, Jr., against the Mortgage Guarantee Company and another. From a judgment in favor of defendants, plaintiff appeals.

Affirmed.

W. L. Claiborne and M. F. Ryan, both of Oakland, for appellant.

John L. Reith, of Oakland, for respondents.

TYLER, P. J.

Action in claim and delivery for the recovery of a steam heating plant.

There is no dispute concerning the facts. Plaintiff in the year 1927 entered into an oral agreement with one Patch to install a complete steam heating system and water plant in an apartment house which Patch was constructing in Berkeley. At this time nothing was said as to terms of payment. After the installation of the plant and after it was in full operation two payments were made by Patch upon the same, amounting to the sum of \$1,900. Being unable to pay the balance due, Patch thereafter signed a conditional contract of sale covering the plant, by the terms of which title was reserved in plaintiff. Subsequently Patch made application to defendant corporation for a loan upon the

premises. The loan was granted, and the apartment house was conveyed to defendant under a deed of trust to secure the payment of the loan. At the time defendant was appraising the property for the purpose of making the loan, nothing was said by any one concerning the title to the heating plant, and defendant was of the belief that the plant constituted a part of the building. Subsequently defendant, pursuant to a sale under the deed of trust, became the purchaser of the premises with appurtenances. Thereafter suit was brought by plaintiff to recover the plant. The trial court found that at the time defendant corporation made an inspection of the premises and appraised the value thereof for the purpose of making the loan, the plant was completely installed in the apartment house and was providing heat and hot water to seventeen apartments in the building; that the boiler unit of the plant was set in the basement upon a brick foundation built to receive it and cemented in at the base; that the pipes ran to and from the burner and boiler and storage tank, and conduits and pipe ran up through the partitions and walls of the building to the various rooms, where the heat was discharged through radiators; that the plant was a part of the equipment used in the operation of the house and contributed to the use of the building for the purposes for which it was intended; that the system was a part of the building. It further found that plaintiff or any other person had never made any claim to defendant that they had any interest therein until after the loan had been made, and there was nothing to indicate that plaintiff had any right or interest therein. Additional findings are to the effect that the plaintiff did not record his conditional contract of sale or any notice thereof with the county recorder. Judgment was thereupon rendered in favor of defendant.

[1-3] The sole question involved in the appeal is whether or not the heating plant was a fixture, or did it remain a chattel under the conditional sales contract entered into between the owner of the premises and plaintiff. This precise question has been answered in the comparatively recent case of *Oakland Bank of Savings v. California Pressed Brick Co.*, 183 Cal. 295, 191 P. 524, where it is held that, while the owner of personal property of this character has the right to make an agreement to sell and deliver possession of the same upon the condition that the title thereto shall remain in him until the same is paid for, this rule prevails only so long as the property retains its character as personalty and it ceases to prevail when one voluntarily places it in the possession and control of the vendee with knowledge that, if it was to be put to the use for which it was designed, it would be affixed to the land. The seller, because, of these

facts, is presumed to have agreed that the personal property should be, or might be, converted into real property. By this transformation it is brought under the operation of the laws for recording contracts affecting realty and for the protection of innocent purchasers. The case cited extensively deals with the question, and we do not deem further discussion on our part to be necessary. See, also, *Kohler v. Brasun*, 249 N. Y. 224, 164 N. E. 31; *Leo Co. v. Jersey City Bill Posting Co.*, 78 N. J. Law, 150, 73 A. 1046; *King v. Title Trust Co.*, 111 Wash. 508, 191 P. 748. Here defendant, having no notice of any secret title, and not being charged with notice, was entitled to conclude that the plant was a part of the realty.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

109 Cal. App. 217

**FIRST NAT. BANK OF MONTEREY PARK
v. CITY OF WHITTIER.**

Civ. 6424.

District Court of Appeal, Second District,
Division 2, California.

Oct. 27, 1930.

Municipal corporations — 1005.

Ordinance prohibiting allowance of claim against city unless filed within year after last item accrued *held* applicable to contractual obligation of city.

City entered into contract for construction of culvert, and all interest in contract was assigned to bank. After completion of work, city paid contractor despite assignment. Two years afterwards, bank presented claim to city for amount due contractor. Ordinance of city provided that board of trustees must not consider claim against city unless presented and filed with clerk of court within year after last item of claim accrued.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by the First National Bank of Monterey Park against the City of Whittier. Judgment for plaintiff, and defendant appeals.

Reversed, with directions to enter judgment for defendant.

Arthur G. Wray, of Whittier, for appellant.

Cruikshank, Brooke & Evans, of Pasadena, for respondent.

SCHMIDT, Justice pro tem.

On March 30, 1925, appellant, city of Whittier, a city of the sixth class, entered into a contract with Erdman Company for the construction of a cement culvert at an agreed consideration of \$2,214.61. Afterwards, on April 30, 1925, the Erdman Company in writing assigned and transferred to respondent, First National Bank of Monterey Park, all its interest in and to said contract. On May 1, 1925, respondent sent said assignment to the city clerk, who indorsed upon it the following: "Contract dated 3/30/25 and assignment dated 4/30/25 on file in the office of the city clerk of the City of Whittier. Paul Gilmore, city clerk. [Seal.]" Thereafter the Erdman Company completed the work and on June 8, 1925, in spite of its assignment to respondent, filed with the city clerk a claim and demand in writing for \$1,494.86, the balance due on the said written contract of March 30, 1925. On June 10, 1925, the claim of the Erdman Company was allowed by the city council of Whittier in the sum named, \$1,494.86, and a warrant was drawn and delivered to the company for its payment. The treasurer's check issued thereon was cashed by the Erdman Company through the respondent bank. Almost two years after the work had been completed under the contract and the warrant for \$1,494.86 had been paid to the Erdman Company, namely, on the 24th of May, 1927, respondent, claiming under the assignment, presented to and filed with the city clerk of the city of Whittier its claim and demand for the said sum of \$1,494.86. The claim was disallowed and rejected by the city council, whereupon suit was instituted in the lower court. The facts were stipulated to as hereinbefore set forth. From a judgment of the lower court in favor of the respondent bank, the city of Whittier has appealed to this court.

The sole question for consideration is the effect of Ordinance No. 17 of the city of Whittier, in force during all of the time involved herein. section 2 thereof provides: "The board of trustees must not hear or consider any claim in favor of any public officer, person, corporation, company or association against the city, nor shall the board credit or allow any claim or bill against the city, unless the same be itemized * * * and is presented and filed with the clerk of the board within a year after the last item of the account or claim accrued." Concerning this section respondent in its brief says, "We desire to state at this point that we do not question the validity or constitutionality of such section nor do we question the public policy behind its adoption," but contends that the section applies only to unliquidated damages and not to a contractual obligation. With this viewpoint we cannot agree.

Similar statutes of limitations as found in city charters have received repeated construction from our higher courts; it being held that, as a condition precedent to filing suit, claim must be presented within the time fixed in the charter provision. In *Ames v. City and County of San Francisco*, 76 Cal. 325, 18 P. 397, it was held that, in an action to recover a salary due a gas inspector under Consolidation Act of city and county of San Francisco of March 4, 1878, the salary became due and payable monthly at the end of each month of the applicant's term of office, and that, unless the claim for such monthly salary be presented to the board of supervisors for allowance within the time limited by section 90 of the act (30 days), it becomes barred and thereafter cannot be paid from the treasury. See, also, *Continental Insurance Co. v. City of Los Angeles*, 92 Cal. App. 585, 268 P. 920, and *Crescent Wharf & Warehouse Co. v. City of Los Angeles*, 207 Cal. 430, 278 P. 1028.

In view of the conclusion reached, it is unnecessary to consider any other question presented.

Judgment reversed, with directions to the lower court to enter judgment in favor of appellant.

We concur: WORKS, P. J.; CRAIG, J.

109 Cal. App. 91

HILL v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 7610.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1930.

1. Elections ⇐120.

Construction placed upon provision of general election laws relating to election contests held inapplicable to election contest against nominee for assembly at primary election (St. 1913, p. 1409, § 28, as amended by St. 1917, p. 1363, § 12).

2. Elections ⇐151.

Statute limiting time for hearing of primary election contest is mandatory (St. 1913, p. 1409, § 28, as amended by St. 1917, p. 1363, § 12).

St. 1913, p. 1409, § 28, as amended by St. 1917, p. 1363, § 12, provides that superior court judge, on presentation of affidavits and proof of posting in election contest, shall forthwith designate time and place where such contest shall proceed,

which time must not be less than one nor more than three days from the presentation of the matter to the court.

3. Elections $\S$ 154(1).

Statute providing that primary election contest must be finished in time to print ballots for final election is mandatory (St. 1913, pp. 1402-1404, 1409, $\S\S$ 21-23, 28, as amended by St. 1917, pp. 1355, 1356, 1363, $\S\S$ 7-9, 12).

4. Evidence $\S$ 17, 29.

Court in primary election contest will take judicial notice of statutes and of dates of election.

5. Prohibition $\S$ 5(3).

Questions involved in election contest which could not possibly terminate before completion of secretary of state will have been certified for final election *held* moot, warranting prohibition.

Original application by Ben A. Hill for a writ of prohibition prayed to be directed to the Superior Court of the State of California in and for the County of Los Angeles to restrain further proceedings in matter of election contest after primary election to nominate candidate for the assembly.

Writ granted.

Fall & Fall, of Los Angeles, for petitioner.

Henry E. Carter, and Wheeler & Wackerbarth, all of Los Angeles, for respondent.

CRAIG, J.

The petitioner Ben A. Hill and Frank McGinley were opposing candidates for the state assembly at the primary election of August 7, 1930, the canvass of which resulted in favor of the former. McGinley instituted a contest of certain precincts, which was set by the superior court of Los Angeles county for September 22, 1930. The parties then failing to appear, the matter was ordered off calendar, and on the following day was reset for September 29, 1930. A petition for a writ of prohibition was filed in this court to restrain further proceedings, upon the ground that the date last mentioned would not be within the statutory period specified for such recount.

The pertinent provisions of section 28 of the act to provide for and regulate primary elections (Stats. 1913, ch. 690, p. 1379, Am. Stats. 1917, ch. 711, p. 1363) are as follows: "Any candidate at a primary election, desiring to contest a nomination of another candidate for the same office, may, within five days after the completion of the official canvass, file an affidavit in the office of the clerk of the superior court of the county in which he desires to contest the vote returned from any precinct or precincts in such county, and thereupon

have a recount of the ballots cast in any such precinct or precincts, in accordance with the provisions of this section. * * * Upon the filing of such affidavit and the posting of the same, the superior court of the county shall have jurisdiction of the subject matter and of the parties to such contest, and all candidates at any such primary election are permitted to be candidates under this act, only upon the condition that such jurisdiction for the purposes of the proceeding authorized by this section shall exist in the manner and under the conditions provided for by this section. * * * On the eighth day after the completion of the official canvass the county clerk shall present the affidavits * * * and proof of posting, * * * to the judge of the superior court of the county, * * * which judge shall, upon such presentation, forthwith designate the time and place where such contest shall proceed, * * * which time must not be less than one nor more than three days from the presentation of the matter to the court by the county clerk as herein provided. * * * If the number of votes which are sought to be recounted, or the number of contests are such that the judge shall be of opinion that it will require additional judges to enable the contest or contests to be determined in time to print the ballots for the election, if there be only one judge for such county, he may obtain the service of any other superior judge. * * * If the proceeding is in a county or city and county where there is more than one superior court judge, the judge to whom the case or cases shall be assigned, shall notify the presiding judge forthwith, of the number of judges which he deems necessary to participate, in order to finish the contest or contests in time to print the ballots for the final election."

[1-3] We are of the opinion that the construction placed upon the provisions of the general election laws having to do with election contests are not applicable nor controlling here. It is obvious that the recount contemplated by the foregoing section must be had immediately following the canvass. The law provides that the judge shall designate the time and place where such contest shall proceed "which time must not be less than one nor more than three days from the presentation of the matter to the court." We think this language is mandatory, at least that by no possible construction could the time be extended further than such date as would still permit the finishing of the contest "in time to print the ballots for the final election." In considering the nature of the provisions of this law as being mandatory or directory, we are bound to take into account further requirements as to preparation for the ballot by the secretary of state. These make it clear that the requirement that the contest be finished "in time to print the ballots for the final

election" is mandatory. This is so because the secretary of state must "make such changes in the record in his office as such judgment or judgments require," must "not later than the twenty-fifth day after any primary election compile the returns," and also certify the revised compilation showing the name of every person who has received the nomination to the county clerk or registrar of voters, not less than thirty days before the November election. Sections 21, 22, 23, *Ibid*.

[4, 5] Taking judicial notice of the statutes and of the dates of election, it becomes apparent that the compilation of the secretary of state will have been certified prior to any possible determination of judicial proceedings in this instance. No action of the superior court could avail anything, and would only determine a question already moot.

The petition for writ of prohibition is granted.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

109 Cal. App. 254

SCOTT v. CITY OF LONG BEACH.

Civ. 4132.

District Court of Appeal, Third District,
California.

Oct. 28, 1930.

1. Negligence ⇨136(9).

Jury should not be permitted to draw inferences of negligence from mere conjectures.

2. Municipal corporations ⇨857.

Plaintiff, seeking damages from city for drowning of his son while learning to swim in tidewater lagoon, maintained for public recreation, had burden of proving negligence (*St.* 1923, p. 675).

Evidence showed that city maintained lagoon in question as part of system of public recreation, from which it received no revenue, and, more than six months before accident, caused it to be deepened to 25 feet. Although life line was stretched across channel, there were no markers or notices indicating depth of water. Deceased had notice, however, from his companions, that channel suddenly deepened a few feet from shore.

3. Municipal corporations ⇨857.

Burden on plaintiff, seeking damages from city for drowning of son while swimming

in public lagoon, was not sustained in absence of evidence of cause of accident (*St.* 1923, p. 675).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by James R. Scott against the City of Long Beach. From a judgment for defendant notwithstanding the verdict, plaintiff appeals.

Affirmed.

O. Douglass Smith, of Long Beach, for appellant.

Nowland M. Reid and George W. Trammell, Jr., both of Long Beach, for respondent.

Mr. Presiding Justice FINCH delivered the opinion of the court.

The plaintiff brought this action to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. The court refused to direct a verdict for the defendant and one was returned in favor of the plaintiff. Thereafter, on motion of the defendant, the court rendered judgment in its favor, notwithstanding the verdict, as permitted by section 629 of the Code of Civil Procedure. The plaintiff has appealed from the judgment. The statement of facts herein is taken largely from appellant's opening brief.

The defendant "owned and maintained as a part of its general system of public recreation," from which it received no revenue, "a channel of water," known as Recreation Park Lagoon, connected with the ocean and in which the ocean tides ebbed and flowed. More than six months prior to the accident the defendant "caused the channel to be dredged and deepened to a depth of twenty-five feet. * * * Earth was removed from the channel and deposited upon the property adjacent to form the slope of the channel and establish a bathing beach. Sand was also placed adjacent to the water's edge to provide a more suitable condition for bathers. * * * At the point and place in question at said channel a lifeline was stretched crosswise of the channel, but no markers, notices or signs indicating the depth of the water in the channel at the particular point and place in question had been or were present on the 3d day of September, 1926, the date of the tragedy. * * * On said 3d day of September, 1926, one James Scott, junior, a minor son of the plaintiff in this action and of the age of fifteen years, together with several other boys of approximately his own age," and their leader "proceeded to said channel for the purpose of swimming, where, after approximately ten minutes after having reached the channel, he was drowned. * * * There were no eye-wit

nesses to the drowning of young Scott. When last seen by any of his companions, he was holding to the rope which stretched crosswise the channel, kicking his feet in an endeavor to learn the art of swimming, and about four or five feet from the edge of the water." About seven feet from the edge of the water the bottom of the channel was slippery in places, and at about the same point the slope of the bottom became steeper.

It may be conceded, as appellant contends, that the defendant negligently failed to place warning signs at the commencement of the deep water in the channel. Stats. 1923, p. 675. The only purpose such signs would have served, as applied to the facts of this case, would have been to inform the deceased of the depth of such water. But the uncontradicted evidence shows that he was given that information a few minutes before the accident, after he had himself discovered the line of deep water by getting beyond his depth. The leader of the boys testified:

"Right after we arrived there * * * I noticed he was out of breath and I said, 'What's the matter, Jimmie?' He said, 'I got out over my head.' I said, 'What's the matter? Don't you know how to swim?' He said, 'No, I don't; will you teach me, will you show me?' I said, 'Yes,' and he said, 'All right, just a minute until I get my breath.' * * * When he said, 'I got out over my head,' I said, 'Yes, there is a drop off, you want to be careful, Jimmie,' and at the same time some of the other boys who were gathered around also spoke up and said, 'Yes, there is a big drop off, twenty-five feet deep out there, you better look out, Jimmie.'"

[1-3] There is an entire lack of evidence as to the cause of the accident. Appellant contends that the jury may have drawn certain inferences of negligence on the part of the defendant. It is true that many conjectures may be indulged as to the cause of the accident, some favorable to the defendant, but inference are not to be drawn from conjectures. The burden of proof is on the plaintiff. In the absence of any evidence as to the cause of the accident, that burden has not been sustained. Appellant relies on the language of *Davis v. Pacific Power Co.*, 107 Cal. 563, 575, 40 P. 950, 48 Am. St. Rep. 156; but the court was there considering the question of the plaintiff's alleged contributory negligence, it having been shown that the plaintiff was injured through the defendant's negligence. There is nothing in this case warranting the inference of contributory negligence, but it does not follow that the defendant was negligent. Many serious accidents occur which are not due to the negligence of any one.

The judgment is affirmed.
All concur.

In re FARMERS' & MERCHANTS' BANK OF IMPERIAL.*

IMPERIAL IRR. DIST. v. WOOD, Superintendent of Banks.

Civ. 440.

District Court of Appeal, Fourth District, California.

Oct. 21, 1930.

As Modified on Denial of Rehearing
Nov. 18, 1930.

Hearing Granted by Supreme Court Jan. 15, 1931.

1. Pledges ⇨55.

Pledgee may sue on debt without first exhausting his security and resort to general assets of debtor for satisfaction, returning pledge or so much thereof as remains after debt is fully paid.

2. Pledges ⇨19.

"Pledge" is collateral security for payment of entire debt and not any divisible part thereof.

[Ed. Note.—For other definitions of "Pledge," see Words and Phrases.]

3. Banks and banking ⇨80(5).

Statute held to give bank depositors and claimants mentioned therein prior rights to participate in bank's assets (St. 1909, p. 87, § 27, as amended by St. 1913, p. 151, § 26).

St. 1909, p. 87, § 27, as amended by St. 1913, p. 151, § 26, provides that all money and assets belonging to each department, whether on hand or with other banks, and the investments made, shall be held solely for the repayment of depositors and other claimants of each department until all depositors and other claimants of each department shall have been paid, and the overplus then remaining shall be applied to any other liabilities of such bank.

4. Marshaling assets and securities ⇨6.

Doctrine of marshaling assets cannot be invoked by one creditor to defeat part of demand of prior lienholder (Civ. Code, §§ 2899, 3433).

5. Banks and banking ⇨80(1).

Irrigation district held entitled to receive dividend on total amount of its deposit, regardless of security given to secure deposit, if pledge of security was legal.

This being true, the depositor could not be compelled to first exhaust its security and then participate equally with other creditors in the general assets of the bank for the balance due depositor.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Petition by the Imperial Irrigation District against Will C. Wood, as Superintendent of Banks for the State of California, for payment of dividend on petitioner's claim against the Farmers' & Merchants' Bank of Imperial in liquidation. From an order dismissing an order to show cause, petitioner appeals.

Reversed with direction.

Charles L. Childers and D. B. Roberts, both of El Centro, for appellant.

Albert A. Rosenshine, Elbert W. Davis, and J. H. Hoffman, all of San Francisco, for respondent.

MARKS, J.

The Farmers' & Merchants' Bank of Imperial is a commercial and savings bank organized and existing under the banking laws of the state of California. It will be referred to hereafter as the bank. The Imperial irrigation district is an irrigation district organized and existing under the California Irrigation District Act approved March 31, 1897 (St. 1897, p. 254), and the acts amendatory thereof and supplementary thereto. It will be referred to hereafter as the district. Will C. Wood is the superintendent of banks of the state of California.

On October 10, 1927, the superintendent of banks closed the bank and took possession of its assets and proceeded to administer upon and liquidate its affairs in accordance with the provisions of the Bank Act of the State of California. On this date the district had on deposit in the commercial department of the bank the sum of \$64,285.69, divided into three accounts, as follows: \$9,738.07 in a cashier's account; \$14,547.62 in a treasurer's account; and four certificates of deposit in the sum of \$10,000 each, representing money also belonging to the treasurer's account. The bank had given the district United States Liberty bonds of the par value of \$50,000 as a pledge to secure the return of all or a part of the deposits. Whether the attempted pledge was given to secure the repayment of all the deposits, or only the treasurer's account funds of \$54,547.62, is not clear from the record. We assume, however, that the security was given for the treasurer's account funds only.

The district filed two claims against the bank, one for \$54,547.62 and the other for \$9,738.07. Both claims were allowed and approved by the superintendent of banks, but he denied the right of the district to hold the bonds as security for the deposit, and demanded their return, which demand was refused. He thereupon instituted suit for their recovery or the recovery of their value, the bonds having been retired and the district having received the sum of \$51,062.50 in their stead. According to the information before us this suit has not been finally determined.

On April 18, 1928, the superintendent of banks filed in the court below a report of his

administration of the affairs of the bank, together with his account, and requested an order for the payment of a dividend of 15 per cent. on the approved claims against the commercial department of the bank, except the claim of the district in the sum of \$54,547.62. The petition was granted and the court ordered the dividend paid "excepting only that no dividends be declared or paid upon the claim of Imperial Irrigation District claim #433 until further order of this court." This claim was the one for \$54,547.62. Thereafter the district filed its petition for payment of the dividend upon this claim. An order to show cause was issued and a hearing had which resulted in a dismissal of the order. Thereupon the district prosecuted this appeal.

The question presented here is new in this state. For the purposes of this decision we will assume, without so holding, that the pledge of the bonds by the bank to the district was a lawful act and gave to the district a valid security for the deposit in question here. This leaves the following question for us to decide: Is the district entitled to receive the dividend on the total amount of its deposit regardless of the security, or only upon that portion of its deposit in excess of the value, or the money it has received for the security, it having been reduced to cash?

In cases similar to the one at bar there are two sharply conflicting rules prevailing in different jurisdictions in the United States. One is called the "bankruptcy rule," under which the creditor must first exhaust his security and participate in the dividends for the balance of his claim only, or surrender his security and receive dividends on the full amount of his claim. The other is called the "chancery rule" or the "equity rule," under which the creditor may receive dividends upon the full amount of his claim regardless of his security or any sum received upon it, until the dividends and security amount to the total sum of his claim.

Counsel for the district urge the adoption of the equity rule. In support of their position they cite the following cases, all of which support this contention: *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, 19 S. Ct. 360, 362, 43 L. Ed. 640; *Aldrich v. Chemical National Bank*, 176 U. S. 618, 20 S. Ct. 498, 44 L. Ed. 611; *Wheeler v. Walton & Whann Co.* (C. C.) 72 F. 966; *London & San Francisco Bank v. Willamette Steam-Mill, etc., Co.* (C. C.) 80 F. 226; *Hitner v. Diamond State Steel Co.* (C. C.) 176 F. 384; *Commercial & Savings Bank v. Robert H. Jenks Lumber Co.* (C. C.) 194 F. 732; *Goodman Mfg. Co. v. Pittsburgh-Buffalo Co.* (C. C. A.) 265 F. 561; *International Banking Corp. v. Lynch* (C. C. A.) 269 F. 242; *People v. E. Remington and Sons*, 121 N. Y. 328, 24 N. E. 793, 8 L. R. A. 458; *Hendrie Bros. v. Graham*, 14 Colo. App. 13, 59 P. 219; *Mark v. American Brick Mfg. Co.*, 10 Del. Ch. 58, 84 A. 887; *Logan v. Anderson*, 18

B. Mon. (57 Ky.) 114; *In re Bates*, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383; *Third National Bank of Detroit v. Haug*, 82 Mich. 607, 47 N. W. 33, 11 L. R. A. 327; *Mead v. Randall*, 71 N. W. 31, 68 Minn. 233; *Merchants' National Bank v. Flippen*, 158 N. C. 334, 74 S. E. 100; *Kellogg v. Miller*, 22 Or. 406, 30 P. 229, 29 Am. St. Rep. 618; *In re Jamison & Co.'s Estate*, 163 Pa. 143, 29 A. 1001; *First National Bank of Richmond v. Wm. R. Trigg Co.*, 106 Va. 327, 56 S. E. 158; *Williams v. Overholt*, 46 W. Va. 339, 33 S. E. 226; *Harrigan et al. v. Gilchrist et al.*, 121 Wis. 127, 99 N. W. 909, 975.

Counsel for the superintendent of banks is equally earnest in urging us to adopt the bankruptcy rule as governing relying upon the following authorities which support his contention: *Amory v. Francis*, 16 Mass. 308; *Petition of Allen*, 241 Mass. 346, 136 N. E. 269; *Bank Commissioners v. Security Trust Co.*, 70 N. H. 536, 49 A. 113; *State v. Nebraska Savings Bank*, 40 Neb. 342, 58 N. W. 976; *In re Frasch*, 5 Wash. 344, 31 P. 755, 32 P. 771; *First National Bank v. Mansfield State Bank*, 127 Wash. 475, 221 P. 595; *Citizens' & Southern Bank v. Alexander*, 147 Ga. 74, 92 S. E. 868, L. R. A. 1918B, 1021; *Blackman v. Pettingill*, 25 Idaho, 307, 137 P. 182.

No great good could come from a review or analysis of the various decisions cited. In some jurisdictions the courts are aided in their conclusions by the statutes they are construing. Speaking generally, however, the two lines of decisions are simply conflicting. In California the Bank Act superseded the Insolvency Act (*People v. Bank of San Luis Obispo*, 154 Cal. 194, 97 P. 306), so the decisions under the earlier statutes are of no assistance to us. The Bank Act itself furnishes us no assistance. It contains nothing to indicate whether the Legislature in adopting it intended to have the bankruptcy rule or the equity rule apply to the claims of creditors holding pledges as securities for their demands against banks in course of liquidation.

The equity rule finds one of its ablest exponents in the Supreme Court of the United States. In the case of *Merrill v. National Bank of Jacksonville*, supra, it was said:

"The inquiry on the merits is, generally speaking, whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full.

"Counsel agree that four different rules have been applied in the distribution of insolvent estates, and state them as follows:

"Rule 1. The creditor desiring to participate in the fund is required first to exhaust his security, and credit the proceeds on his claim, or to credit its value upon his claim, and prove for the balance, it being optional with him to surrender his security and prove for his full claim.

"Rule 2. The creditor can prove for the full amount, but shall receive dividends only on the amount due him at the time of distribution of the fund; that is, he is required to credit on his claim, as proved, all sums received from his security, and may receive dividends only on the balance due him.

"Rule 3. The creditor shall be allowed to prove for, and receive dividends upon, the amount due him at the time of proving or sending in his claim to the official liquidator, being required to credit as payments all the sums received from his security prior thereto.

"Rule 4. The creditor can prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him."

"The circuit court and the circuit court of appeals held the fourth rule applicable, and decreed accordingly.

"This was in accordance with the decision of the circuit court of appeals for the Sixth circuit, in *Chemical National Bank v. Armstrong*, 59 F. 372, 16 U. S. App. 465, 8 C. C. A. 155, 28 L. R. A. 231, Mr. Justice Brown, Circuit Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund; and, this being so, that the second rule before mentioned must be rejected, as it is based on the denial, in effect, of a vested interest in the trust fund, and concedes to the creditor simply a right to share in the distributions made from that fund according to the amount which may then be due him, requiring a readjustment of the basis of distribution at the time of declaring every dividend, and treating, erroneously as we think, the claim of the creditor to share in the assets of the debtor, and his debt against the debtor, as if they were one and the same thing.

"The third and fourth rules concur in holding that the creditor's right to dividends is to be determined by the amount due him at the time his interest in the assets becomes vested, and is not subject to subsequent change, but they differ as to the point of time when this occurs. * * *

"Differences in the language of voluntary assignments and of statutory provisions naturally lead to particular differences in decision, but the principle on which the third and fourth rules rest is the same. In other words, those rules hold, together with the first rule, that the creditor's right to dividends is based on the amount of his claims at the time his interest in the assets vests by the statute, or deed of trust, or rule of law, under which they are to be administered.

"The first rule is commonly known as the 'bankruptcy rule,' because enforced by the bankruptcy courts in the exercise of their peculiar jurisdiction, under the bankruptcy acts, over the property of the bankrupt, in virtue of which creditors holding mortgages or liens thereon might be required to realize on their securities, to permit them to be sold, to take them on valuation, or to surrender them altogether, as a condition of proving against the general assets.

"The fourth rule is that ordinarily laid down by the chancery courts, to the effect that, as the trust created by the transfer of the assets by operation of law or otherwise is a trust for all creditors, no creditor can equitably be compelled to surrender any other vested right he has in the assets of his debtor in order to obtain his vested right under the trust. It is true that, in equity, a creditor having a lien upon two funds may be required to exhaust one of them in aid of creditors who can only resort to the other; but this will not be done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund. Story, Eq. Jur. (13th Ed.) § 633; *In re Bates*, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383. And it is well established that in marshaling assets, as respects creditors, no part of his security can be taken from a secured creditor until he is completely satisfied. 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) pt. 1, pp. 258, 322. * * *

"Certainly, the giving of collateral does not operate of itself as a payment or satisfaction either of the debt or any part of it, and the debtor, who has given collateral security, remains debtor, notwithstanding, to the full amount of the debt; and so in *Lewis v. United States*, 92 U. S. 623, 23 L. Ed. 515, it was ruled that 'it is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor.'

"Doubtless, the title to collaterals pledged for the security of a debt vests in the pledgee so far as necessary to accomplish that purpose, but the obligation to which the collaterals are subsidiary remains the same. The creditor can sue, recover judgment, and collect from the debtor's general property, and apply the proceeds of the collateral to any balance which may remain. Insolvency proceedings shift the creditor's remedy to the interest in the assets. As between debtor and creditor, moneys received on collaterals are applicable

by way of payment; but as, under the equity rule, the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on, collateral, cannot operate to change the relations between the creditor and his co-creditors in respect of their rights in the fund.

"As Judge Taft points out, it is because of the distinction between the right in personam and the right in rem that interest is only added up to the date of insolvency, although, after the claims as allowed are paid in full, interest accruing may then be paid before distribution to stockholders.

"In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets or so much of his dividends as are unnecessary to pay him must be applied to the benefit of the other creditors; and, while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.

"The contractual relations between borrower and lender, pledging collaterals, remain, as is said by the New York court of appeals in *People v. Remington*, 121 N. Y. 328, 24 N. E. 793, 8 L. R. A. 458, 'unchanged, although insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement.' The creditor looks to the debtor to repay the money borrowed, and to the collateral to accomplish this in whole or in part; and he cannot be deprived either of what his debtor's general ability to pay may yield, or of the particular security he has taken.

"We cannot concur in the view expressed by Chief Justice Parker in *Amory v. Francis* (1820) 16 Mass. 308, that 'the property pledged is in fact security for no more of the debt than its value will amount to, and for all the rest the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole if no security were taken.'

"We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after payment from other sources as to the original amount due, and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise."

The bankruptcy rule was first adopted by the Supreme Court of Massachusetts in 1820, in the case of *Amory v. Francis*, *supra*, wherein it was said:

"The rule adopted by the court of chancery in England, and enforced by the commissioners of bankruptcy, is certainly just and

equitable; requiring that every creditor, having a mortgage or other security, shall, before he is admitted to prove his debt, surrender his security for the benefit of the other creditors, the proceeds of the sale going into the common fund; or shall suffer the pledge to be sold, taking the proceeds toward his debt, and proving under the commission for the residue. If it were not so, the equality, intended to be produced by the bankrupt laws, would be grossly violated; and the creditor holding the pledge would, in fact, have a greater security than that pledge was intended to give him. For originally it would have been security, only for a proportion of the debt equal to its value: whereas by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value, as is the dividend, which may be received upon the whole debt.

"This rule was adopted in England on account of its reasonableness, and because consistent with the nature of the contract. For the property pledged is in fact security for no more of the debt, than its value will amount to; and for all the rest, the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole, if no security were taken. The same rule would undoubtedly be applied in England to cases of insolvent estates, when the debtor has deceased; if any mode of settlement and distribution of such insolvent estates existed there.

"There seems to be no good reason, why the same rule should not be applied to the settlement of the estates of deceased insolvent debtors in this Commonwealth. For the statute, which provides for the distribution of these among creditors, requires an equal pro rata distribution; and it never could have been intended by the legislature, that a creditor, having security, should have any advantage, beyond the actual value of the property secured."

The two foregoing quotations illustrate the reasoning used by the various courts adopting one or the other of the rules we are considering, except where statutory construction influenced the results reached. As the Bank Act (St. 1909, p. 87, as amended) does not indicate the course to be followed under the facts of the case before us, we must consider the rights of a pledge holding creditor in enforcing his debt against his debtor under the law and decisions of this state.

[1] It is the well-settled law in this state that as a pledge is only collateral security for the debt, the pledgee may sue upon the debt without first exhausting his security, and resort to the general assets of his debtor for the partial or total satisfaction of the debt, returning the pledge or so much thereof as may remain after the debt is fully paid. As was

said in the case of *Sonoma Valley Bank v. Hill*, 59 Cal. 107:

"Now it is well settled that in the absence of a statute or stipulation to the contrary, the possession of the pledged property does not suspend the right of the pledgee to proceed personally against the pledgor for his debt, without selling the pledge, for the reason that the security is only collateral. It has been repeatedly so held. (See *Bank of Rutland v. Woodruff*, 34 Vt. 89; *Robinson v. Hurley*, 11 Iowa, 410 [79 Am. Dec. 497]; *Butterworth v. Kennedy*, 5 Bosw. [18 N. Y. Super. Ct.] 143; *Elder v. Rouse*, 15 Wend. [N. Y.] 218; *Langdon v. Buell*, 9 Wend. [N. Y.] 80, 83; *Case v. Boughton*, 11 Wend. [N. Y.] 106; *Beckwith v. Sibley*, 11 Pick. [Mass.] 482; *Townsend v. Newell*, 14 Pick. [Mass.] 332; *Whitaker v. Sumner*, 20 Pick. [Mass.] 399.)

"In the case above cited from the Vermont reports (*Bank of Rutland v. Woodruff*), the law is stated in the opinion of the Court: 'It is claimed, too, that if the plaintiffs held these bills as collateral security for the money merely, they should have offered to surrender them before suing for the money; that they cannot pursue their remedy directly for the money, and hold the bill at the same time. But it is a new doctrine that a creditor holding collateral securities for a debt, cannot enforce his debt without surrendering his securities. He is entitled to hold them until he gets his pay; then they belong to the debtor.'

"The rule on this subject is thus stated in *Robinson v. Hurley*, above cited: 'After the debt falls due the pledgee under the law has his election to pursue one of three courses: First, to proceed personally against the pledgor for his debt without selling the collateral security; or second, to file a bill in Chancery and have a judicial sale under a regular decree of foreclosure; or third, to sell without judicial process, upon giving reasonable notice to the debtor to redeem.' In *Smith v. Strout*, 63 Me. 205, it was held that judgment recovered against the pledgor on the debt does not preclude the pledgee from continuing to hold the pledge.

"As a pledge is a security for the payment of the debt, the pledgee must have the right to retain it until the debt is paid. Such is the character of the security, and the decisions in the cases above referred to are in accordance therewith. (See further on the subject *Comstock v. Smith*, 23 Me 202; *Whitwell v. Brigham*, 19 Pick. [Mass.] 117; *Buck v. Ingersoll*, 11 Mete. [Mass.] 226; *Story on Bail*, § 315; *Redfield on Carriers*, etc., § 666; 2 Kent's Com. 582.)" See, also, *Ehrlich v. Ewald*, 66 Cal. 97, 4 P. 1062; *Savings Bank v. Middlekauff*, 113 Cal. 463, 45 P. 840; *Hawley Bros. v. Brownstone*, 123 Cal. 643, 56 P. 468; *French v. McCarthy*, 125 Cal. 508, 58 P. 154; *Perry v. Parrot*, 135 Cal. 238, 67 P. 144; *Com-*

mercial Savings Bank of San Jose v. Hornberger, 140 Cal. 16, 73 P. 625; Traders Bank of Los Angeles v. Wilcox, 42 Cal. App. 24, 183 P. 256.

[2] It would therefore seem clear that in California a pledge is given and received as collateral security for the payment of the entire debt and not any divisible part or portion thereof. It is as much security for the first dollar of the obligation as it is the last dollar of the debt which may remain unpaid after the application of credits derived from other property of the debtor. We cannot see how the pledge holder can be compelled to treat the pledge as a security for a portion of his debt only in the absence of a statute which might be construed as a part of the contract, compelling him so to do. Also in the absence of any mandate of the law changing the general rule, we cannot see how the fact of the debtor being a bank, the affairs of which are being administered by the superintendent of banks, can change the general rule. The rights and obligations of the parties to a pledge are fixed by the contract under the provisions of law, and the Bank Act being silent upon the subject, the rights and obligations of the parties must remain the same after the commissioner of banks entered the transaction as they were before that event.

[3] Section 27 of the Bank Act (Stats. 1913, p. 151, § 26) provides as follows: "All money and assets belonging to each department, whether on hand or with other banks, and the investments made, shall be held solely for the repayment of the depositors and other claimants of each such department, as herein provided, until all depositors and other claimants of each such department shall have been paid, and the overplus then remaining shall be applied to any other liabilities of such bank."

This section gives to the depositors and claimants mentioned a prior right to participate in the money and assets belonging to the bank, and to that extent gives them a preference over other creditors. *People v. California Safe Deposit & Trust Co.*, 160 Cal. 374, 117 P. 321.

[4, 5] Counsel for the superintendent of banks urge that under sections 2899 and 3433 of the Civil Code the district should be compelled to first exhaust its security and then participate equally with the other creditors in the general assets of the bank for the balance due it. It is admitted that the depositors cannot be paid in full. The two Code sections cited state the rule for marshaling assets in force in this jurisdiction. Neither requires the prior creditor to first resort to the fund or property upon which he has the sole lien if such action would impair his right to the complete satisfaction of his debt. The marshaling of assets is an equitable doctrine

which cannot be invoked by one creditor to defeat part of the demand of a prior lienholder. This rule is clearly stated in 16 California Jurisprudence, 950, as follows:

"A lien claimant may invoke the rule of marshalling assets only when it will benefit him without injuring others. The right to marshal is a mere equity which may never be invoked when its operation will accomplish inequity. Marshalling will not be enforced, for example, where the holder of the senior security will be prejudiced by it." *Kent v. Williams*, 114 Cal. 537, 46 P. 462; *Harrington v. Taylor*, 176 Cal. 802, 169 P. 690.

If the district were required to exhaust its security and then participate equally with the other creditors in the other assets of the bank, its demand for which the pledge was given would not be paid in full.

Throughout this opinion we have assumed that the pledge of the bonds to the district was a legal and valid transaction. If the superintendent of banks is finally successful in his suit to recover the bonds, or their value, the question we have been discussing will immediately become moot, as the district will have no pledge to secure its deposit; it then occupying the same position as the other unsecured depositors. This case should not have been submitted until the legality of the pledge had been determined.

The order dismissing the order to show cause is reversed.

We concur: CARY, P. J.; HAINES, Justice pro tem.

MOREHOUSE v. ALLEN.*

Civ. 6517.

District Court of Appeal, Second District,
Division 2, California.

Oct. 28, 1930.

Rehearing Denied Nov. 26, 1930.

Hearing Granted by Supreme Court
Dec. 22, 1930.

1. Bills and notes $\S$ 137(1), 138.

Note may by its terms provide for its renewal or extension.

2. Bills and notes $\S$ 138.

Where agreement to renew note made at time of execution does not state number of renewals, agreement must be construed as one to renew only once.

3. Bills and notes $\S$ 138.

Where agreement is for renewal of note at holder's option, exercise of option must be shown by one claiming extension.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 300 P. 961.

4. Bills and notes ☞137(1).

Suit on note *held* not premature, where makers did not show holder had consented to further extension under stipulation for extension at holder's option.

The extension stipulation which was a part of the note provided in part that, if the note was not paid on or before June 6, 1927, it was thereby renewed from year to year at the holder's option.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by N. J. Morehouse against W. S. Allen. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. S. Allen, in pro. per.

William S. Mitchell, for respondent.

CRAIG, J.

The respondent commenced an action upon a promissory note, to which the appellant pleaded an extension of time for payment until a date subsequent to the filing of suit, and denied that the same was due. Judgment upon the pleadings was rendered in favor of the plaintiff, from which the defendant appeals.

The complaint alleged that the plaintiff had previously assigned to the defendant a certain promissory note, signed by third parties, for \$3,000, dated February 15, 1921, due six months after its date; that on February 28, 1921, the defendant executed and delivered to the plaintiff a promissory note for \$3,000 (the instrument in controversy), due six months after the date last mentioned; that in this latter note it was stipulated and agreed that, in the event of the extension, renewal, novation, or substitution of the note of February 15, 1921, "the time for the payment of this note shall automatically be extended to the same date as the maturity of such aforesaid extension, renewal, novation or substitution"; that the defendant did thereafter make a novation and substitution of the note of February 15, 1921, accepting therefor a new note payable June 6, 1927, which latter had matured prior to the filing of this action, and was due, owing, and unpaid.

The defendant affirmatively alleged facts admitting the execution of each of said instruments, but denied that any amount was yet due upon either of the notes. Incorporated in and made a part of the answer is a contract signed by the defendant and said third parties (the payors named in the first note), embodying the note of February 15th, and entitled "Contract of Novation," dated June 6, 1922, and containing the usual provisions of a promissory note, as well as other covenants relat-

ing to certain personal property and a mining claim in which all of the parties were interested. It recites that the new note is given in lieu of that executed February 15, 1921, and shall be due and payable on or before June 6, 1927; and that, "*if this note is not paid on or before June 6, 1927, it is hereby renewed from year to year, at the option of the holder, until paid.*" It was further alleged in the answer that "the note or obligation contained in said novation was not paid on or before June 6, 1927, and has not yet been paid, and that the obligation contained in said novation, in accordance with its terms, and at the request of the makers, and in accordance with the option of the defendant, the holder thereof, was on or about June 6, 1927, renewed for one year from June 6, 1927; and that said note or obligation contained in said novation is not yet due, and has not yet been paid."

It is contended by the appellant that the judgment upon the pleadings was erroneous, for the reason that the suit was premature. He relies upon the stipulation of the contract of novation that, "if this note is not paid on or before June 6, 1927, it is hereby renewed from year to year, at the option of the holder, until paid," and upon the allegation that the same had not been paid, had again been extended for one year, and was not due.

[1-4] Authorities cited by the respective parties afford no aid other than in support of the elementary rule that a note may by its own terms provide for its renewal or extension. To this there can be no controversy, and the contention of appellant has been recognized in former cases. *Kleinsorge v. Kleinsorge*, 133 Cal. 412, 65 P. 876; *Caffaro v. Romani*, 70 Cal. App. 448, 233 P. 412. It may be conceded, therefore, that by agreement of appellant and respondent as expressed by the terms of the note of February 28, 1921, the note of February 15, 1921, was legally extended by novation or renewal, rendering the first note due June 6, 1927. But it has been held that, where an agreement to renew a note, made at the time of executing it, does not state the number of renewals, it must be construed as an agreement to renew only once. *Farmers', etc., Bank v. Laird*, 188 Mo. App. 322, 175 S. W. 116. And it is equally well established that, if there be an agreement for renewal at the holder's option, the exercise of the option must be shown by one claiming such extension. *California State Bank v. Webber*, 110 Cal. 538, 42 P. 1066; *Woolwine v. Storrs*, 148 Cal. 7, 82 P. 434, 113 Am. St. Rep. 183; *Brenneke v. Smallman*, 2 Cal. App. 306, 83 P. 302. There must exist a valid and binding contract between the holder and the other party, precluding action to enforce the note. *Hamilton Nat. Bank v. Breeden*, 130 Tenn. 465, 171 S. W. 86, L. R. A. 1915C, 831;

Illinois Life Ins. Co. v. Young, 118 Kan. 308, 235 P. 104; Farmers' State Bank of Lisbon v. Fausett, 54 N. D. 696, 210 N. W. 638, 48 A. L. R. 1219; Lake St. State Bank of Minneapolis v. Hunter, 170 Minn. 128, 212 N. W. 2; Oetjen v. Robinson-Rodere Co., 98 N. J. Law, 282, 117 A. 629. Appellant's answer does not disclose, by allegation or documentary exhibit, a consent by the respondent to the extension or forbearance of suit after June 6, 1927. We think the action was not premature, and that the answer did not set forth facts sufficient to constitute a defense to the cause of action alleged by the plaintiff.

The judgment is affirmed.

We concur: WORKS, P. J.; SCHMIDT, J. pro tem.

109 Cal. App. 219

LEGGETT v. COOPER et al.

Civ. 88.

District Court of Appeal, Fourth District,
California.

Oct. 27, 1930.

1. Appeal and error ☞1011(1).

Appellate court cannot disturb judgment merely because of conflict in evidence.

2. Appeal and error ☞882(19).

Where defendant assisted in fixing valuation of property stolen from plaintiff, she could not complain because trial court took this valuation as basis of judgment against her.

3. Appeal and error ☞673(2).

Finding that action for conversion of merchandise stolen was not barred could not be disturbed, where there was nothing in record fixing exact date of act of larceny.

The written confession of defendant recited that theft had taken place during period of fourteen months ending on January 5, 1924, and the complaint was filed on December 23, 1925. Plaintiff's witness testified that defendant had said during conference that she did not begin her speculations until number of months after commencement of her employment in July, 1922.

STROTHER, Justice pro tem., dissenting.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by N. H. Leggett against Anne E. Cooper and another. From a judgment for plaintiff, defendant named appeals.

Affirmed.

Henry C. Mack, of Bakersfield, for appellant.

G. W. Zartman, of Tulare, for respondent.

PER CURIAM.

The plaintiff and respondent conducted one or more stores in the city of Tulare, county of Tulare, state of California. The defendant and appellant, Anne E. Cooper, was employed by respondent as a clerk from about July, 1922, to about January, 1924, when she left his employ and went to the city of Stockton, Cal. The defendant A. S. Cooper is her husband.

In September, 1924, appellant returned to one of the stores of respondent in Tulare and was there seen stealing and carrying away merchandise. A few days later two employees of respondent went to the city of Stockton and located the residence of appellant and her husband. They found the husband, and with his consent and assistance opened appellant's trunk and found therein a large quantity of merchandise which had been taken from respondent's store in Tulare. They also found a number of unopened bundles of merchandise which had been shipped from respondent's store in Tulare to appellant in Stockton. They also found a number of dresses and other wearing apparel which showed slight wear and which appellant subsequently admitted had been stolen by her from respondent. Appellant had several trunks stored at another address which were opened and found to contain merchandise belonging to respondent. With the consent of appellant's husband all of the merchandise so recovered, which had not been worn, was shipped back to respondent in Tulare.

On the night of the same day, and after the new goods had been returned to respondent, appellant and her husband were interviewed by the employees of respondent at their hotel in Stockton. At this conference, according to the testimony of the witnesses for respondent, appellant was informed of the shipment of all the new goods back to respondent. She admitted stealing these goods from respondent, as well as the slightly worn merchandise, together with small sums of money, and a large amount of other merchandise, which she had sent as presents to her relatives residing in other states. The question of making restitution for the stolen money and merchandise which could not be returned, namely, the worn goods and those sent to relatives of appellant, was discussed between appellant and her husband

on the one side and R. E. La Posea and his wife, the employees of respondent, on the other. Mrs. La Posea testified that she listed the articles which appellant admitted stealing from respondent and which were not returned, together with the money taken, and their respective values as given her by appellant, and that this valuation totaled between \$1,250 and \$1,300. A paper was prepared for the signature of appellant in which she admitted the thefts of the unreturnable property and the money. Her husband, however, objected to the amount, protesting that the valuation of \$1,250 was too large. After a considerable discussion it was finally decided by the four that the valuation of the stolen goods which could not be returned, together with the money taken, was \$1,000, and that appellant would repay this amount to respondent. The negotiations resulted in an instrument being signed by appellant in words and figures as follows:

"Stockton, California

"Nov. 24th, 1924.

"I hereby voluntarily admit I stole from N. H. Leggett of Tulare California the following listed amount. I hereby release and forever discharge the N. H. Leggett their officers, agents, and employees, jointly and severally from all claims I now have or ever had against them, their officers, agents and employees, by reason of any statement, charge or thing whatsoever made by them concerning me. I sign this of my own free will, under no duress and with no promise of immunity. Merchandise and money for 14 months—ending about Jan. 5th, 1924, amounting to One Thousand Dollars—\$1000.00.

"[Signed] Mrs. A. S. Cooper.

"Witness:

"A. S. Cooper.

"R. E. La Posea."

It appears from the testimony of the witnesses for respondent that appellant admitted the theft of this wearing apparel and money from respondent, and that the valuation was fixed as a matter of compromise between the parties, the representatives of respondent maintaining that the total value was in excess of \$1,000, and appellant and her husband that the value was \$1,000 or less. It also clearly appears from the testimony of Mrs. La Posea that these negotiations at the hotel between the parties, and the written instrument referred only to the money taken and to the merchandise which had either been worn by appellant or given away by her so that it could not be returned and placed in stock. At the time of the signing of this document appellant was fully informed that all new merchandise had already been returned to respondent. The description or valuation of the merchandise returned was not discussed at the conference

which resulted in the signing of the written instrument.

Appellant failed to pay for the stolen property not returned, and respondent brought this suit to recover its value. The trial court found in his favor on all questions at issue and rendered judgment against appellant in the sum of \$1,000. A judgment of nonsuit was entered in favor of A. S. Cooper who had no knowledge of the thefts of his wife. From this judgment appellant appeals primarily upon the ground that the evidence does not support the findings of the trial court as to the value of the stolen property not returned.

[1] It is true that on the witness stand appellant denied stealing any merchandise or money from respondent. She further testified that all of the merchandise bearing the price marks of respondent which were found in her possession had been purchased and paid for by her, and filed a cross-complaint for the value of the merchandise returned. The trial court, however, found against all her contentions. The evidence for respondent and appellant presents a sharp conflict which the trial court resolved in favor of respondent. In our opinion the evidence is ample to support the findings of the trial court, and these findings are binding upon this court on appeal. We cannot disturb a judgment merely because of a conflict in the evidence. This rule of law is too elementary to need citation of any authorities to sustain it.

[2] According to the testimony of the witnesses for respondent, appellant actually admitted the theft and a consequent indebtedness to respondent. A controversy arose over the amount of this indebtedness. This controversy was finally settled by the parties, who agreed upon the sum of \$1,000 as the value of the property stolen by appellant and not returned to respondent. Appellant assisted in fixing this valuation of the stolen property not returned. It is therefore binding upon her and she cannot complain because the trial court took this valuation as a basis of its judgment against her.

[3] Appellant pleaded the statute of limitations as a bar to respondent's demand. The trial court found against her on this defense, and she complains of this finding and maintains that it is not supported by the evidence and is contrary to the evidence. It appears from the record that appellant was employed by respondent in July, 1922, and left early in January, 1924. The complaint was filed on September 23, 1925. R. E. La Posea testified that appellant said during the conference in Stockton that she did not begin her peculations until a number of months after the commencement of her employment. The written confession of appellant recites that the thefts had taken place during the

period of fourteen months ending on January 5, 1924. There is nothing in the record to fix the exact dates of the various acts of larceny and nothing which would compel the trial court to conclude that any thefts occurred at such a time prior to the filing of the complaint that any portion of respondent's demand was barred by the statute of limitations. Therefore, the trial court having found against this contention of appellant, its finding cannot be disturbed here.

The findings are supported by ample and competent evidence and the findings support the judgment. There is no prejudicial error in the record.

Judgment affirmed.

STROTHER, Justice pro tem.

I dissent. This is an action for conversion of merchandise and money, alleged to have been received by defendants, which belonged to plaintiff, and which, upon demand, they refused to deliver to plaintiff. It is also alleged that defendants admitted in writing their wrongful receipt of the property.

The answer denies the receipt of the property by the defendants and the making of the alleged admission, and by way of counterclaim sets up the wrongful taking and withholding by plaintiff of certain personal property of defendants.

At the close of plaintiff's evidence, the court, on motion, granted a nonsuit as to the defendant A. S. Cooper, and at the conclusion of the trial, ordered judgment against the other defendant, who appeals from the judgment entered against her.

The court found that it was true that the defendant Anne E. Cooper received, between July 22, 1922, and January 5, 1924, merchandise and money to the amount alleged in the complaint, which belonged to plaintiff; that plaintiff upon discovery of the facts, on November 23, 1924, made demand upon defendant for return of the property, but that she failed to return it; that said defendant on November 24, 1924, signed an admission in writing that she had received money and property belonging to plaintiff, in the amount claimed.

The appellant had been employed by the plaintiff in his store in Tulare, and had quit her employment and moved with her husband to Stockton. While on a visit to Tulare she was observed by a Mrs. Pa Posea taking some articles of wearing apparel.

A few days later, at the instance of plaintiff, Mrs. La Posea went to Stockton to get a settlement with appellant for property stolen. Appellant admitted considerable thefts from plaintiff while in his employ, amounting to \$1,000 in value and signed a written admission as follows:

"Stockton, California,

"Nov. 24th, 1924.

"I hereby voluntarily admit I stole from N. H. Leggett, of Tulare, California, the following listed amount. I hereby release and forever discharge the N. H. Leggett, their officers, agents and employees, jointly and severally, from all claims I now have or ever had against them, their officers, agents and employees, by reason of any statement, charge or thing whatsoever made by them concerning me. I sign this of my own free will under no duress and with no promise of immunity. Merchandise and money for 14 months, ending about Jan. 5, 1924, amounting to one thousand dollars \$1,000.00

"[Signed] Mrs. A. S. Cooper."

The only evidence introduced by plaintiff in support of his cause of action was the above-signed statement and the testimony of Mrs. La Posea of the theft by appellant, on the occasion of her visit to Tulare, of articles worth about \$24, and the additional testimony of Mrs. La Posea and her husband relating their conversation with the appellant in Stockton, which was practically to the same effect as the signed statement. No evidence of the taking of any specific article or money was introduced. Mrs. La Posea further testified to the recovery by her, with the assistance of appellant's husband and, apparently without appellant's knowledge, of a large amount of merchandise with plaintiff's tags on the articles, which were shipped back to plaintiff.

The plaintiff himself testified at the trial as follows:

"Q. You are jocular when you say two truck loads, you are not testifying as a fact you recovered two truck loads? A. I think the automobile made three, if not three or four big sedan cars, and I am not sure one of the transfer men didn't go down and bring up a load also. That was Tulare."

He further testified: "I didn't take an inventory. Those goods were placed in a box, and they were nailed up, and they have been nailed up ever since."

The plaintiff alleged in his complaint a demand and refusal of appellant to return the goods. As his testimony and that of his other witness was to the effect that a considerable part of the goods was returned and was in his possession at the time of the trial, he failed to sustain the charge in the complaint that the goods were not returned, at least to the extent of the value of the goods that were returned. Aside from the fact that those articles were returned, he had no evidence, except the general confession of appellant, that any goods were taken. As to what the value of the goods returned was, he, certainly, and probably no one else, was in a position to ascertain.

As the allegation of the complaint as to the return of the goods, and the finding of the court thereon, is not supported by the evidence, the judgment should be reversed. The pleadings in the case are not so framed as clearly to present the issues, and should be amended.

The judgment should be reversed and the court below directed to try the cause anew upon such amendments to the pleadings, if any, as the parties may be advised to make.

PEOPLE v. McINTIRE.*

Cr. 1973.

District Court of Appeal, Second District,
Division 2, California.

Oct. 21, 1930.

Rehearing Denied Nov. 5, 1930.

Hearing Granted by Supreme Court
Nov. 20, 1930.

1. Witnesses ⇨79(3).

Trial court had jurisdiction to determine as fact whether or not witness testifying in criminal prosecution was wife of defendant.

2. Criminal law ⇨1158(4).

Conclusion of trial court that purported marriage of witness in criminal case to defendant was void cannot, where evidence is in conflict, be disturbed (Civ. Code, § 79).

3. Criminal law ⇨671.

Whether or not to excuse jury pending argument as to admissibility of evidence is within discretion of trial court.

4. Criminal law ⇨1144(12).

Presumptions are that court acted with discretion in refusing request to excuse jury pending argument as to admissibility of evidence.

5. Automobiles ⇨336.

Automobile driver may be convicted of failure to do any one of several things required when automobile collides with pedestrian (St. 1923, p. 517, § 141, as amended by St. 1929, p. 544, § 62).

6. Automobiles ⇨355(8).

Evidence held insufficient to sustain conviction for failure to stop and render aid after automobile accident (St. 1923, p. 517, § 141, as amended by St. 1929, p. 544, § 62).

7. Automobiles ⇨355(6).

Evidence held insufficient to sustain conviction for driving automobile on public high-

way while under influence of liquor (St. 1923, p. 517, § 112, as amended by St. 1929, p. 537, § 44).

8. Criminal law ⇨560.

Conviction is not justified upon mere conjecture or suspicion.

9. Automobiles ⇨355(13).

Facts respecting death of pedestrian struck by automobile held not to warrant conviction of driver for murder in second degree.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

W. R. McIntire was convicted of second degree murder and driving a motor vehicle while under the influence of liquor and of failure to stop and render aid after accident, and he appeals.

Judgment as to conviction of murder in the second degree modified, and otherwise reversed.

Paul Taylor, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

SCHMIDT, Justice pro tem.

Appellant, William R. McIntire, in the lower court was convicted under count 1 of the information with the crime of second degree murder, under count 2 of driving a motor vehicle while under the influence of intoxicating liquor in violation of section 112, California Vehicle Act (as amended, Stats. 1929, p. 537, § 44), and under count 3 of failure to stop and render aid, etc., in violation of section 141, California Vehicle Act (as amended, Stats. 1929, p. 544, § 62).

On January 1, 1930, at the intersection of Atlantic boulevard and Hubbard streets in the county of Los Angeles, one Mrs. Margaret Towers, while crossing in a pedestrian lane, was injured by being struck by an automobile, resulting in injuries that caused her death. In connection with this unfortunate accident, appellant was charged in the lower court with the various offenses set forth. This appeal is from the judgment upon the verdicts and from the order of the court denying appellant's motion for a new trial.

Appellant claims error was committed by the trial court in compelling the witness Ruby Burroughs to testify after she claimed she was the wife of appellant.

Between the time of the preliminary hearing and the trial it appears that a purported marriage ceremony was performed; the parties thereto being said witness Ruby Burroughs and appellant. To a great extent this appeal rests upon the admissibility of her

testimony—in fact, her testimony was more important than that of all other witnesses combined, to prove who drove the car, as well as other facts.

[1] The contention is made that the court had no power to permit a collateral attack upon the purported marriage once it had been established that a marriage ceremony had been performed. But the attack here made was not collateral. It was the duty of the trial court, and it had jurisdiction, to determine as a fact whether or not the witness was the wife of appellant.

[2] The trial court, after taking testimony, held that the purported marriage having been attempted to be performed under section 79 of the Civil Code, was void, in that the evidence did not show that appellant and said Ruby Burroughs had "been living together as man and wife." There being a conflict in the evidence on this question, we cannot disturb the conclusion reached by the trial court. There was therefore no error committed in compelling Ruby Burroughs to testify.

[3, 4] Error is further assigned in the refusal of the court, upon request of the appellant, to excuse the jury while the lengthy arguments as to the admissibility of the testimony of Ruby Burroughs and the evidence taken pro and con upon this question was being heard. It is well settled that it is within the discretion of the trial court whether or not to excuse the jury pending argument as to the admissibility of evidence. All presumptions are that the court acted with discretion. Appellant has failed to show any prejudice in this regard.

The final point made is insufficiency of the evidence to sustain the verdict of guilty as to each count in the information. For convenience we will consider the counts in their reverse order.

Count 3 was worded substantially in the language of section 141, California Vehicle Act, as amended in 1929 (Stats. 1929, p. 544, § 62), which section, in so far as this case is concerned, reads:

"(a) The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident and shall fulfill the requirements of subdivision (c) and any person failing to stop or to comply with said requirements under such circumstances shall be guilty of a felony," etc.

"(c) The driver of any vehicle involved in any accident resulting in injury or death to any person * * * shall also give his name, address and the registration number of his vehicle and exhibit his operator's or chauffeur's license to the person struck * * * and shall render to any person injured in such accident reasonable assistance," etc.

[5] Under this section a defendant may be convicted of a failure to do any one of the several required things when his automobile collides with a pedestrian, namely, (1) to stop immediately; or (2) give his name and address; or (3) registration number of his vehicle; or (4) exhibit his operator's or chauffeur's license to the person struck; or (5) to render necessary assistance. *People v. Scofield*, 203 Cal. 703, page 710, 265 P. 914.

[6] Substantially all the testimony, including that of the said Ruby Burroughs, was that appellant drove the automobile that caused the death of Mrs. Towers; that he stopped about 100 feet from the accident and went about half way to where Mrs. Towers was lying in the street; was accosted by the witness David T. Williams, who stated to appellant, "You have killed that lady," whereupon appellant returned to his car and drove away.

Miss Gladys M. Gould, granddaughter of Mrs. Towers, testified that at the time of the accident she "crossed over to where her grandmother was and saw her laying there; quite a few people gathered just a few minutes after it happened; my mother took my grandmother's head I think, and tried to hold it on her arm but they (the people around there) would not let us touch her."

Immediately following the accident many automobiles and persons gathered at the scene of the accident. Although there is no direct testimony that Mrs. Towers was rendered unconscious, nevertheless it is a very reasonable inference from all the testimony concerning her injuries and her condition that she was not able to talk or understand what was going on.

As to stopping immediately, this appellant did. With reference to the data in subdivisions 2, 3, and 4, the statute requires same to be given to the person struck. If the collision is with another vehicle, which is not the case here, the statute requires that the information shall be given to "the driver or any occupant of any vehicle collided with." It must be borne in mind that the charge in the information related exclusively to said Margaret Towers.

In *People v. Scofield*, 203 Cal. 703, it was said, at page 708, 265 P. 914, 916: "It was possible for the defendant to have placed on the person of Gilliam" (who was rendered unconscious) "the specified information" (called for by section 141, California Vehicle Act), "but the law would seem to contemplate that such information be given to some one consciously able to receive it. This interpretation of the statute does not, as has been suggested, render it possible for a reckless driver to escape punishment by being sure that he renders his victim unconscious and then proceed on his way. There is still the obligation to stop and render the necessary assist-

ance to the injured party. In this connection it must be noted that the statute requires that necessary assistance be rendered. Under the facts in this case, the deceased was given all the assistance that could be required without the aid of the defendant. It is suggested that the defendant might have interjected his person into the midst of the several individuals who were caring for the deceased and insisted upon his own ministrations. This, we think, he was not required to do under the circumstances here shown. In other words, his assistance was not necessary. To have forced himself into the company of those who were rendering aid might have been an impertinence and not at all justifiable. A failure to do so should not subject the defendant to criminal responsibility under the statute." This language applies with equal force to the case at bar, in which the facts were almost identical. It necessarily follows that the evidence is insufficient to sustain the verdict of guilty under count 3.

[7, 8] II. Count 2 charged appellant with violation of section 112, California Vehicle Act, namely, driving an automobile along and upon a public highway while under the influence of intoxicating liquor. The testimony shows that the accident occurred at about 6:30 to 7 p. m. in the evening. Ruby Burroughs testified that she had seen appellant taking a drink or two in his office early in the afternoon; "I seen him take it out of the bottle, I don't know how much he drank;" that she could not tell whether the bottle contained alcoholic liquor by merely looking at it; that she was not sufficiently familiar with intoxicating liquors to be able to distinguish between various kinds of liquor; that after the accident appellant drove the car from the scene of the accident several miles to the city of Burbank, where some one (the record does not disclose whom) stopped them and asked if they had been drinking, and, receiving an answer in the affirmative, suggested they have some one else drive the car; that thereupon said Ruby Burroughs drove the car for a short distance, but, not being familiar with the driving of cars, appellant again drove the final few blocks to their destination, the Simmons home; that appellant was not under the influence of liquor. Another witness, Sam Maz, testified that right around 6 o'clock appellant drank one glass of light wine containing about six ounces which the witness gave appellant; that it contained not to exceed 3 per cent. of alcoholic content. Another witness, Mrs. Simmons, testified that upon returning to her home about two hours after the accident she found the defendant at her home, and in her opinion he was drunk, and, when asked as to the degree of drunkenness, replied: "He" (appellant) "was still able to stand but he was in a stupor; he was not able to hold any conversation." This, in substance, is all the testimony on this count.

The question is, Was the defendant under the influence of intoxicating liquor within the meaning of the statute? We have here evidence that prior to the accident appellant had had some intoxicating liquor. However, there is an utter lack of any evidence that the liquor had "so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions," as the rule was laid down in *People v. Ekstromer*, 71 Cal. App. 239, at page 246, 235 P. 69, 71, or facts from which the jury could so infer. It is a well-known fact that some people can and do take several drinks without being substantially affected thereby, while others are affected by the mere taking of one drink. It is likewise a well-known fact that with many people the effect resulting from drinking alcoholic liquors is not produced until some time after taking, while with others the effect is almost immediate. There is no substantial evidence upon which it could be legally found that at the time of the accident appellant was driving his car while under the influence of intoxicating liquor. The evidence in this case only creates a conjecture or suspicion that at the time of the accident appellant was under the influence of intoxicating liquor. A conviction is not justified upon mere conjecture or suspicion. The situation in this case is quite similar to a civil action in which a collision is proved, but not any negligence. It necessarily follows that the evidence is wholly insufficient to sustain a conviction under count 2.

[9] III. We come now to consider count 1, under which appellant was found guilty of murder in the second degree. The theory of murder arises from a death resulting in the commission of a felony, in this case, resulting from driving an automobile in violation of section 112, California Vehicle Act. Having heretofore held that the evidence is insufficient to sustain the conviction under count 2, namely, violation of section 112 California Vehicle Act, the conviction of murder in the second degree cannot stand. We are, however, satisfied that the facts of the case show and justified the verdict of the jury in so far as it held appellant responsible for the death of Mrs. Towers. We are equally satisfied that the verdict of guilty should not have been greater than manslaughter.

Section 1181, Penal Code, as amended in 1927 (St. 1927, p. 1037), provides that, if the evidence in criminal cases shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof or of a lesser crime included therein, the trial court may modify the judgment accordingly without granting or or-

dering a new trial, and this power shall extend to any court to which the cause may be appealed.

This section received interpretation from the Supreme Court in *People v. Kelley*, 208 Cal. 387, 281 P. 609, and, applying the construction given section 1181, Penal Code, in that case to count 1 in this case, the same order as made in the *Kelley Case* should be made here.

As to count 1, the judgment of the lower court of murder in the second degree is modified. The cause is remanded to the trial court, with directions to enter a judgment against appellant finding him guilty of manslaughter, and thereupon to pronounce judgment upon him as prescribed by law. As to count 2, the judgment of conviction and order denying a new trial are reversed; and as to count 3 the judgment of conviction and order denying a new trial are reversed.

We concur: WORKS, P. J.; CRAIG, J.

169 Cal. App. 147

**NORTH BRITISH & MERCANTILE INS.
CO., Limited, et al. v. INGALLS.**

Civ. 209.

District Court of Appeal, Fourth District,
California.

Oct. 22, 1930.

Rehearing Denied Nov. 7, 1930.

Hearing Denied by Supreme Court
Dec. 13, 1930.

1. Appeal and error ☞907(2).

Appellate court, in absence of evidence, must assume that it supported findings which are therefore binding.

2. Appeal and error ☞907(2).

Appellate court, in absence of testimony, must assume that facts were of such character as to sustain findings and judgment.

3. Fraudulent conveyances ☞39.

Transfer of proceeds of insurance policy to wife as result of death of husband was not fraudulent as to creditors of husband (Civ. Code, §§ 1149, 1153, 1571-1573, 3439, 3440, 3442).

Since death is an involuntary happening that most people desire to avoid as long as possible, such involuntary fact of death would not be an act by which one could commit a fraud, nor was it an omission to perform a duty from which constructive fraud might be inferred.

4. Exemptions ☞4.

Statutes exempting property from levy of execution are to be liberally construed.

5. Fraudulent conveyances ☞39.

Statute relating to exemption from execution was inapplicable in action by husband's creditors against beneficiary in insurance policy (Code Civ. Proc. § 690, subd. 18).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by the North British & Mercantile Insurance Company, Limited, and others, against Ruth L. Ingalls. Judgment for defendant, and plaintiffs appeal.

Affirmed.

W. W. Hindman and Jennings & Belcher, all of Los Angeles, for appellants.

Isaac Jones, of Ontario, and Martin J. Coughlin and W. E. Byrne, both of San Bernardino, for respondent.

MARKS, Acting P. J.

Appellants are corporations organized for the purpose of writing various forms of insurance, and are licensed to do business in the state of California. Respondent is the widow of J. S. Ingalls, deceased, who died November 26, 1924. During his life he was engaged in the business of writing insurance as agent for the appellant companies. Shortly after the death of J. S. Ingalls, respondent was appointed executrix of his last will and testament and entered upon the discharge of her duties as such. The life insurance companies hereinafter referred to had written insurance upon the life of deceased, with respondent named as beneficiary in each policy, except two. These two policies were in the sum of \$2,000 each, and were made payable to his estate. In each of the policies here involved the insured reserved the right to change the beneficiary. After the death of deceased, respondent received from the insurance carriers the sum of \$67,355.22, for herself, and \$4,000, as executrix of the estate of deceased. On the 14th day of December, 1925, she filed an inventory and appraisal of the property of deceased which showed total assets of the value of \$17,966.58. The claims and debts of deceased amounted to the sum of \$44,591.34. Among them were claims in favor of the insurance companies who are appellants here, in the sum approximately of \$28,000.

Appellants instituted this action against respondent to subject the insurance moneys received by her personally to the debts of deceased. It is alleged in the amended complaint that at the time of the death of deceased he was insolvent and that the pay-

ment of the money to respondent on the insurance policies was an act in fraud of the creditors of deceased, and was therefore void as against such creditors. It is the theory of appellants that the insurance policies were the community property of the deceased and respondent; that a gift of such community property was effected by deceased to respondent and became effective upon his death, at which time his estate was wholly insolvent; and that such gift was in fraud of creditors. As a further argument, it is urged on behalf of appellants that if a gift or transfer of the policies of insurance became effective prior to the death of deceased, it was a gift in contemplation of death and must be regarded as a legacy in so far as the creditors of deceased are concerned.

The case was tried before the court without a jury and after judgment rendered in favor of respondent comes before us on the judgment roll alone.

It appears that the insurance policies upon the life of deceased were issued and the premiums made payable upon the following dates: March 22, 1920, policy No. 387114 of the Pacific Mutual Life Insurance Company was issued, premium (\$85) made payable quarterly on the 22d days of June, September, December, and March of each year. Policy No. 464363 of the Pacific Mutual Life Insurance Company was issued July 24, 1922, premium (\$669) made payable in advance annually on the 24th day of July each year. Policy No. 500184 of the Pacific Mutual Life Insurance Company was issued June 5, 1923, premium (\$136.80) made payable annually in advance on the 5th day of June of each year. Policy No. 1159324 of the Northwestern Mutual Life Insurance Company was issued June 20, 1916, premium (\$63.38) made payable annually on the 20th day of June in advance of each year. Policy No. 1304260 of the Northwestern Mutual Life Insurance Company was issued January 2, 1919, premium (\$30) made payable quarterly on the 2d days of January, April, July, and October of each year. Policy No. 1304261 of the Northwestern Mutual Life Insurance Company was issued January 2, 1919, premium (\$30) made payable quarterly on the 2d days of January, April, July, and October of each year. Policy No. 104345 of the Northwestern Mutual Life Insurance Company was issued May 27, 1921, premium (\$61.26) made payable annually in advance on the 20th day of May of each year. Policy No. 1159323 of the Northwestern Mutual Life Insurance Company was issued June 25, 1923, premium (\$63.38) made payable annually in advance on the 20th day of June of each year. Policy No. 560727 of the Union Central Life Insurance Company was issued November 2, 1917, premium (\$38.40) made payable quarterly on the 2d days of February, May, August, and November of each year.

Policy No. 648474 of the Union Central Life Insurance Company was issued April 26, 1920, premium (\$82) made payable quarterly on the 2d days of July, October, January, and April of each year. Policy No. 707272 of the Union Central Life Insurance Company was issued December 22, 1921, premium (\$311.10) made payable annually in advance on the 17th day of December of each year.

The deceased became indebted to the appellants as follows: To the National Fire Insurance Company of Hartford during the months of June, July, August, September, October, and November, 1924; to the Colonial Fire Underwriters Agency of Hartford during the months of August, September, October, and November, 1924; to the Pennsylvania Fire Insurance Company of Philadelphia during the year 1924; to Fidelity & Casualty Company of New York during the year 1924; and to the North British & Mercantile Insurance Company during the year 1924.

On all issues of fraud the court found against the contentions of appellants. The portions of the findings essential to this appeal are as follows:

"That the said J. S. Ingalls was not insolvent at the time of his death; but that the estate of said J. S. Ingalls, deceased, is insolvent."

"That the policies of insurance referred to in the affirmative allegations contained in paragraph X of defendant's answer to the first cause of action set forth in plaintiffs' amended complaint on file herein, upon which defendant alleges she collected certain moneys from certain life insurance companies, are the same policies of life insurance herein found in which defendant was named the beneficiary thereof and upon which it is herein found certain sums of money herein specified were paid to her as such beneficiary. That at the time each of said policies of life insurance, in which it is herein found that defendant was named beneficiary thereof, was obtained, acquired and issued, and during all the times each thereof was maintained, and at the time each, every and all of the premiums thereon were paid, the said J. S. Ingalls was solvent and not in contemplation of insolvency. And that none of said life insurance policies was obtained, acquired or issued, or any premium thereon paid, and that the defendant herein was not named therein or permitted to remain as the beneficiary of any thereof, and defendant did not collect any of the proceeds from any of said life insurance policies, with the intent on the part of either said J. S. Ingalls or the defendant herein, to hinder, or delay, or defraud any creditor of said J. S. Ingalls, or any other person of his demands."

"That the only creditors the said J. S. Ingalls had, and of his estate, are those who after his death presented to and had allowed

by the said executrix and probate court claims against said J. S. Ingalls, deceased, and his said estate. That each and every one of the obligations of the said J. S. Ingalls for which such creditors so presented and had allowed such claims, was incurred at a time long subsequent to the respective times when the said J. S. Ingalls obtained and had issued each, every and all of the aforesaid life insurance policies, and at a time subsequent to the payment of most of the premiums thereon. That at the respective times each, every and all of the said policies of life insurance were obtained and issued the said J. S. Ingalls was not indebted to the plaintiffs, or to any, or either of them, or to any one of the persons, firms, or corporations, who presented to and had allowed by said executrix and probate court any claim against the said J. S. Ingalls, deceased, or to his said estate; that none of the plaintiffs, or any one of the persons, firms or corporations who presented to and had allowed by said executrix and probate court any claim against said J. S. Ingalls, deceased, or his said estate, was a creditor of the said J. S. Ingalls at the or a time when any of said policies of life insurance were obtained or issued. That each and every one of said policies of life insurance were obtained and issued, and most of the premiums thereon paid, at a time long prior to the time the said J. S. Ingalls became indebted to any one of the plaintiffs or to any one of the persons, firms or corporations who after the death of the said J. S. Ingalls presented to and had allowed by said executrix and probate court any claim against said deceased, J. S. Ingalls, or his said estate."

"That the defendant was not named as beneficiary in any of said life insurance policies as trustee, or otherwise, for the said J. S. Ingalls, or for any of his creditors."

"That the plaintiffs at the commencement of the trial of this action in open court expressly waived any and all right plaintiffs may have had to a judgment for the amount of premiums paid by the said J. S. Ingalls on account of said life insurance policies at a time when he, the said J. S. Ingalls, may have been insolvent."

The question presented upon this appeal is a new one in the jurisprudence of California. We have been cited to but few decisions of the courts of this state that are of material value to us in reaching our conclusions. The identical question has been passed upon many times by the courts of sister states which have held with surprising unanimity against the contention of appellants.

Appellants' arguments, based upon numerous California decisions and Code sections, are extremely ingenious and are forcefully presented. They base their theory of the case upon the doctrine announced in *Union Mutual*

Life Insurance Company v. Broderick, 196 Cal. 497, 238 P. 1034, 1038, and other kindred cases. In the *Broderick* Case, the deceased, Herbert D. Broderick, took out a policy of insurance on his life with his wife named therein as his beneficiary, with the right reserved to himself to change the beneficiary. In consideration of a loan to him of \$1,000 by his sister, he changed the beneficiary in the policy from his wife to his sister, who paid some of the subsequent premiums on the policy. In reaching its conclusions the Supreme Court held as follows:

"The policy of insurance in this case reserved to the assured the right to change the beneficiary. The rule in such cases is well stated in *New York Life Ins. Co. v. Bank of Italy*, 60 Cal. App. 602, 214 P. 61, wherein it is said: 'It is true that under a policy reserving to the assured the right to change the beneficiary the interest of the designated person prior to the death of the insured is a mere expectancy in an inchoate or incompleated gift, which is subject to revocation at the will of the insured, and that the power of revocation which would defeat it might be exercised up to the moment of his death. When, therefore, the deceased substituted the different enumerated persons in the place of his estate as beneficiaries he initiated a gift which, in the case of appellant, became complete by the death of the insured without revocation. And this is so notwithstanding that the premiums were paid from community funds. *McEwen v. New York Life Ins. Co.*, 23 Cal. App. 694, 139 P. 242; *Shoudy v. Shoudy*, 55 Cal. App. 447, 203 P. 437.'"

See, also, *Blethen v. Pacific Mutual Life Insurance Co.*, 198 Cal. 91, 243 P. 431; *New York Life Insurance Co. v. Dunn*, 46 Cal. App. 203, 188 P. 1028; *New York Life Insurance Co. v. Bank of Italy*, 60 Cal. App. 602, 214 P. 61; *Estate of Castagnola*, 68 Cal. App. 732, 230 P. 188; *Mutual Benefit Co. v. Clark*, 81 Cal. App. 546, 254 P. 306; *Denike v. Denike*, 86 Cal. App. 493, 261 P. 322; *Dotson v. International Life Insurance Co.*, 89 Cal. App. 653, 265 P. 357; *Blackburn v. Merchants' Life Insurance Co.*, 90 Cal. App. 362, 265 P. 882.

From the doctrine we have quoted from the *Broderick* Case, appellants next pass to four sections of the Civil Code, which provide as follows:

Section 1149. "A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver."

Section 1153. "A gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver."

Section 3440. "Every transfer of personal property, other than a thing in action, or a

ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer. * * *

Section 3442. "In all cases arising under section twelve hundred and twenty-seven, or under the provisions of this title, except as otherwise provided in section thirty-four hundred and forty, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

To the foregoing sections cited by appellants we add, as pertinent, the following section of the same Code:

Section 3439. "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

[1] With these provisions of law before them, counsel for appellants argue that respondent had only an expectancy, and not an estate, in the benefits to be derived under the policies of insurance; that this expectancy did not ripen into an interest until the death of deceased; that upon the death happening, a gift of the benefits occurred from the husband to the wife; that as the gift was without consideration, and as the husband was insolvent at the time, it was void as against his creditors. As an alternative proposition they argue that if the gift did not occur at the time of the death of the husband, it took place at some prior date and was in contemplation of death and therefore void. We need spend no time on this latter proposition. The trial court found all the facts against the contention of appellants, upon which they

must rely to establish a void gift *inter vivos*. As the evidence is not before us, we must assume that it supported these findings which are, therefore, binding upon us.

The trial court further found that J. S. Ingalls was not insolvent at the time of his death. It also found with great particularity that the value of his estate was \$17,966.58, and his debts, \$44,591.34. In view of this latter finding we will assume that Ingalls was insolvent at the moment of his death. As the court found that at the times all the premiums on the insurance policies were paid, Ingalls was solvent, and, as the last premium was paid on November 2, 1924, we will further assume that the insolvency occurred after that date, and at the time of or just before his death, on November 26, 1924. The trial court found that the insurance premiums were paid with either the separate funds of deceased, or with the funds of the community. Counsel for appellants have assumed that community funds were used for this purpose.

[2] The record is silent upon the question of whether the demands of appellants were the separate debts of deceased, or obligations of the community. In the absence of the testimony, we must assume that they were of such a character as to sustain the findings and judgment. *E. E. McCalla Co. v. Sleeper* (Cal. App.) 288 P. 146.

[3] Under the law as it now stands, we would probably hold that a wife named as beneficiary in an insurance policy on the life of her husband, the premium having been paid from community funds, and in which the right had been reserved to the insured to change the beneficiary, has a greater interest in the insurance than a bare expectancy which might be defeated by the caprice of her husband. *Blethen v. Pacific Mutual Life Insurance Co.*, supra; *Union Mutual Life Insurance Co. v. Broderick*, supra. For the purpose of this opinion, however, we will assume that the contention of appellants on this phase of the case is correct, and using this assumption, we will then consider the question of whether or not there was any fraud on the part of either the husband or the wife, in the change of the rights of the wife from a mere expectancy to a vested interest in the insurance benefits.

Section 3440 of the Civil Code makes every transfer of personal property void as to creditors under the conditions specified therein. Section 3442 of the Civil Code provides that every transfer of property made or given voluntarily, or without consideration, void as to existing creditors. Section 3441 of the same Code gives the creditor the right to avoid the act of the debtor where the fraud obstructs the right of the creditor to take the property affected.

Certainly, in the case before us there was no fraud on the part of any one in the act of the deceased in taking out the policies of insurance on his life. He was solvent at the time and none of the appellants were then his creditors. There was nothing wrong in naming his wife as beneficiary in these policies. The law looks with favor upon the attempt of the husband to provide a competence for his widow. There was nothing wrong in his paying the premiums on this insurance. He was solvent when all these premiums were paid. If they had not been paid the policies would have lapsed and appellants would not be before the courts pressing this suit for the relief they desire. At the time the great majority of the premiums were paid appellants were not the creditors of deceased. Of what, then, must the appellants complain, and upon what must they base their charges of fraud? There are but two elements in the case left to them, namely, the death of deceased and the ripening of the expectancy in the insurance benefits into an interest by operation of law. Can fraud be predicated solely upon death and the operation of law? Death has cheated many creditors and canceled many debts, and the law has frequently placed property beyond the reach of creditors. We do not believe that a dead man can commit a fraud even when aided in the change of an interest in property by the operation of law. The change in the interest came only after death. As long as life remained in Ingalls the status of the parties and the property remained unchanged. When the breath of life departed the change occurred. The same moment that made respondent a widow vested in her the right to the benefits under the insurance policies. The community of husband and wife was then dissolved.

"Fraud is either actual or constructive." Section 1571, Civ. Code. Actual fraud consists of acts committed by a party. Section 1572, Civ. Code. Constructive fraud is a breach of duty by a party or an act or omission which the law specially declares to be fraudulent. Section 1573, Civ. Code. As we have seen, the Code sections relating to fraudulent instruments relate to transfers of property. Actual fraud and fraudulent transfers imply an act on the part of one committing the fraud. Implied fraud arises from an act or omission or a breach of duty. We find nothing in the record to show an act or omission on the part of any party to the contracts of insurance, either during the insolvency of the insured or in contemplation of such insolvency that would bring the case within the Code provisions. The policies were issued and the premiums paid prior to the insolvency of deceased. The best of faith on the part of the insured, the insurance companies, and the beneficiary appears in the issuance of the

policies and the payment of the premiums and with everything connected with the insurance up to the time of the death of the insured. There was no change in the relation of the parties and no act or omission upon which to predicate fraud up to the moment that life departed from the body of the insured. A dead man cannot act. Here the law acted for him. What omission or breach of duty can be charged to deceased? The failure to live and pay his debts is the one suggesting itself. Death generally comes unasked and unsought. It is an involuntary happening that most people desire to avoid as long as possible. An act implies a will to perform. An omission indicates a failure to do an act. Both imply a will to do or not to do something that should or should not be done. The involuntary fact of death is not an act by which one can commit a fraud, nor is it an omission to perform a duty from which constructive fraud may be inferred. The "transfer" of property in this case was consummated, not by an act or omission on the part of deceased, but by his death and the "act" on the law itself.

We find the reasoning used by the Court of Appeals of Colorado in the case of *Hendrie & Bolthoff Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 P. 209, 211, particularly applicable to the case before us. The court said:

"Besides, the contract is based upon and its fruits finally realized, if at all, because of the insurable interest of the beneficiary in the life of the assured. The latter is equally as essential, and is equally an important consideration of the contract. Upon what principle or theory, then, can it be said that rights based upon this insurable interest, which is an interest or right purely personal to the beneficiary, can inure to the benefit of the creditors of the assured? Can they say to the wife: 'Though it is true that this fund was realized upon your insurable interest in the life of your husband, not upon his interest in his own life, nor upon our interest in it as creditors, yet, because he paid the cash premiums required while insolvent, we should subject to the payment of our debts, not only so much of the fund as equals the amount of premiums so paid, which is all he took from his estate, and all of which he deprived us, but we will take the whole fund. We will take back that which he took from us, and also that which could not have been secured without your insurable interest in his life.' The questions, in our opinion, suggest their own answer.

"Again, the fund, which is the property against which the creditors seek to enforce their claims, has not come into existence, has not become property till after the death of the debtor. How, then, can it be said that he made a voluntary or fraudulent conveyance

of that which did not exist during his life? If a creditor's rights would attach to any portion of the proceeds of the insurance, would it not be more reasonable to say that in such case the right of recovery would be limited to the amount of funds so diverted, which in this instance would be the aggregate amount of premiums paid by the insolvent debtor? This would be what he gave to or voluntarily expended for the benefit of his wife. The fund, realized by her was not from the payment of the premiums only, but from and by reason of, in addition thereto, her insurable interest in his life, which he neither gave nor conveyed to her, and in which he had no interest. In this state a married woman has a right to acquire, hold, manage, and convey her own separate property, free from any claim of her husband or of his creditors. Suppose that an insolvent husband should give to his wife \$1,000, and that such a gift was under such circumstances as to make it manifestly fraudulent against his creditors; and suppose that his wife, by prudent management of the money, and by successful speculation, should, in course of time, acquire property of the value of \$5,000. Could it be successfully contended that the husband's creditors could enforce their claims against this property to the full extent of its value? Obviously not. Certainly, in the absence of actual fraud upon the part of the wife, their right would be limited to the amount of the original money gift, with interest. This was what he gave in fraud of the creditors; this, what he took from them. It became none the less her absolute property because she might afterwards be compelled to repay it; and upon no principle of either law or justice could she be required to answer to her husband's creditors for its accretions while it was her property. All which the creditors could have demanded from the debtor was the amount of the gift had he retained it, and certainly this was all which they could demand from the donee or grantee. Upon precisely the same principle it would seem clear that the proceeds of life insurance effected in favor of an insolvent debtor's wife could be chargeable, if at all, with his debts only to the extent that he, while insolvent, had used the funds of his estate to secure and carry the insurance."

The following cases from other jurisdictions tend to support the position of respondent: *Tyler v. Treasurer*, 226 Mass. 306, 115 N. E. 300, L. R. A. 1917D, 633; *Pullis v. Robison*, 73 Mo. 201, 39 Am. Rep. 497; *Sternberg v. Levy*, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438; *Harriman National Bank v. Huie* (C. C. A.) 249 F. 856; *Bailey v. Wood*, 202 Mass. 549, 89 N. E. 147, 25 L. R. A. (N. S.) 722; *Shaver v. Shaver*, 35 App. Div. 1, 54 N. Y. S. 464; *Pence v. Makepeace*, 65 Ind. 345; *Stigler v. Stigler*, 77 Va. 163; *Pinneo v. Goodspeed*, 120 Ill. 524, 12 N. E. 196; *Chapin v.*

Fellowes, 36 Conn. 132, 4 Am. Rep. 49. Citation of further authorities might be greatly extended, but no good could come of it. A contrary rule has been adopted in but few states.

Appellants further contend that under the provisions of subdivision 18 of section 690 of the Code of Civil Procedure, it is their right to have applied to their claims the benefits of all insurance policies on the life of deceased whose annual premium payments were in excess of \$500. They admit that respondent is entitled to receive and retain the benefits purchased by an annual premium up to that amount. In support of this argument they cite the cases of *Hall v. Hess*, 97 Misc. Rep. 331, 161 N. Y. S. 418; *Stone v. Knickerbocker Life Insurance Company*, 52 Ala. 589; *Fearn v. Ward*, 80 Ala. 555, 2 So. 114; *Kimball v. Cunningham Hardware Co.*, 197 Ala. 631, 73 So. 323; *Red River National Bank v. DeBerry*, 47 Tex. Civ. App. 96, 105 S. W. 998; and *Holmes v. Marshall*, 145 Cal. 777, 79 P. 534, 69 L. R. A. 67, 104 Am. St. Rep. 86, 2 Ann. Cas. 88. The cases from New York, Alabama, and Texas turned upon the particular provisions of the debtor's exemption laws of those states. On account of the marked difference between these laws and the provisions of our Code, they do not furnish authority for a like holding here.

In the case of *Holmes v. Marshall*, supra, the following facts appear: J. F. Jenkins died intestate leaving Annie J. Jenkins as his surviving widow. He had three policies of insurance on his life, one payable to his estate in the sum of \$982.50, and the others in the total sum of \$1,484 payable to his widow. The money was paid to the respective beneficiaries, and after deducting the expenses and costs of administration, the balance, which was paid to the estate, was set aside to the widow as exempt property. The widow placed these moneys in her bank account where they were attached by Holmes. The attachment was dissolved and an appeal taken. The Supreme Court sustained the order dissolving the attachment, holding that the money was exempt from all executions. The question which confronts us was not involved in this case and was not considered or decided by the court.

We are brought to the consideration of the question of whether or not insurance benefits payable to the widow, in excess of the amount that could be purchased with an annual premium of \$500, can be subjected to the debts of her deceased husband. In considering this phase of the case we are faced with the fact that the expectancy of the wife in the insurance did not vest and become an interest until the moment she became a widow, at which time the community was broken. The only value taken from the property of the husband

in acquiring the insurance was the premiums paid. The benefits paid to the widow were the results of the payments of these premiums and her insurable interest in her husband.

[4] Statutes exempting property from the levy of an execution are enacted by the Legislature on grounds of public policy for the purpose of providing for a debtor and the members of his family (*Estate of Millington*, 63 Cal. App. 498, 218 P. 1022), and it is the policy of the law to construe the exemption statute liberally (*Crown Laundry Co. v. Cameron*, 39 Cal. App. 617, 179 P. 525), so as to carry out the intention of the Legislature (12 Cal. Jur. 332).

[5] If this action were based upon debts of the wife, the answer to the question would be simple. If the insurance policies had matured and the benefits had been paid to the husband, and the action was against him upon his debt during his lifetime, our course would be clear. But the debt is that of the husband, and the action is against the wife after his death. Section 690 of the Code of Civil Procedure is a part of chapter 1 of title 9 of this code. This title is headed "Execution of Judgment in Civil Actions." Section 690 is headed "What Exempt from Execution." The preceding sections of the chapter relate to the levy of the execution by the judgment creditor upon the property of the judgment debtor. From the context of the chapter it would seem to us that the provisions of section 690 were intended by the Legislature to relate to exemptions from execution against the judgment debtor and not a stranger to the indebtedness. With this conclusion reached, we are of the opinion that the limitations on the amount of insurance exempt, contained in subdivision 18 of section 690 of the Code of Civil Procedure, would only apply in an action by the creditor against his judgment debtor who has received insurance moneys in excess of an amount purchased by an annual premium of \$500. The limitation does not apply in an action of a creditor of the husband on the husband's debt against a stranger to the indebtedness who happens to have been the beneficiary in insurance policies and to have received the money thereon. Had any of the premiums been paid by the insured during his insolvency, many cases uphold the right of the creditor to recover such premiums. However, this question is not involved in this case in view of the waiver of appellants contained in the findings, and the findings as to the solvency of the insured when the premiums were paid.

Judgment affirmed.

We concur: BARNARD, J; WARNER, Justice pro tem.

PEOPLE v. BIRD.*

Cr. 1976.

District Court of Appeal, Second District,
Division 2, California.

Oct. 20, 1930.

Rehearing Denied Nov. 3, 1930.

Hearing Granted by Supreme Court
Nov. 17, 1930.

1. Constitutional law ⇨12.

Exception to general and prevailing rule must be strictly construed and not extended beyond its letter.

2. Indictment and Information ⇨2(3).

In construing constitutional provision, relating to prosecutions by information, presumption must be indulged there was no intention to affect existing system any further than plain terms required (Const. art. 1, § 8).

Const. art. 1, § 8, provides that offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by magistrate, or by indictment, with or without such examination and commitment as may be prescribed by law.

3. Constitutional law ⇨80(1).

Legislature has no power to confer upon district attorney, as executive officer, judicial authority (Const. art. 3, and art. 6, § 1).

Const. art. 6, § 1, vests judicial power of state in Senate sitting as court of impeachment, in Supreme Court, District Courts of Appeal, superior courts, such municipal courts as may be established, and such inferior courts as Legislature may establish, and article 3 distributes and divides powers of government into three separate departments.

4. Criminal law ⇨1167(1).

Where magistrate committed defendant for manslaughter, but district attorney filed information charging him with murder, and jury returned verdict of manslaughter, district attorney's error required reversal of judgment (Pen. Code, § 809; Const. art. 1, § 8).

5. Criminal law ⇨830.

When requested instruction contains part which should not be given, it is not error to refuse the whole.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Owen R. Bird was convicted of manslaughter, and he appeals.

Reversed, with directions.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 300 P. 23.

David Welts and Cooper & Collings, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the State.

Joseph W. Ryan, of Los Angeles, *amicus curiæ*.

IRA F. THOMPSON, J.

A complaint against the defendant in this case was filed in the municipal court on December 3, 1929, charging him with murder. A preliminary hearing was had and the magistrate refused to bind him over for the offense mentioned, but committed him to the sheriff to await trial for the crime of manslaughter. In due course the district attorney filed an information charging him with manslaughter in accordance with the commitment. Subsequently and on January 23, 1930, the district attorney made a motion for leave to file an amended information, which motion was denied. On the following day, with the consent of the court, the information was dismissed and a new complaint charging murder was filed in the municipal court. Again a preliminary hearing was had before another judge of that court, and again the magistrate declined to hold the defendant for murder, but committed him for manslaughter. On this occasion, however, the district attorney, claiming to act under the authority of section 809 of the Penal Code, filed an information by which he charged the defendant with murder. A trial was had and the jury returned a verdict of guilty of manslaughter. Prior to the trial and after the filing of the second information the defendant made a motion to set it aside on the ground that he had not been legally committed, and for the further reason that the offense alleged in the information was not shown by the evidence taken at the preliminary hearing. This is an appeal from the judgment pronounced upon the verdict.

The first point, and the one most insistently pressed upon us by the appellant as well as *amicus curiæ*, is that section 809 of the Penal Code is unconstitutional in so far as it purports to authorize the district attorney to charge an offense not named in the order of commitment. The enactment reads as follows: "When a defendant has been examined and committed, as provided in section 872 of this code, it shall be the duty of the district attorney, within fifteen days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offense. The information shall be in the name of the people of the State of California, and subscribed by the district attorney, and shall be in form like an indictment for the same offense. It may charge the offense, or offenses, named in the order of commitment, or any offense, or offenses, shown by the evidence tak-

en before the magistrate to have been committed."

It is asserted that the section is in violation of section 8 of article 1 of the state Constitution, which reads: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

The first question which presents itself for consideration concerns the reason why the people wrote this provision into the fundamental law and particularly into the article defining and declaring a bill of rights. When the barons of England exacted from King John a declaration of their rights and liberties they incorporated in the Great Charter these words: "No freeman shall be *taken*, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land." (Italics ours.) This provision alone, says Blackstone, "would have merited the title it bears, of the great charter" because it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land." 4 Blackstone's Comm. 424. In Cooley's Constitutional Limitations (vol. II, p. 736) we read concerning this section of the Magna Charta this language: "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case [4 Wheat. 518, 4 L. Ed. 629]: 'By the law of the land is most clearly intended the general law; a law which *hears before it condemns*; which *proceeds upon inquiry*, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which *may pass under the form of an enactment* is not therefore to be considered the law of the land.'" (Italics ours.) Mr. Webster went further than the quotation evidences. He continued: "Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgment and decrees, not to declare the law or administer the justice of the country." Any student of history is cognizant of the fact that this section of the great charter was not always proof against the seizure and incarceration of men contrary to the "law of

the land" and the dictates of natural justice. For example, let us call to mind how the Duke of Buckingham was ordered to the Tower by Henry VIII, in defiance of the traditional law, the first in this sovereign's long list of martyrs. It would be the work of supererogation to set down further instances in English history where for one political consideration or another men were deprived of their liberty without the formality of indictment. Suffice it to say that such acts and the combining of the power of judge and prosecutor accounted for a not inconsiderable part of the immigrants to our shores. Nor is it surprising that with a background of many failures to observe the greatest section of the pledge of King John, the colonists viewed with suspicious eye the entire legal profession. When the time came for them to declare their independence they voiced their disapproval of the use of a conglomerate mixture of judicial and executive power by the sovereign in these words: "He has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers" and "for depriving us, in many cases, of the benefits of trial by jury" and "for transporting us beyond seas to be tried for pretended offenses." So important did this phase of government appeal to those upon whom fell the duty of framing the fundamental law that the general subject with which we deal was split into three articles in the Bill of Rights, made a part of the Constitution by the first ten amendments. One of these (Amendment 7) provides for jury trials "in suits at common law," another (Amendment 6) guarantees the accused in criminal prosecutions "the right to a speedy and public trial, by an impartial jury," and the third (Amendment 5), the one which directly bears upon our problem, reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." It is impossible to accurately determine the weight and measure of words without having in mind to some degree at least an appreciation of those conditions which led up to their being set down. For practical illustrations of what may result in the absence of the efficacious acknowledgment of the principle of government herein involved, attention might be directed to the French Revolution, or to accounts of the recent upheaval in Russia, or to informal trials in China. But sufficient has been said to indi-

cate the reason why the Constitutions of the various states of the Union contained articles similar to those found in our federal Constitution. In the Constitution of California, adopted in 1849, section 8 of article 1 was almost a repetition of the quoted article of the federal Constitution. It reads: "No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may keep with the consent of Congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on presentment or indictment of a grand jury; and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." In the constitutional convention of 1878-79, as a pure matter of "economy in the administration of government" (Proceedings of Constitutional Convention, p. 1177), the section was made to read as we have set it forth herein, but not without opposition, 22 of the delegates being in favor of retaining the old section. In other words, the majority believed that it would be more economical to have a hearing before a magistrate and a commitment by him, and that the liberty of the citizens would be substantially protected by a preliminary trial before a member of the judicial system, where impartiality reigns.

[1, 2] We are thus brought to a rule of construction. It is obvious from the history of the provision which we have hastily sketched that our people and our foremost students of government have considered the guaranty against being charged with an infamous crime without the indictment by a grand jury, of the very first importance, a system which we may pause to remark has continued to work successfully in federal courts. The esteem in which it has been held is well expressed in *Jones v. Robbins*, 8 Gray (Mass.) 329, as follows: "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." As an exception to the general rule the people of California have provided for the alternative of a hearing before and the commitment by a fair, impartial, and inde-

pendent magistrate. An exception to the general and prevailing rule is to be strictly construed and not extended beyond its letter. In other words, the presumption must be indulged that there was no intention to affect an existing system or policy any further than the plain terms of the exception requires. Lewis' Sutherland on Statutory Construction § 487. In the present instance we think the presumption simply confirms the plain meaning of the words employed. In simple language the constitutional provision requires a hearing before and a commitment by a magistrate in lieu of an indictment by a grand jury. It is immaterial what the district attorney thinks the evidence shows—the important thing is, What does the magistrate judge to be disclosed by that evidence? The district attorney is elected to prosecute and not to judge.

[3] Of course, it stands to reason (and we doubt if anyone would deny it) that the Legislature has not the power to confer upon the district attorney as an executive officer judicial authority, in the sense in which we now employ that term, in the face of the provisions of article 6, § 1, of the Constitution, vesting the judicial power of the state "in the senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts, such municipal courts as may be established * * * and such inferior courts as the legislature may establish * * *," and article 3 thereof distributing and dividing the powers of government into the three separate departments. Such was the holding in the case of *In re Sims*, 54 Kan. 1, 37 P. 135, 25 L. R. A. 110, 45 Am. St. Rep. 261, where similar constitutional restrictions prevented the legislative action from becoming effective.

There is another approach to our present problem which has an important bearing in any effort to solve the question. After the section of the Constitution was adopted there existed grave doubts as to whether the exception provided for therein constituted due process of law. Justice Matthews, the author of the prevailing opinion in *Hurtado v. California*, 110 U. S. 517, 4 S. Ct. 111, 122, 292, 28 L. Ed. 232, characterized the question as "one of grave and serious import, affecting both private and public rights and interests of great magnitude." By the opinion therein, from which Justice Harlan dissented in an exhaustive statement of his reasons, it was determined that the substitution of a hearing before and a commitment by a magistrate in the place of an indictment did not do violence to the "due process of law" clause contained in the Fourteenth Amendment to the federal Constitution. It is interesting to speculate upon the answer which would have been given by the court had the constitutional provision contained the subject matter of the present legislative enact-

ment. Certain it is that that authority cannot possibly be construed to substantiate the argument of respondent here. In fact, it is directly opposed. It is there said: "Tried by these principles, we are unable to say that the *substitution* for a presentment or indictment by a grand jury of the proceeding by information after *examination* and *commitment* by a magistrate, *certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution is not due process of law.* It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the [sic] statute of California, it carefully considers and guards the substantial interest of the prisoner." (Italics ours.) How different from the present situation, where, as in the case at bar, the information, it is said, may not only lack but be directly in conflict with the magistrate's certificate of probable guilt; and where the accused may, in practice, be actually deprived of the aid of counsel in examining the witnesses produced by the prosecution because he may be denied knowledge before hand of what the district attorney, secretly perhaps, intends to include in the information. We do not believe that the American people *have become*, or that we should be, so insensible to the liberties of the person as to intrust the accusation and confinement of men to the judgment of a public prosecutor, who, no matter how honest he may be, is naturally biased and prejudiced against the accused from the time he determines to prosecute. Rather do we believe we should adhere to the spirit of that enunciation of Blackstone (4 Blackstone Comm. 349-50) as follows: "The founders of the English law have, with excellent forecast, contrived that no man shall be called to answer the King for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of an indictment, information or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as the *palladium* remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make), but also from all *secret machinations which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience.* (Italics ours.) And however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be

again remembered that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."

We have not overlooked the fact that respondent relies upon the authority of *People v. Sanders* (Cal. App.) 283 P. 136, with assurance that it disposes of every contention advanced by the appellant herein. The majority opinion in that case proceeds upon the assumption that the change in the law is one regulating procedure and overlooks the very substantial and fundamental right of the individual not to be publicly charged and tried for an heinous offense except upon establishment of probable cause. Let us consider the concrete case with which we now deal. Two magistrates decided that there was reason to believe the appellant was guilty of manslaughter and not of murder. Perhaps the jury would not have determined he was guilty of manslaughter had he not been tried for murder. Can any one be so bold as to assert that the defendant was not irreparably and immeasurably damaged by being publicly accused and tried for murder? If so, let him without just cause be likewise charged and he will realize the impairment of a substantial right. Nor have we overlooked the dissenting opinion of Justice Houser in that case, with whose views we are in thorough accord. Were it not for the length of this opinion we would be inclined to set it forth in full herein. The illustration which he instances of a man being bound over for burglary and informed against for rape is sound and may conceivably be extended to any other infamous crime. His comment upon the authority of *People v. Nogiri*, 142 Cal. 596, 76 P. 490, constitutes a proper construction of the language of that case and demonstrates the impossibility of conferring upon the district attorney the "judicial, discretionary and appellate power" to ignore the commitment of the magistrate in the face of the constitutional provision requiring a hearing and a commitment by that judicial officer. Supporting our views and those of the dissenting opinion, we refer to an excellent comment upon the case of *People v. Sanders*, su-

pra, in 18 California Law Review, 324, wherein, in addition to many authorities cited, it is pointed out that there is a very great difference between allowing the prosecutor the right to charge the offense in language different from that of the magistrate and charging an offense different from the one named in the commitment.

[4] It cannot be said that the error here found to exist does not require a reversal of the judgment. We cannot say that the jury was not largely induced, by the charge of murder and the introduction of evidence relevant thereto and the intimations necessarily attendant thereupon, to return their verdict, and a stigma was necessarily cast upon appellant, in the eyes of his fellow citizens, by the greater charge. The case in this particular is somewhat similar to that of *People v. Dugat*, 77 Cal. App. 263, 246 P. 344.

It is argued by appellant that the evidence is insufficient to justify the verdict of the jury, but in this we cannot agree. While the evidence is capable of the construction that he was not guilty, it is also susceptible of the construction that he was.

Complaint is also made of the failure of the court to give certain instructions. We have examined them, together with those given, and have concluded that no error was therein committed.

[5] The requested instruction, which was not given and which is made the basis of appellant's most insistent argument, contains this paragraph: "You are instructed that one who has ordered an intruder to leave his home has the right to draw a weapon and hold it in readiness as he goes toward the intruder and orders him to depart." There is no evidence to which this portion of the instruction could be made to apply. According to appellant's own testimony, he did not hold the gun in readiness, but actually fired it for the purpose of frightening the deceased. It is a familiar rule that, when a requested instruction contains a part which should not be given, it is not error to refuse the whole. *People v. Golsh*, 63 Cal. App. 609, 219 P. 456.

Judgment reversed, with directions to the trial court, upon request therefor, to permit amendment of the information to make it accord with the commitment and thereupon to retry the cause.

We concur: WORKS, P. J.; CRAIG, J.

109 Cal. App. 102

VALE et al. v. CITY OF SAN BERNARDINO
et al.
Civ. 212.

District Court of Appeal, Fourth District,
California.

Oct. 20, 1930.

1. Appeal and error ⇨105.

Order of nonsuit, entered on minutes of court, is treated on appeal as judgment of nonsuit (Code Civ. Proc. § 581).

2. Municipal corporations ⇨721(2).

Evidence held insufficient to show diversion from park purposes by construction of log cabin representing pioneer home, used by pioneers' societies.

Evidence showed that log cabin in question was also used by Grand Army of the Republic, Women's Relief Corps, and Spanish American War Veterans. It was built by societies having for their object, besides benevolent and social purposes, the collection of historical data, formation of libraries, and provision for memorial hall for pioneers. Their membership was limited to early settlers and their descendants; they had no password; their meetings were open to public; and cabin would be opened at any time on request of visitors.

3. Municipal corporations ⇨721(2).

Although public park must not be diverted to other purposes, use thereof for buildings or purposes incidental to use as park will be upheld.

4. Municipal corporations ⇨721(2).

That log cabin in park, representing pioneer home, was open to public, did not show diversion from park purposes, or interference with free public use.

5. Municipal corporations ⇨721(2).

That pioneers' societies, permitted to use log cabin in public park, denied similar permission to rival society, did not alone show unlawful use of park.

6. Municipal corporations ⇨721(2).

Use of land for park purposes was not affected merely because pioneers' societies managed their meetings in log cabin in park.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by M. W. Vale and others against the City of San Bernardino and others. From an order of nonsuit, plaintiffs appeal.

Affirmed.

John L. Campbell, of San Bernardino, and R. E. Bledsoe, for appellants.

Fred A. Wilson, W. E. Byrne, and Martin J. Coughlin, all of San Bernardino, for respondents.

BARNARD, J.

This is an action in equity to compel the defendants to remove from a public park in the city of San Bernardino, commonly known as Pioneer Park, a log cabin with additions thereto. The material parts of the deed by which the land in question was acquired by the city read as follows:

This Indenture, made the thirtieth day of November, in the year of our Lord one thousand eight hundred and seventy-two, between Thaddeus Amat, Bishop of Monterey and Los Angeles, an ecclesiastical corporation sole of the religious persuasion known as the Catholic, party of the first part, and the 'Inhabitants of the Town of San Bernardino' the parties of the second part:

"Witneseth:

"That the said party of the first part, for and in consideration of one dollar to him in hand paid, by the said parties of the second part, the receipt whereof is hereby acknowledged, and the further consideration hereafter specified, has remised, released and by these presents doth remise, release and forever quit claim unto the said parties of the second part, and to their successors, all that certain lot, piece or parcel of land situate, lying and being in the Town of San Bernardino, County San Bernardino, State of California, and bounded and particularly described as follows, to-wit:" (Here follows description of property, containing 5.12 acres.) "Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of in or to the said premises, and every part and parcel thereof, with the appurtenances. To have and to hold, all and singular the said premises, together with the appurtenances unto the said parties of the second part and to their successors forever.

"And for a further consideration binding upon the parties of the second part, and this conveyance is made upon the express consideration, that the premises hereby conveyed, shall be and remain forever a public plaza or square for the use and enjoyment of the parties of the second part and their successors—this conveyance revokable should other disposition be made of said premises."

[1] The complaint alleges that on or about July 1, 1911, and, since, the defendant city, by and through its mayor and common council, in violation of the trust created by the said deed, has permitted private buildings (being the log cabins referred to) to be erected on the premises for private use and not for the use and benefit of all of the inhabitants of the city, and has permitted the San Bernardino Society of California Pioneers and the Golden State Club to occupy the same to the entire exclusion of all other societies and all other persons. Also, that the mayor and common council have neglected and refused to comply with a request that said buildings be removed. The plaintiffs ask for an order compelling the specific execution of said trust, by directing the removal of the buildings in question. After an answer was filed a trial was had and at the conclusion of plaintiffs' evidence a motion for nonsuit was made, which was later granted by the court. The order of nonsuit was entered upon the minutes of the court, and is herein treated as a judgment of nonsuit. Code Civ. Proc. § 581; *Brown v. Sterling Furniture Co.*, 175 Cal. 563, 166 P. 322. This appeal is from that order.

The respondents contend the order should be affirmed for a number of reasons, including the following: That the notice requesting a reporter's transcript was not filed within the time required by law; that the appellants have failed to set forth in their brief sufficient of the record to justify a reversal; that the plaintiffs have no legal right to maintain such an action; that an adequate remedy exists at law; that by the deed referred to the city became vested with title to the property in fee simple, without reservations or conditions; and, finally, that there is no evidence in the record to show that the buildings or any use made of them violate any park purposes.

[2] We think there is no merit in the first point, and, while one or more of the others could not be lightly dismissed, were it necessary to consider them, our views upon the last point raised, which is the meat of this controversy, makes the consideration of the other grounds named unnecessary. Assuming that the action may otherwise be maintained, and that the property in question was restricted by the above deed to use for park purposes only, we think the evidence, even when viewed in the light most favorable to appellants, shows no diversion from or violation of such use.

The evidence, including stipulations which is relied on by appellants as showing a use of the property for other than park purposes, is thus summarized in their brief: "The salient facts thus established, are that with permission of defendant, City of Bernardino, its Mayor and Common Council, defendants, San

Bernardino Society of California Pioneers, and the Golden State Club, erected and placed in Pioneer Park, the premises described in plaintiffs' complaint, the log cabin, with its additions, and that said societies at the commencement of this action were occupying the same; that said defendants are associations which embrace members only possessing certain qualifications, set forth in their respective constitutions, and by-laws; that said defendants have absolute control of the management and conducting of their respective meetings which are held in the cabin in said park; that the members of said Golden State Club pay dues or some sum as membership fees; that plaintiffs requested said City and Common Council to remove said cabins, but that they have wholly neglected and refused to comply with such request. As might have a bearing upon the issue involved, it will be noted—that it is further stipulated that the only buildings upon this ground, is said log cabins, and the Auditorium, the latter not involved in this case."

The only other such evidence which is called to our attention by appellants is a request signed by more than fifty citizen pioneers, including all of the plaintiffs, addressed to the San Bernardino Society of California Pioneers asking permission to use the log cabin in question for one night a week. In their reply, as shown by the record, said society denied permission to use the building "for the purpose of organizing a rival Pioneer Society," for the reason that "the old pioneers concluded, after discussing the matter, that the granting of such application would lead to dissension instead of harmony among the pioneers." This reply then proceeds to disclaim any intention of depriving any pioneers of the use of the cabin; expresses regret that the signers of the petition have seen fit to refrain from participating in the use thereof; urges the lack of any good reason to justify the organization of a rival or second pioneer society; and invites the petitioners to return and use the premises, not only one evening a week, but every evening and every day.

It also appears from the record that, in addition to its use by the Pioneer Society and the Golden State Club, respondents herein, the log cabin in question is also used by the Grand Army of the Republic, the Women's Relief Corps, and the Spanish American War Veterans. It appears that the Pioneer Society and the Golden State Club are affiliated organizations, and that their objects, in addition to benevolent and social purposes, are to collect and preserve information and facts in connection with the early settlement and history of California, especially of San Bernardino county; to form libraries and cabinets; to provide for a memorial hall to perpetuate the memory of the early pioneers; and that their membership is limit-

ed to early settlers and their descendants. It further appears that they have no password; that their meetings are not secret, but are open to the public at all times; that any person may take part in such meetings even to the extent of making a speech; and that, even at times when the building is not open, it will be opened, upon request, for the pleasure of any one desiring to visit it.

[3] The rule is that, where land is dedicated as a public park, it must be so used, and not diverted to other and different purposes. *Slavich v. Hamilton*, 201 Cal. 299, 257 P. 60, 61. On the other hand, the use of such land for buildings or purposes which are incidental to its use as a public park will be upheld. *Hall v. Fairchild-Gilmore-Wilton Co.*, 66 Cal. App. 615, 227 P. 649. In *Slavich v. Hamilton*, supra, the court said:

"It is a matter of public knowledge that the erection of hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories, and the like in public parks is common. *Spire v. City of Los Angeles*, 150 Cal. 64, 66, 11 Ann. Cas. 465, 87 P. 1026. The court was not, at the time that case was before it, nor has it since been, 'pointed to any authority where it has been regarded as a diversion of the legitimate uses of the park to establish them, but, on the contrary, their establishment has been generally recognized as ancillary to the complete enjoyment by the public of the property set apart for their benefit.'"

In the case just cited it was sought to erect a veterans' memorial building upon land which had been given to the city of Oakland by private individuals for use as a public park, and which had been further dedicated to such use and purposes by the city. The proposed building was to "be used primarily as a meeting place and memorial hall for organizations whose membership is composed of soldiers, sailors, and marines who have served the United States of America honorably in any of its wars," it being contemplated that it would be used by the Grand Army of the Republic, the Veterans of Foreign Wars, the American Legion, and other patriotic organizations. The court held that this intended use was not only a public use, but was one consistent with the park purposes to which the land had been dedicated, the court using this language: "The erection of monuments and memorials in public parks has long been recognized as a use consistent with park purposes. *Brahan v. Meridian*, 111 Miss. 30, 71 So. 170; *Parsons v. Van Wyck*, 56 App. Div. 329, 67 N. Y. S. 1054. While no case involving the question of the use of a public park as a site for a memorial building has come to our notice, we are of the view that the erection of the veterans' memorial hall, as here proposed, will not interfere with the enjoyment by the community in general of Adams Park,

and will not be such a diversion of the property from its use for park purposes as to amount to an invasion of the settled principles of law relied on by the respondent."

[4] In the instant case, the log cabin in question has been used for many years; it is a replica of a typical pioneer home and in itself constitutes an exhibit commemorative of pioneer days, fully equal in historical, inspirational, and educational value to a good many exhibits in museums which are recognized as a legitimate part of a public park. It constitutes both a monument and a memorial, which have a fitting place in a public park. It is used by organizations which are contributing to the laudable purpose of promoting and stimulating patriotism, and which are of exactly the same style as those for which the building referred to in *Slavich v. Hamilton* was intended. It not only furnishes a meeting place for a number of such patriotic organizations, but the particular organizations whose use of the building is here objected to have the additional object and purpose of collecting and preserving historical information and facts in connection with the history of California, of forming libraries and cabinets, and perpetuating the memories of the early pioneers. Such collections, exhibits, libraries, and memorials are not uncommon in public parks and often constitute the most attractive feature therein to a large part of the public. It further appears from the evidence that the building, with all its facilities, even including such meetings and dances as are given by the organizations fostering and maintaining the same, are as much open to the public at all times as to any members of these organizations, and that, even at such times as the building may be closed, it will be opened for any one, upon request. To our minds this shows neither a diversion of the property from park purposes, nor such an exclusive use thereof as could be held to interfere with the full and free public use which is contemplated by law. *Slavich v. Hamilton*, supra; *Spire v. City of Los Angeles*, 150 Cal. 64, 87 P. 1026, 11 Ann. Cas. 465; *Harter v. San Jose*, 141 Cal. 659, 75 P. 344.

[5] All of the appellants were formerly members of the organizations here complained of, and, as such, participated in the alleged improper use of the park. The filing of this action followed the refusal of these organizations to permit the appellants and others to assume the same occupation and control of the premises at certain stated times. Whether other organizations should also be allowed to hold meetings in the building in dispute is another question, depending upon many things, and not involved here. We think, however, that the mere fact that such permission is denied to another body by one already allowed to meet in the building

is not, in itself, sufficient to establish that the latter organization is not lawfully using the premises.

[6] Nor do we think the use of the premises for park purposes is affected, because, as appears, the respondent associations have control of the management and conduct of their meetings. It would hardly be held that a lawful use of a veterans' memorial building in a city park for meetings of the American Legion became an unlawful use if that body exercised control over its own meetings. Restaurants, libraries, museums, and various other concessions, even including hotels, have been held proper in public parks, when not inconsistent with general park purposes, but it seems apparent that all such accessories have to be controlled by some one and carefully managed. Parks are often used for public meetings, but the fact that such meetings are and must be promoted, managed, and conducted by some authority, usually some organization, does not even indicate that such use of a park is not a public one. To permit to such organizations, as may lawfully be allowed to meet in a building standing upon park property, the control and management of meetings that are open to the public, certainly does not change the use of the property from a public to a private one.

The evidence having failed to show any use of the property in question inconsistent with or contrary to its use as a public plaza or park, under the established rules of law, the motion for a nonsuit was properly granted.

The order appealed from is affirmed.

We concur: CARY, P. J.; MARKS, J.

109 Cal. App. 116

PEOPLE v. MITCHELL.

Cr. 1985.

District Court of Appeal, Second District,
Division 2, California.

Oct. 21, 1930.

1. Criminal law §147.

Statute requiring filing of misdemeanor charge within one year contemplates only misdemeanors, as distinguished from offenses for which court may exercise discretion in determining penalty (Pen. Code, § 801).

2. Criminal law §147.

Prosecution for receiving stolen property commenced about two years after receipt of property held not barred by limitations, not-

withstanding court only sentenced defendant to serve three months' term in county jail (Pen. Code, §§ 17, 801).

3. Receiving stolen goods §8(4).

Evidence in prosecution for receiving stolen property held to warrant finding that defendant knew property had been stolen.

4. Receiving stolen goods §7(6).

Variance in prosecution for receiving stolen property between allegation that complaining witness was owner, and proof that witness had purchased property on installments, held not material (Pen. Code, § 960).

5. Receiving stolen goods §7(6).

Variance between allegations and proof of ownership in prosecution for receiving stolen property is not prejudicial if property stolen can otherwise be identified (Pen. Code, § 960).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mrs. Mary Mitchell was convicted of receiving stolen property, and she appeals.

Affirmed.

John Beardsley, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

CRAIG, J.

Upon an information charging the crime of receiving stolen property, a felony, appellant was tried before a jury and found guilty as charged, after which conviction the court below sentenced her to serve a term of three months in the county jail. A motion for a new trial having been denied, she appealed, assigning as grounds for reversal the bar of the statute of limitations and insufficiency of the evidence to sustain the judgment.

[1, 2] The information was filed about two years after receipt of the property in question by the appellant. Reliance is placed upon the interpretation of sections 17 and 801 of the Penal Code, as announced in *People v. Gray*, 137 Cal. 267, 70 P. 20. It was there held that an offense punished as a misdemeanor must for all purposes be deemed as such, and that an indictment therefor, filed more than one year after the commission of the offense, was barred by the statute of limitations. In *Doble v. Superior Court*, 197 Cal. 556, 241 P. 852, 853, the Supreme Court in denying a petition for a writ of prohibition, prior to trial, limited the application of section 17 of the Penal Code to "purposes after a judgment imposing a punishment other than imprisonment in the state prison." Particular attention was called to the fact that while

section 801 requires the filing of a misdemeanor charge within one year after its commission, said section contemplates only misdemeanors as distinguished from offenses for which the court may exercise judicial discretion in determining the nature of the penalty. While it is there recognized that *People v. Gray* arose after trial and judgment, yet the plain import of the decision is that in so far as it conflicts with this interpretation it is overruled, and that to such extent it was not founded upon any authority to the contrary of this later view. It is said of *People v. Gray*, supra: "The case is therefore only authority for the proposition that, where a defendant is charged with a felony but has only committed a misdemeanor, the statute of limitations for misdemeanors and not that for felonies will govern. However, that case is not authority under the provision of section 17 here involved, for that provision only has application to the judgment where the punishment may be either for a felony or a misdemeanor. It will be noted that in quoting section 17 the opinion in *People v. Gray*, supra, ignores the language, 'after a judgment imposing a punishment other than imprisonment in the state prison,'—following the phrase 'shall be deemed a misdemeanor for all purposes. * * * A fair construction of section 17, in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious, in that event, it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive effect so far as the statute of limitations is concerned." So, in the instant case, the jury having found the appellant guilty of a felony, as charged, the statute of limitations can be said to have no application, but for all purposes after judgment the offense may be deemed a misdemeanor.

Appellant urges that a distinction exists between the instant case and *Doble v. Superior Court*, supra, in that the issue was there raised on a petition for writ of prohibition to prevent a trial of the case, whereas here the trial was had and judgment pronounced. This difference in fact leaves the two prosecutions identical in principle. The decision in the *Doble Case* was entirely predicated upon the assumption that the defendant might upon trial be found guilty of the felony involved in the charge. In this action the defendant actually was found guilty of an offense of that grade; hence the law announced in that case is directly in point and controlling here.

[3] The evidence tended to show that the prosecuting witness identified a radio in ap-

pellant's apartment which had previously been stolen from his residence. Appellant claimed to have taken it in payment of the indebtedness of a third person whom she did not produce at the trial and whom officers were unable to locate; she also stated that she had documentary evidence of its legal transfer to her, which she did not exhibit when demanded. A friend of appellant forcibly extorted from the prosecuting witness a paper upon which the latter had noted the serial number of the instrument, and on the following day appellant placed it in a warehouse, where it was subsequently discovered. An extended detail of the evidence is unnecessary. The jury were instructed upon the law in such cases, and we cannot say that legally they were not warranted in concluding that appellant knew that the property had been stolen. *People v. Jacobs*, 73 Cal. App. 334, 238 P. 770.

[4, 5] The only other point advanced is that the evidence affirmatively showed the property to have been purchased by the complaining witness upon instalments, and that he was not the owner as alleged in the information. A variance between allegation and proof of ownership in such a case is not prejudicial to the rights of the defendant if the property stolen can otherwise be sufficiently identified. Proof upon this issue is material only for the purposes of identification. Pen. Code, § 960; *People v. Price*, 143 Cal. 351, 77 P. 73.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; SCHMIDT, Justice pro tem.

PEOPLE v. BOLTON.¹
Cr. 1939.

District Court of Appeal, Second District,
Division 2, California.

Oct. 22, 1930.

As Modified on Denial of Rehearing Nov. 5,
1930.

Hearing Granted by Supreme Court
Nov. 20, 1930.

1. Criminal law ⇨1159(4).

Trial court and jury are vested with conclusive jurisdiction as to questions respecting credibility of evidence, except where implied findings are unsupported by substantial evidence.

2. Homicide ⇨253(1).

Evidence held to sustain conviction for homicide in the first degree.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹Hearing granted 8 P.2d 116.

3. Criminal law Ⓒ741(1).

Weight to be given defendant's evidence is question for jury.

4. Criminal law Ⓒ741(1).

Fact that defendant's evidence, if accepted, might entitle him to acquittal did not require jury to believe it, if circumstances reasonably justified inference of guilt.

5. Criminal law Ⓒ1159(2).

Decision of jury is final and conclusive if circumstantial evidence, which bears against defendant, without regard to contrary evidence, is substantial.

6. Criminal law Ⓒ1144(15).

Appellate court must assume that jury followed instruction requiring them to disregard certain evidence.

7. Homicide Ⓒ160.

Evidence respecting defendant's previous possession of pistol similar to that with which homicide was committed was material and proper.

8. Homicide Ⓒ160.

Remoteness as to testimony regarding defendants' previous possession of pistol went to weight rather than competency.

9. Homicide Ⓒ159.

Admission of evidence in homicide case respecting altercations between defendant and deceased and facial disfigurements of latter as result thereof *held* not erroneous.

10. Homicide Ⓒ159.

Remoteness of testimony as to altercations between defendant charged with homicide and deceased does not render it inadmissible, but merely affects weight.

11. Criminal law Ⓒ475.

Admission in homicide prosecution of testimony of expert on interior ballistics *held* not erroneous.

12. Criminal law Ⓒ855(1).

Juror's remark during trial in homicide prosecution, respecting defendant's testimony, that "he was full of hop," when making certain statement, did not indicate predetermination of guilt.

Defendant having previously testified that he was under the influence of narcotics administered by hospital attendants at the time certain statements were testified by witnesses to have been made by him, and that he did not remember having made them, an interne was called in rebuttal who swore that defendant talked

coherently and appeared normal. Thereupon a juror remarked: "He testified he was full of hop all the time and didn't know what he was doing," and concluded, when tendered permission to ask a direct question; "Well, not more than that."

13. Criminal law Ⓒ822(1).

Instructions should be considered as a whole.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

John Dewey Bolton, Jr., was convicted of homicide in the first degree, and he appeals.

Affirmed.

Charles J. Orbison and Don S. Irwin, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, J.

The defendant was convicted of homicide in the first degree, and appealed from the judgment and from an order denying a motion for new trial.

In the early morning of November 9, 1929, while driving southerly toward the city of Santa Monica, in Los Angeles county, he was met at a point about three miles from said city by four men who were driving northerly toward the city of Ventura. He informed them that he had been robbed, and then shot, by bandits. In the front seat of his automobile, on the right side, lay a young woman, who proved to be his wife, whom he had married six months previously thereto. She also had been wounded, and was then apparently lifeless. He testified that during the preceding evening he drove around the streets of Los Angeles, arriving home at about midnight, when he was joined by his wife, and that they started for a ride; that they stopped at a café on Wilshire boulevard, then proceeded to Santa Monica, thence toward Ventura for some distance, and finally turned back "because it was getting late." The record is devoid of direct evidence as to subsequent occurrences except for his testimony upon the trial and his statements to numerous witnesses who testified on behalf of the people. The defendant swore that during their return his wife was driving the automobile, and that at a point about eight miles northerly from Santa Monica they were accosted by two men in a Chrysler car which had been following them; that the taller of these men leaped from the Chrysler, approached the left side of defendant's machine, commanded, "stick them up," and that the companion of this bandit then joined them, whereupon the taller one moved to the right side of defendant's car, and took his money,

which amounted to about \$26; that the highwaymen were about to depart, when Mrs. Bolton remarked to one of them, "Isn't your name Woods?" whereupon the shorter man exclaimed, "Bump them off," following which the other fired four shots from defendant's side of the car, two of which struck Mrs. Bolton in the head, and a third struck the defendant in the left breast. He testified that the men fled, and that, finding his wife unconscious, he removed her to the right side of the seat and drove toward Santa Monica until he met the parties already mentioned. The defendant and one of these four men, named Day, entered the rear seat of the machine, another by the name of Cannon took the wheel, and drove to Santa Monica, where they were joined by George Figuerredo, a police officer, and continued to a hospital. The defendant was there given preliminary treatment, a 25-caliber bullet was removed from beneath the surface of his left arm near the elbow, and he was then transferred to the general hospital, and was later charged with the crime of murder.

[1] It is strenuously insisted by appellant that the evidence adduced before the jury was insufficient to warrant their verdict or to support the judgment. Much of the evidence of witnesses called by the prosecution is criticized as improbable, unworthy of belief, or otherwise of questionable weight, but with these questions the trial court and jury were vested with conclusive jurisdiction except where their implied findings can be said to be unsupported by substantial evidence, regardless of evidence contrary to such findings. *People v. Dant*, 68 Cal. App. 588, 229 P. 983.

[2] In 1926, appellant was engaged by one Ruby W. Abbott as instructor and manager of certain dance halls. He became indebted to her in the amount of \$4,000. She also loaned him other amounts aggregating \$3,000, and assumed another \$1,000 burden for which she had become liable as surety upon a loan to Bolton. He and his wife were each insured in the sum of \$5,000 in favor of the other by policies providing for \$10,000 indemnity in the event of accidental death. There is slight if any question that he was in deep financial straits at the time of the crime, notwithstanding the fact that he stated to witnesses that he had plenty of money in the bank, and that he was earning \$100 per week. It further appears by the testimony of numerous witnesses that he had quarreled with his wife at least a year before they were married. In May, 1928, appellant used profane, violent, and obscene language toward her, attacked her with physical force. During that time he stated to a friend that if he ever married her he would kill her, and that he would "get rid of her quick." Eight days before his wife was slain he telephoned to Ruby Abbott that he soon expected to have \$10,000, and

that he would repay her, stating, "I am certain of it," "I will have it shortly." Another witness swore that appellant told him that he soon expected \$10,000, that his wife might be "run over by a street car or killed somehow"; and that he stated to his wife in the presence of others: "One of these days I will bump you off," "I will shoot your block off." This evidence tended to prove that, even before marriage, defendant planned to do away with the deceased.

It is conceded that the tragedy must have occurred on the Roosevelt highway which parallels the Pacific Coast between the cities of Santa Monica and Ventura, at a point between about one and a half miles and three miles northwesterly from its intersection with Topango Canyon road. According to the defendant's testimony, he and the deceased had driven toward Ventura, beyond said intersection, and, having turned about, were driving toward Santa Monica, southeasterly from the Topango Canyon road, when attacked by the alleged highwaymen. The shorter of the bandits menaced them with a pistol from the left side of their car, while the taller one at first ordered them from the machine, but later entered it, reached in Bolton's inside pocket, took his billfold from which he extracted money, then threw the pocket book back to him. Appellant testified that, after the second shot was fired, "I threw myself against my wife in this manner and was backing out of the car and he fired one shot at me which missed and he fired another shot which strikes me in my left side but he was practically out of the car when he fired that shot—on the ground." He further stated to the jury that, previous to that time, "the window was down and the tall fellow was practically inside of the car directly in front of me * * * he fired one shot and my wife threw her hands to her face * * * and screamed, and leaning kind of forward * * * he shot again." Each of the wounds was caused by a 25-caliber bullet from an American or foreign make automatic pistol. Each of them had taken a somewhat downward course toward the left from the point of entry. One 25-caliber bullet which entered one inch in front of the right ear of the deceased was extracted from the lower portion of the left hemisphere of her brain; another had entered the cartilage of the right ear, and made its exit about one-half inch below the lobule of the left ear. One of the wounds bore a slight ring or contusion about it, tending to indicate that the weapon had been held at a distance of about six inches from the victim, but the other bore no evidence upon which to base an opinion as to the distance from which the shot had been fired. The middle finger of the right hand had been penetrated and fractured by a bullet which left pronounced black powder marks, from which it was estimated that the gun had been held "very close," possibly two inches or less from the hand. Accepting as we must

the testimony of many witnesses as apparently believed by the jury to be true, the defendant stated that the crime was committed near certain road construction work, about one and one-half miles above the intersection heretofore mentioned. A night watchman, who had been stationed at this point all night of November 8, swore that he heard no shots, whereas a resident living three miles northerly testified that he heard two shots in quick succession at about 3:20 a. m., or twenty minutes before Day and his companions met the defendant. Appellant stated before the trial that, while driving up, and during his return, the Chrysler car passed him several times before he was halted. To others he stated that he had driven to Ventura by another route, and had there spent the night. From the testimony of at least five witnesses it appears that appellant late in July, 1929, carried a 25-caliber automatic upon his person, in September he had one in a drawer at his apartment, and in November a similar weapon was in his desk. When questioned by an officer Bolton remarked: "You can go up and look in my apartment * * * you can't find any gun there. * * * I never owned a gun in my life."

[3-5] There were so many discrepancies and diametrical contradictions between the defendant's statements to acquaintances and officers and his testimony before the jury, that they may well have rejected them all as unworthy of belief, including that of robbery, and even the existence of the bandits. Other equally irreconcilable statements and testimony in appellant's description of the highwaymen, whether one or both were armed, his attempt, if any, to resist them, and his unqualified denial that he had made any statements, need not be collated to determine that the jury doubtless may have deemed a satisfactory explanation of the crucial events wholly absent. The weight to be given to the defendant's evidence is a question for the jury to determine, and the fact that he was found guilty is sufficient indication here that they were not impressed with its truth. *People v. Egan*, 77 Cal. App. 279, 246 P. 337. Were it reconcilable and probable, the fact that, if accepted, it might entitle him to an acquittal, did not require the jury to believe it, if the circumstances were such as reasonably to justify an inference of guilt. *People v. Sotelo*, 102 Cal. App. —, 283 P. 388; *People v. Oliver*, 102 Cal. App. 29, 282 P. 813. The decision of the jury is final and conclusive, if circumstantial evidence, which bears against the defendant, without regard to evidence to the contrary, is substantial. It then ceases to be a question of law, and becomes one of fact. *People v. Peete*, 54 Cal. App. 333, 202 P. 51. The evidence in this case strongly tended to support the inference of guilt in the absence of a belief in the defendant's recital of the facts which the jury were at liberty to disregard.

[6] During the testimony of the surgeon who removed the bullet from the defendant's arm; he was examined on behalf of the people as to the position of the arm when wounded, and the course of the bullet from its entry. It was not attempted to show by the physician as an expert relative positions of the deceased and her assassin, nor the distance or direction from which the shots were fired. The admission of this evidence is assigned as error, but, if this be conceded, it does not appear prejudicial to a degree requiring a reversal. The jury were thereafter instructed to disregard the evidence of the doctor in this respect, and it was stricken out. We must assume that they followed this instruction.

Error is also assigned in the admission of testimony of the same witness from experience in extracting other bullets, inspection of the bullet in question, and an X-ray examination, that it did not strike a bone in the defendant's side. It is insisted that the doctor was not qualified to so testify, and that his testimony, connected with other opinions thereafter stricken out, was prejudicially erroneous. This objection is founded upon authority holding that, upon a plea of self-defense, in seeking the truth as between a dying declaration and the testimony of a defendant as to the position from which a shot was fired, it was not possible to say from the evidence of inexperienced autopsy surgeons who differed as to the results of a post mortem examination that the bullet could not have been deflected. It is sufficient to say that, not only was the inquiry complained of in no way analogous, but that this testimony also was stricken out, with forceful admonitions to the jury that it be disregarded. And, in any event, it was held in the cited case that the evidence there under discussion was harmless. *People v. Yokum*, 118 Cal. 437, 50 P. 686.

[7, 8] Strenuous argument, likewise apparently under misapprehension, is directed to asserted error in receiving over objections the evidence regarding appellant's previous possession of a 25-caliber automatic pistol. It is conceded that the prosecution may show preparation for crime, but it is contended that the evidence in controversy did not connect the defendant or his weapon with the crime, and that it was too remote and immaterial. Bolton's alleged statement that he had never possessed any revolver in his life was refuted by many witnesses, leaving the jury to determine for themselves the truth or falsity of his denials. It developed that from a period antedating the crime about a year down to the month in which the homicide was committed he did possess a black 25-caliber automatic, that the weapon with which he was shot, and with which Mrs. Bolton was assassinated was of like caliber and make. This evidence was therefore material and proper, and the question of its remote-

ness would go rather to its weight than to its competency. *People v. Mount*, 93 Cal. App. 81, 269 P. 177. Upon these matters the jury were fully instructed as to their duties.

[9, 10] Acquaintances of the defendant testified to violent language and physical abuse by him toward the deceased in 1928, and described facial disfigurements of the latter in 1929 which tended to show that she had then been beaten. This evidence is criticized as being in such detail as to inflame the minds of the jury. It is also claimed that the first altercation mentioned was remote. However, it was connected by other acts of a similar nature, before mentioned, all tending to prove a criminal plan, existing in the mind of the defendant from the beginning. That the remoteness of testimony as to altercations between the defendant and the deceased does not render it inadmissible, but affects its weight, is too well settled in this state to require discussion. *People v. Colvin*, 118 Cal. 349, 50 P. 539; *People v. Palassou*, 14 Cal. App. 123, 111 P. 109; *People v. Wilson*, 23 Cal. App. 513, 138 P. 971; *People v. Holloway*, 28 Cal. App. 214, 151 P. 975. That evidence of previous disagreements or encounters may not be introduced in detail to a degree which distracts the jury's attention from the offense in issue is an established rule, but it has not been so narrowed as to require mere conclusions. Appellant seeks in the instant case to predicate the assertion of error upon authorities from other jurisdictions which themselves suggest this distinction. *People v. Fisher*, 295 Ill. 250, 129 N. E. 196; *Miller v. State*, 158 Ga. 697, 124 S. E. 195; *Sanders v. State*, 19 Ala. App. 367, 97 So. 294; *Keifer v. State*, 199 Ind. 10, 154 N. E. 870; *State v. Nelson*, 148 Minn. 285, 181 N. W. 850, 854. In those cases it was held that, while the extent of the showing is in a measure discretionary, it is not proper to go into the details to such an extent as to confuse the issue and to prejudice the defendant by trying the merits of the controversy. In *State v. Nelson*, supra, it was observed that "all the facts that could have been told upon a charge of assault were narrated and the merits litigated." On the other hand, while not permitted to minutely examine into prior altercations for the purpose of determining which of the parties was at fault, a general statement of the facts has repeatedly been sanctioned in this state. A narration similar to that here in question was approved in *People v. Palassou*, supra, wherein it was held not a case where the court allowed proof of a separate and distinct crime disconnected from the offense charged. As there stated: "To indicate a state of mind of the defendant at the time of the killing the prosecution is always entitled to show any previous difficulties or troubles that have arisen between the parties, and this showing is not limited to physical encounters, but may consist solely in an affray of words;

and this character of evidence is admissible, however much it may tend to disgrace and injure the defendant in the estimation of the jury. The objection upon such ground is not at all tenable." We conclude that the admission of this evidence was not erroneous.

Complaint is made of certain portions of the examination by counsel for the people of three witnesses, and of the defendant, which we do not deem it necessary to relate or discuss in detail. It is argued that the defendant's rights were injured thereby for the reason that it was incompetent and immaterial, tended to inflame the minds of the jury, and error is assigned because of a failure to strike out specified parts thereof. We have carefully perused the record in this respect, and it appears that in each instance such evidence was either justified by questions propounded by the defense or was exhaustively drawn out again by examination on behalf of the defendant; and the asserted objectionable evidence was also in each instance stricken out at the request of the defendant, and the jury were instructed to disregard it. We do not think all of the evidence so assailed was, under the circumstances, improper, nor was any error committed which was not cured by the action of the trial court at the instance of defendant's counsel.

[11] Neither can we accede to appellant's claim of reversible error in the admission of the testimony of an expert on interior ballistics. It is founded upon the assertion that the manner of action of an automatic pistol may not be shown without some evidence that a weapon of similar type was used in committing the crime. Since it appeared that both the deceased and the defendant were shot by a 25-caliber automatic pistol, this and other facts which we need not repeat rendered the evidence pertinent to a fair consideration of the whole case.

[12] The defendant having previously testified that he was under the influence of narcotics administered by hospital attendants at the time certain statements were testified by witnesses to have been made by him, and that he did not remember having made them, an interne was called in rebuttal who swore that the defendant talked coherently and appeared normal, mentally. At this point a juror remarked: "He testified he was full of hop all the time and didn't know what he was doing." When tendered permission to ask a direct question, the juror concluded: "Well, not more than that." It is insisted that this juror so indicated a predetermination of guilt as to render him capable of rendering an impartial verdict. We think the juror's expression disclosed, if anything, a belief in the truth of the defendant's testimony, or that he was merely comparing it with that of the witness. However that may be, it had no bearing upon

the guilt or innocence of Bolton, and it is not stated in his briefs in what respect his cause was injured.

[13] Portions of instructions to the jury upon the credibility of witnesses, and the distrust with which the willfully untruthful testimony should be viewed, are segregated and criticized. The instructions should be considered as a whole. Besides, the portions of which complaint is made have been expressly approved. *People v. Amaya*, 134 Cal. 531, 66 P. 794; *People v. Bollinger*, 196 Cal. 191, 237 P. 25.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

MOFFITT v. FORD MOTOR CO. et al. *
Civ. 7279.

District Court of Appeal, Second District,
Division 2, California.
Oct. 21, 1930.

Rehearing Denied Nov. 20, 1930.

Hearing Granted by Supreme Court
Dec. 18, 1930.

1. Trial ⇨109.

Court may order nonsuit on opening statement when it seems clear that statement of proposed proof would not constitute cause of action (Code Civ. Proc. § 581).

2. Appeal and error ⇨113(4).

Order vacating nonsuit on opening statement was not appealable, even though case may have been of nature warranting trial by jury (Code Civ. Proc. § 581, and § 963, subd. 2).

3. Appeal and error ⇨110.

Order granting new trial after trial before court cannot be appealed (Code Civ. Proc. § 963).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Alice D. Moffitt against the Ford Motor Company and others. From an order vacating a previous order of nonsuit and directing trial of the issues, defendants appeal. On motion to dismiss appeal.

Motion granted.

Lucius K. Chase, Chase, Barnes & Chase, George L. Greer, Hardy, Elliott & Aberle, Joe Orider, Jr., Harry D. Parker, Dave F. Smith, Guy B. Graham, George H. Moore, and Ger-

ald O'C. Egan, all of Los Angeles, for appellants.

Benjamin M. Stansbury and Mott, Vallee & Grant, all of Los Angeles, for respondent.

CRAIG, J.

A jury having been impaneled and sworn to try the issues in this case, counsel for the plaintiff made an opening statement, upon which statement the defendants interposed a motion for a nonsuit, which was granted. Thereafter the trial court vacated its order for nonsuit, and ordered a trial, on motion of the plaintiff. From this latter order the defendants appealed, and the plaintiff and respondent moves that the appeal be dismissed upon the ground that it is not authorized by existing statutes as amended.

[1] The first order was made under the provisions of section 581 of the Code of Civil Procedure, authorizing a nonsuit when the plaintiff fails to prove a sufficient case for the jury. Such action has been approved when in the sound judicial discretion of the court it seemed clear that the statement of proposed proof would not constitute a cause of action. *Bias v. Reed*, 169 Cal. 33, 145 P. 516.

[2] Section 963, subd. 2, of the Code of Civil Procedure, permits of an appeal from an order "granting a new trial * * * in an action or proceeding tried by a jury where such trial by jury is a matter of right." Reduced to a concise construction of this provision as advanced by appellants, it overlooks an essential element incorporated in said section by the Legislature, and asserts the right of appeal from an order granting a new trial in any action or proceeding, whenever trial by jury is a matter of right. We do not accede to this view, firstly, for the reason that the conditions presented do not unquestionably fall within the designation of a "trial or proceeding" contemplated by the statutes, and, secondly, that it adds by construction a right which was eliminated by amendment in 1915. No evidence was offered, nor was any question officially considered by the jury or determined, under instructions of the court, or otherwise. The jury were simply called, examined as to their qualifications, sworn, and discharged. The judge alone considered and acted upon the opening statement of counsel, as a matter of law. Appellants refrain from conceding the inevitable conclusion, upon their suggested interpretation, that they had been afforded a trial by jury when the nonsuit was granted, and that such is not the fact must be admitted. *John C. King Co. v. L. & N. R. Co.*, 131 Ky. 46, 114 S. W. 308; *Vickers v. Atlanta & W. P. R. Co.*, 64 Ga. 307; *Perlman v. Brooklyn, H. R. Co.*, 78 Misc. Rep. 168, 137 N. Y. S. 917. But they do insist that they may appeal from the order vacating the

judgment of nonsuit and ordering a trial of the issues, because they were entitled to a jury as a matter of right, although such action as was taken was performed by the court. As we have indicated, this must be based upon the assumption that one may appeal from an order granting a new trial in all save expressly excepted cases, whether tried by a jury or by the court. That such was not the legislative intent is strongly indicated by decided cases. In re Estate of Baird, 195 Cal. 59, 231 P. 744, 748; Estate of Waters, 181 Cal. 584, 185 P. 951; McGoldrick v. Visalia Midway Oil Co., 58 Cal. App. 280, 208 P. 334, 335.

In In re Estate of Baird, supra, which was reversed after trial by a jury following two previous reversals, the Supreme Court directed that special findings and verdicts be set aside and that an order denying a petition for partial distribution be entered. The superior court having complied with the terms of that decision, the petitioner moved for a new trial which was granted, whereupon the respondents appealed. A motion to dismiss the appeal was denied upon the ground that "this is an appeal 'from an order granting a new trial * * * in an action or proceeding tried by a jury'—within the meaning of section 963, Code of Civil Procedure." All parties to the instant proceeding rely on the language of that authority, but it plainly held that, notwithstanding the entry of judgment under directions of the appellate tribunal under the circumstances related, it was clear "that this appeal rests as much upon the *verdicts* of the jury as does petitioner's motion for a new trial. The direction to the trial court in reversing the judgment to set aside the verdicts and findings and enter judgment for respondents, the compliance with said directions by the trial court, and the subsequent order granting a new trial, all have a direct connection with and are related to the verdicts of the jury, for, although the successive steps taken after the rendition of the verdicts represent in a sense independent proceedings, nevertheless each of them depends upon and rests on such *verdicts*." Section 963 of the Code of Civil Procedure is clearly there construed as meaning "that there cannot be an appeal from an order granting a new trial *unless there has been a trial* by jury as distinguished from a trial by the court without a jury or in an equity proceeding." (Italics supplied.) Upon the authority of Estate of Waters, supra: "Section 963, Code of Civil Procedure, before it was amended in 1915, provided that an appeal might be taken from 'an order granting or refusing a new trial.' By the amendment of the year mentioned, the passage of the amendment long antedating the order now appealed from, this language was changed so as to permit an appeal only from 'an order granting a new trial in an ac-

tion or proceeding tried by a jury where such trial by jury is a matter of right.' The Supreme Court, in reciting the history of this amendment and of others affecting appeals, has said: 'Separate appeals from orders granting new trials can be had only in those cases where a jury trial has been had as a matter of right.'" McGoldrick v. Visalia Midway Oil Co., supra. And again it was observed in Furlow Pressed Brick Co. v. Balboa L. & W. Co., 186 Cal. 754, 200 P. 625, 628, that said section "does not provide for an appeal from an order granting a new trial after trial by the court sitting without a jury," since "it was evidently thought by the Legislature to be more expeditious and economical to do away with the appeal from the order granting a new trial where there had been no trial jury and thus to allow the parties to try the case de novo than to permit such appeals."

[3] Hence we are impelled to hold that there was no jury trial, and that, in the absence of such a trial, the order was not appealable, even though the case may have been of such nature as to have warranted a trial by jury. This being so, the conclusion is inevitable that the order in controversy was not appealable, and it is immaterial whether or not the proceeding constituted a trial within the contemplation of section 963 of the Code of Civil Procedure. If it did not, of course the order would not be appealable, and, if it did, the trial was before the court, and an order granting a new trial under such circumstances cannot be appealed.

The motion to dismiss is granted.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

109 Cal. App. 120
STEVENS et al. v. SACRAMENTO SUBURBAN FRUIT LANDS CO.

LAYTON et al. v. SAME.

ISENBERGER v. SAME.

Civ. 4142-4144.

District Court of Appeal, Third District,
California.

Oct. 22, 1930.

Rehearing Denied Nov. 21, 1930.

Hearing Denied by Supreme Court
Dec. 18, 1930.

1. Fraud $\hookrightarrow$ 58(1).

Evidence held to support findings vendor misrepresented quality of land, and purchasers relied on misrepresentations.

2. Fraud $\hookrightarrow$ 58(1).

Evidence land was worth only \$75 per acre, whereas, if representations had been true, it would have been worth \$350 per acre, furnished basis for finding on damages.

3. Fraud ⚡59(2).

Damages suffered because of misrepresentations are to be ascertained by determining market value of land as it is and what it would have been had representations been true.

4. Fraud ⚡38.

In action for damages for fraud, question of laches does not enter into determination.

5. Fraud ⚡18.

Misrepresentations that land was fertile and that fruit trees would thrive thereon authorized action for damages for fraud (Code Civ. Proc. § 338).

6. Limitation of actions ⚡100(5).

In determining whether action for misrepresentations is barred, circumstances in each case must be examined to determine whether purchaser, as reasonable person, should have made prior discovery of fraud (Code Civ. Proc. § 338).

7. Limitation of actions ⚡100(5).

Where nonresident purchaser did not see land until December, 1924, action for damages for misrepresentations, commenced on August 15, 1927, *held* not barred by limitations (Code Civ. Proc. § 338).

8. Limitation of actions ⚡197(2).

Evidence *held* to establish that purchaser's right to damages for misrepresentations regarding quality of land was barred by limitations (Code Civ. Proc. § 338).

The evidence disclosed that the contract to purchase land was entered into on or about January 24, 1922; that the purchaser was advised that it would be necessary to blast the hardpan beneath the upper soil before setting out trees; that trees were planted without blasting in disregard of such advice, and that the trees lived only a few months; that purchaser had objective lesson as to hardpan on drilling well on premises; that he moved from premises in November, 1922, and made no inquiries regarding quality of land until year 1926; and that the action was begun on August 7, 1927.

9. Corporations ⚡672(6).

Instrument introduced in evidence showing foreign corporation had designated agent for service of process must be considered as though properly pleaded, where not objected to as not being within issues (Deering's Gen. Laws 1923, Act 1743).

10. Corporations ⚡646.

Amended statute requiring that instrument designating agent to be served with

process for foreign corporation should give agent's residence *held* inapplicable, where statute under which designation was filed made no such requirement (Deering's Gen. Laws 1923, Act 1743).

11. Limitations of actions ⚡88.

That agent designated by foreign corporation for service of summons moves within state has no effect on operation of statute of limitations (Deering's Gen. Laws 1923, Act 1743; Code Civ. Proc. § 338).

12. Limitation of actions ⚡3(1).

Legislature alone can fix conditions under which limitation statute may operate (Code Civ. Proc. § 338).

13. Limitation of actions ⚡3(1).

Legislature alone can state circumstances necessary to suspend running of limitation statute (Code Civ. Proc. § 338).

14. Corporations ⚡646.

Agent designated by foreign corporation to be served with summons need not be employee or officer of company (Deering's Gen. Laws 1923, Act 1743).

15. Limitation of actions ⚡88.

That agent designated by foreign corporation on whom summons might be served left corporation did not sever designation so as to prevent running of limitations on cause of action for fraud asserted against corporation (Code Civ. Proc. § 338; Deering's Gen. Laws 1923, Act 1743).

Appeals from Superior Court, Sacramento County; F. M. Jamison, Judge.

Separate actions by J. S. Stevens and another, by John R. Layton and another, and by N. E. Isenberger against the Sacramento Suburban Fruit Lands Company. From judgments for plaintiffs, defendant appeals.

Judgment of J. S. Stevens and another against defendant affirmed; judgment of N. E. Isenberger against the defendant affirmed; judgment of John R. Layton and another against defendant reversed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, and Arthur C. Huston, of Woodland, for appellant.

Ralph H. Lewis and George E. McCutchen, both of Sacramento, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Three separate actions are combined and presented for our consideration upon this appeal. The three actions are presented, in part, upon one transcript and argued in one set of briefs. The actions are prosecuted to

obtain a judgment for damages based upon fraud and deceit, alleged to have been practised upon the respective plaintiffs by the defendant in the sale of distinct and separate parcels of land to the respective plaintiffs, one tract of land being sold to the plaintiffs Stevens, one tract of land to the plaintiffs Layton, and one tract of land to the plaintiff Isenberger. The land involved in the several actions is situate approximately nine or ten miles north of the city of Sacramento, in the district known as and called the "Rio Linda" district.

In 1912 the defendant company purchased a tract of 12,000 acres of land, subdivided the same, and entered upon the work of selling the land in tracts of 5 and 10 acres. The purchasers came mainly from the Northwestern States. The home office of the company was located in the city of Minneapolis. A local office was maintained in the city of Sacramento, under the charge of a general manager. The plaintiffs Stevens purchased a 10-acre tract; the plaintiffs Layton and the plaintiff Isenberger purchased 5-acre tracts. The complaints in the three actions are practically identical. The respective complaints, in setting forth a cause of action, alleged that the defendant, through its agents, represented to the purchasers that the land was rich and fertile, capable of producing all sorts of farm products; that the soil was entirely free from all conditions and things injurious or harmful to the growth of fruit trees. It was further alleged that the land was well adapted to the raising of fruits of all kinds; that fruit trees of all kinds would thrive and flourish thereon and produce fruit of best quality and in large and commercial quantities; that all kinds of fruits of finest quality and of commercial quantity were being grown and produced upon adjoining lands of the same quality and texture. The respective complaints further alleged that the land was represented to be of the reasonable market value of \$350 per acre, whereas, in truth and in fact, it was worth only a sum showing a value of \$15 per acre. The answers of the defendant deny the allegations of the complaints as to the fraudulent representations; admit its existence as a corporation organized under the laws of the state of Minnesota, and, as a further defense, plead the statute of limitations in the following words: "That this action and cause of action is barred by the provisions of section 338 and of subdivision IV thereof of the Code of Civil Procedure of the state of California."

While the defense of the statute of limitations is pleaded in the form above stated, the answers of the defendant contain no allegation of the corporation having complied with the statute relative to the filing with the secretary of state of the state of California a designation of an agent upon whom service of summons might be made, as provided by

the act of the Legislature of 1917 (St. 1917, p. 371, and as amended by St. 1921, p. 638, and St. 1923, p. 1034, Deering's General Laws of California 1923, Act 1743), a necessary prerequisite in order to toll the statute of limitations.

As the argument upon this appeal revolves around the purchase made by the plaintiffs Stevens of lot 14 of Rio Linda, subdivision No. 5, this opinion will be devoted first to a discussion of the issues relating to that action.

The record discloses that, prior to the year 1923, the plaintiffs Stevens were residents of the town of Frederick in the state of Wisconsin, and owned 80 acres of land in Bayfield county, in said state, of the value of about \$1,000, and a Ford automobile of the value of some \$450; that neither one of the plaintiffs had ever visited the state of California, and that both of the plaintiffs were entirely unfamiliar with farming conditions, not only in the Rio Linda district, but also with farming conditions in the state of California; that while the plaintiffs were so residing in the state of Wisconsin the defendant furnished the plaintiffs with a booklet descriptive of the advantages of the Rio Linda district, and an agent of the company called upon the plaintiffs and made all of the representations contained in the complaint, and also other representations set out in the testimony, all of which were alleged to be false and fraudulent, and well known to be such; that, relying upon such false and fraudulent representations, the plaintiffs entered into a contract of purchase with the defendant, the purchase involving a transfer to the defendant of land then belonging to the plaintiffs in Bayfield, Wis., and also the transfer to the defendant of the Ford automobile herein referred to; the value of the land being represented to the plaintiffs at the sum of \$350 per acre. The contract of purchase was entered into in December, 1922, and in September of the following year the plaintiffs came to California, and in November, 1923, bought a small tract about three-quarters of a mile from the land in controversy. It does not appear that the plaintiffs ever resided upon the land involved in this action.

The trial court, preceding the signing and filing of findings herein, expressed its views in a written opinion, from which we take the following: "The court is of the opinion that by reason of the thinness of the soil upon the tract of land, and the nature and thickness of the hardpan underlying it, that it is not adapted to, nor will it successfully produce fruit in any considerable quantity. The nature of the soil and the underlying hardpan, are of such a character that fruit trees will not mature and continue to bear, but, on the contrary, will wither away and die. The court is further of the opinion that plaintiffs were entirely ignorant of the nature and

character of the soil and hardpan on said land, and for knowledge of the same relied entirely upon the representations of the agents of defendant, and that while these agents did set forth in booklets that the soil was underlaid with hardpan, yet by representations they led plaintiffs to believe that the hardpan would in no wise prove a detriment to the growing of fruit. Taking the evidence as a whole, it is apparent that representations were made to plaintiffs by defendant's agents that the land was well suited to the production of fruit in merchantable quantities, and that after the lapse of a few years the orchards planted and growing upon said land would net a considerable income. These representations were and are not true and must have been known to defendant's agents to be untrue when they were made." The court in its opinion further stated: "It appears to the court that these plaintiffs were wholly unfamiliar with the land, the nature of its soil, its productiveness, is adaptability to fruit growing, and that they relied entirely upon the representations of defendant's agents as to all these matters, and continued to do so until along in 1926, when the fruit trees planted a few years prior thereto began to wither and die." The court further stated in its opinion, relative to the provisions of section 338 of the Code of Civil Procedure, relied upon as a defense, as follows: "That this defense cannot avail defendant in this action. The untruthfulness of the representations made by defendant's agents were not discovered by plaintiffs until within the three-year period prior to the commencement of this action. Relying as they did upon the representations of defendant's agents, as aforesaid, they were not put upon notice of their falsity until the trees began to wither and die."

While the contract of purchase was entered into in the year 1922, the plaintiffs did not come to California until September, 1923, and, as stated, had not seen the land prior to the time of entering into the contract.

The record shows abundant testimony to the effect that the plaintiffs relied upon the statements of the defendant's agents as to the character and quality of the land, and, a review of the testimony satisfies us that the findings of the court in accordance with its opinion, and which we have quoted, are sufficiently supported. We may add that, in addition to stating that the land was suitable for the raising of all kinds of fruits, commercially, the agent represented to the plaintiffs that, while the price, at the time the negotiations were being had, was \$350 per acre, on and after the 1st of January of the following year it would be advanced \$50 an acre. A short excerpt from the testimony of one of the plaintiffs of what occurred at one of the interviews had between the agent of the defendant and the plaintiffs, while they were

living in Wisconsin, is sufficient to illustrate the character of the representations: "He (referring to the agent) came to our home one evening about 7 o'clock and we were there until about 1 o'clock in the morning. He had photographs, an album of views, taken out there in the district. The views were very beautiful—fruit growing—and intimated they were taken here (referring to Rio Linda). I did not know before he wanted to sell us some of this land. He said there was nothing better in California. It would grow anything, and if Mr. Stevens and I would go there, we would be independent in a short time, say five years. We would have to keep poultry as an investment to make our payments. We realized we were not able to pay that amount, and we asked him about it. He said that our payments, we could make all those payments in 5 years, and we could let our poultry go. We could be independent in 5 years. He said the land certainly was adapted to grow anything; all kinds of fruit would grow there." The pamphlets referred to contained a great number of photographs of places many miles removed from Rio Linda, and do show what can be raised and accomplished in California where the character of the soil admits of a high degree of cultivation, and one unacquainted with distances and locations, and living in a distant state, would almost certainly be misled thereby. Two excerpts from the pamphlets or booklets will serve to illustrate what we have just said: "The Rio Linda district today is the home of nearly 250 families—a happy, thrifty people—all in possession of their own homes, their own orchards and gardens and profit-paying poultry flocks. The Rio Linda district is no painted picture—what we say here is no overdrawn description of what is hoped may come to pass. Rio Linda is an actuality. The people are there; the rapidly increasing poultry flocks are there, and the opportunity is there for you today at Rio Linda." A second excerpt from one of the booklets reads as follows: "Though the soil condition in California varies greatly in different districts, the soil in the Rio Linda district is very uniform. The surface of the land looks almost level to the eye, though actually it has gently rolling slopes and undulations which naturally assist in drainage and irrigation. The top soil, generally speaking, is what is known in California as a sandy clay loam. This top soil varies in depth, is a friable soil and variously adapted to the different fruit trees and vines. The subsoil is a closely packed clay, varying in depth, texture and character. With reference to this clay subsoil the United States Government soil reports show that the majority of the lands in the Sacramento and San Joaquin valleys are underlaid with a hard clay stratum commonly known as hardpan." This latter quotation is relied upon by the defend-

ant as containing a statement sufficient to place the plaintiffs on notice relative to the existence of hardpan. We may here state, however, that, after the plaintiff came to California, and had been here some months, and heard some talk about hardpan, they asked a man who was acting as horticultural expert of the defendant as to the existence of hardpan and its effect upon fruit growing, and to their query the reply was made that the hardpan acted as a "sort of fertilizer." It will be noticed that the excerpt which we have last quoted makes no reference to the fact as to whether the hardpan in the Rio Linda district is near the surface, nor does it make any reference as to whether the hardpan in the fertile sections of the Sacramento and San Joaquin valleys is in the so-called "fertile" districts, so far below the surface as not to interfere with cultivation.

[1] Without further reference to the testimony establishing the alleged fraudulent representations, we will content ourselves with the statement that a review of the record satisfies us that the findings of the trial court as to such representations are sufficiently supported.

[2, 3] The minor point made by the appellant that the testimony does not show the damages allowed by the court we likewise think untenable. The record contains evidence to the effect that the lot in question was of the value of only about \$75 per acre, and also that, had it been of the character represented, it would have been of the value of \$350 per acre, which furnishes a basis for the court's conclusion as to the amount of the damages, and it satisfactorily appears that the court followed the California rule that the damages suffered on account of misrepresentations are to be ascertained by determining the fair market value of the land as it is, and what it would have been had the representations been true.

The main contention of the appellant is to the effect that the several causes of action involved in this appeal are barred by the statute of limitations. Upon this question the trial court found as follows: That the allegations of the plaintiffs' complaint to the effect that it was not apparent, to persons not expert in fruit culture, prior to 1927, that the lands were not well adapted to the raising of fruits; that prior to the year 1927 it was generally believed by all the settlers and neighbors situate on lands adjoining the plaintiffs that the lands were especially adapted to the culture of all kinds of deciduous fruits; that the plaintiffs did not have any occasion to suspect that they had been defrauded prior to the year 1927; that the plaintiffs relied upon the representations of the defendant's agents that the hardpan was not injurious to the raising of fruit trees; and that the agents of the defendant lulled

the plaintiffs into security by representations that the hardpan was not injurious but acted as a fertilizer.

The record shows that the plaintiffs came to California on or about September 23, 1923; and, as we read the testimony, it indicates that there were sufficient facts and circumstances discovered by the plaintiffs to put them upon inquiry, some time the latter part of the year 1925, and at least during the year 1926. The action by the plaintiffs Stevens was begun on August 4, 1927. It is strongly insisted by the appellant that the discovery should have been made much earlier, and that there were sufficient facts and circumstances apparent from which the plaintiffs should, and could, have obtained knowledge of the fraud at a period antedating more than three years, the date of the beginning of the action. As said in 16 California Jurisprudence, 501; "In the determination of this question, if it appears that a person has notice or information of circumstances which, if followed, would lead to knowledge, or that the facts are presumptively within his knowledge, he will be deemed to have actual knowledge of the facts. In such case, the familiar rule that every person who has actual notice of circumstances sufficient to put a prudent man on inquiry, is deemed to have actual notice of the fact itself in cases in which by prosecuting the inquiry he might have learned the fact is applied. The courts, however, do not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded upon the ground that he did not discover the fact that he had been cheated soon enough. Where there is no duty upon a person to make inquiry and under the circumstances a prudent man would not be put upon notice, the mere fact that means of knowledge are open will not debar one from relief when discovery is afterwards made; the circumstances must be such that inquiry becomes a duty, and a failure to make it a negligent omission. And, where ignorance of the fraud is produced by the affirmative acts of the guilty party, a failure to discover the fraud is excused and the statutory period will not run until actual discovery of the facts.

The authorities supporting the text just quoted are exceedingly numerous, and need not be cited. The plaintiffs, during all the negotiations relative to the purchase of the tract of land involved, were residents of the state of Wisconsin, a state in which the soil is entirely dissimilar, the methods of cultivation almost wholly unlike those followed in California. One is a state where agriculturists depend upon rainfall; the other, where irrigation is necessary for the success of horticultural undertakings. The Rio Linda district is shown by the testimony to be what is called "upland" territory; it does not lie

adjoining any stream of water; irrigation is necessary for the profitable cultivation and raising of any kind of fruit. For successful irrigation there must be sufficient drainage. Whether such drainage conditions exist depends upon the condition of the subsoil, and one unfamiliar with the character of the lands involved in this action could ascertain this fact only by experimentation. The testimony shows that the orchards pictured in the booklets were not upon lands similar to those sold the plaintiffs in these actions. The testimony does show that by experimenting in different parts of the 12,000 acres heretofore referred to as being the tract placed upon the market by the defendant fruit trees had been successfully propagated where the soil was underlaid with hardpan, but that to do so it was necessary to blast the hardpan. No one coming from Wisconsin, where such conditions do not exist, could reasonably be expected to have in mind the necessity of blasting in order to set out a tree. Again, whether even blasting will enable one to succeed in raising fruit trees depends upon whether sufficient drainage is thereby secured. Further, the testimony shows that it requires two or three years to determine whether a tree will grow. If drainage cannot be had, or is not had, the tree will apparently thrive for a year or two, and then wither and die. It does appear that the plaintiffs ascertained the existence of hardpan in the Rio Linda district but, as herein stated, were advised by a representative of the defendant that hardpan acted as a "sort of fertilizer."

[4] This being an action for damages, and not an action for rescission, the question of laches does not enter into a determination. However, cases having to do with that subject are applicable upon the question of discovery. In the case of *Dickey v. Dunn*, 80 Cal. App. 724, 252 P. 770, 772, it is said: "Where a purchaser is justified in relying, in fact does rely, upon false representations his right of action is not destroyed because means of knowledge were open to him (*Teague v. Hall*, 171 Cal. 668, 154 P. 851) and while it appears that the plaintiff visited the property before the transfer was made, the evidence sufficiently supports the finding that he relied upon the representations both as to its value and character. The statements as to the character of the soil and as to the water supply were clearly representations of fact. *French v. Freeman*, 191 Cal. 579, 217 P. 515; *Stone v. McCarty*, 64 Cal. App. 158, 220 P. 690."

Again, in *Powell v. Oak Ridge Orchards Co.*, 84 Cal. App. 714, 258 P. 636, 638, on the subject of laches, we find the following: "There is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine of laches [citing cases], the question of whether or not a par-

ty defrauded has rescinded promptly depending upon all the circumstances of the particular case and being primarily one for the trial court to determine (*French v. Freeman*, supra); and if its conclusions thereon find reasonable support in the evidence the reviewing court will not interfere therewith (*Suhr v. Lauterbach*, 164 Cal. 591, 130 P. 2). Interference here, under the circumstances stated, would, in our opinion, be clearly unwarranted, it appearing that plaintiffs acted with reasonable diligence."

Applying the principle announced in these cases to the *Stevens* and *Isenberger* cases, it would be primarily the duty of the trial court to ascertain and determine both discovery and knowledge on the part of the plaintiffs, and whether the circumstances were such as to put the plaintiffs upon inquiry by means of which they could and should have earlier discovered the character and condition of the soil, its unfitness for fruit raising, and the misrepresentations on the part of the defendant's agents.

In the *Orchards Case*, supra, the plaintiff purchased the premises on January 3, 1921, and took possession immediately. In July, 1922, he discovered the trees were dying. He made the offer of rescission on February 15, 1923, and began suit in April, 1923. As we have seen, the delay in that case was held excusable. A year and a half elapsed between the purchase and the discovery of the fraud. In the *Dunn Case*, supra, the delay in discovering the falsity of the representation as to the value and character of the soil was a trifle over two years.

In *Scott v. Delta Land Co.*, 57 Cal. App. 320, 207 P. 389, in which it was held that misrepresentations as to the productive quality of the soil and the adequacy of the water supply were material factors, a delay of a few days over one year was held excusable. In that case we may say it further appeared that the quality of the soil could only be determined by chemical analysis or by actual experimentation. Hence there could be no imputation of negligence, because Scott, a farmer, having been afforded an opportunity to see and examine the soil, did not at once discover its true character. In the case at bar the plaintiffs, after coming to California, of course had an opportunity to view the lot in question, but could only determine the character of the soil by having an analysis made of it, or by actual experimentation. That the latter course is one which would be followed, and which it was reasonable for a farmer to follow, cannot be gainsaid, and therefore it cannot be held as a matter of law that the plaintiffs were negligent in relying upon experimentation rather than having an analysis of the soil made in order to determine whether it was fit for the setting out and cultivation of fruit trees.

[5] That the misrepresentations were all material and sufficient upon which to base an action, in addition to the cases listed we may cite the following: *Stone v. McCarty*, 64 Cal. App. 158, 220 P. 690; *Palladine v. Imperial Valley, etc.*, 65 Cal. App. 727, 225 P. 291; *Gammon v. Ealey & Thompson*, 97 Cal. App. 452, 275 P. 1005; *French v. Freeman*, 191 Cal. 579, 217 P. 515; *McMahon v. Grimes*, 206 Cal. 526, 275 P. 440.

In support of its contention that the actions herein are barred by the statute of limitations, the defendant calls our attention to the recent decision of the Circuit Court of Appeals in the case of *Sacramento Suburban Fruit Lands Co. v. Johnson*, 36 F.(2d) 935, and the companion cases there referred to. The *Johnson Case*, however, is readily distinguishable from the case prosecuted by the plaintiffs *Stevens*. In the *Johnson Case* the following instruction on the subject of discovery of fraud was given: "Moreover, he is told by the circular that to bring an orchard to bearing takes five to seven years. He has a right to test it out. He wouldn't be obliged to grasp and believe anybody's statement if he heard it, that it was not adapted to commercial orchards, and he would have five to seven years, according to defendant's theory, to test it out, if he didn't otherwise find out it was not adapted to commercial orchards. He says he planted his trees in 1924, and seeing them die, as they did, mostly in 1927, his theory is that it was then that he discovered, and only then, that the land was not adapted to the commercial growing of fruit." The Circuit Court then says: "Under this instruction the plaintiff might bide his time for the full period required for the maturing of an unplanted orchard, unless he happened to find out through some other source that the land was not adapted for orchards. * * * The instruction falls short of the rule of diligence required in such cases."

In the *Jensen Case*, reported in the same volume, page 936, reversal was had by reason of error of the court in its instructions to the jury.

In the *Anderson Case*, reported in the same volume, page 937, the judgment of the trial court was affirmed.

In the *Tipper Case*, reported in the same volume, page 941, the judgment in favor of the plaintiff was also affirmed.

In the principal case of *Sacramento Suburban Fruit Lands Co. v. Melin* (C. C. A.), reported in the same volume above referred to, page 907, 908, it appears that the plaintiff visited the Rio Linda district before entering into a contract of purchase. It appears also in the *Melin Case* that the cause was reversed on account of errors in instructions, one of which related to the representation as to the value of the land; the court in the *Melin Case*

saying: "In order that purchaser may rely on vendor's representations as to value of the property, it is not sufficient that vendor have greater information or superior judgment, but it generally must appear that land is remotely situated, or for other reasons the sources of information are not reasonably available to purchaser." Here we have a situation readily distinguishable. At the time the contract was entered into the plaintiffs were residents of the state of Wisconsin, and that the state of Wisconsin is a long distance from the Rio Linda district is a fact of which we must take judicial notice. At the time the contract was entered into, the plaintiffs had no information concerning the value of the land, its character, quality, or capabilities, other than that furnished by the defendant; nor can we say that they had any reasonable means of acquiring such information prior to the date of entering into the contract. Erroneous instructions as to the question of good faith on the part of the defendant also entered into the decision in the *Melin Case*. One of the tracts involved in the *Melin Case* was purchased in 1921; the action was commenced August 14, 1927. A much longer period was involved than in the case of the plaintiffs *Stevens*; likewise a dissimilarity as to the means of information possessed by the respective plaintiffs. One came to California and inspected the land before purchasing, and had an opportunity to make inquiries in the nearby populous city of Sacramento. The plaintiffs *Stevens* had no such opportunity. The following cases were reversed by reason of instructions held to be erroneous: *Sacramento Suburban Fruit Lands Co. v. Boucher* (C. C. A.) 36 F.(2d) page 912; *McKew Case*, same volume, page 917; *Curtis Case*, same volume, page 923; *Haenggi Case*, same volume, page 923. The following cases were affirmed by reason of there being no errors in the instructions: *Loucks Case*, same volume, page 921; *Miller Case*, same volume, page 922.

A review of the different cases cited in the volume to which we have referred we deem unnecessary, as the circumstances are different, and as the reversals were had for errors occurring during the course of the trial. We may, however, refer to the case of *Sacramento Suburban Fruit Lands Co. v. Schreindl et al.* (C. C. A.) reported in the same volume, beginning on page 932, wherein it was held not error to give an instruction to the effect that a purchaser, in an effort to discover the fraud practiced upon him, was not obliged to employ experts, or make abstruse and difficult investigations, just as we have stated heretofore in this opinion. It was not necessary for the plaintiffs to have employed some one qualified to make an analysis of the soil, but they had a right to rest upon experimentation and the usual means employed by farmers, in determining whether the lands in question

would or would not fulfil the representations which had been made. In the case just referred to the judgment was affirmed.

[6] The conclusion to be gleaned from the cases relied upon by the appellant is that the circumstances must, in each case, be examined to determine whether the plaintiff, as a reasonable person, should have made prior discovery of the fraud, and that no hard and fast rule can be laid down as to the time within which such discovery must be made in order to bar the plaintiff's right of action. If the facts show that the purchaser, as a reasonable person, had the means of discovery, and should have made the discovery and prosecuted his inquiry leading up to the knowledge of the fraud practiced upon him at a period more than three years prior to the beginning of the action, then the cause should be held barred; otherwise, not.

[7] In the companion case of *N. E. Isenberger* against the defendant, the testimony relative to representations is practically the same as what we have hereinbefore set forth, but, in addition thereto, it clearly appears that Isenberger came to California, first, in December, 1924. The complaint in his action was filed on August 15, 1927. Three years had not elapsed from the date in which this plaintiff came to the state and the beginning of his action. The testimony showing that he had no reasonable opportunity to discover the existence of the fraud and did not have any actual opportunity to discover the same, there is no basis upon which the plea of the statute of limitations can rest. The circumstances presented in the case of the plaintiff Isenberger is very similar to the circumstances considered in the case of *Nichols v. Moore*, 181 Cal. 131, 183 P. 531. The findings of the court in the Isenberger case are sufficiently sustained, and nothing presented as to this cause seems to merit further consideration.

In the action entitled "*John R. Layton and Louise S. Layton*" we have a state of facts which calls for a consideration of whether the statute of limitations should be held to run in favor of the defendant. The record shows that John R. Layton has lived in California ever since 1912; that prior to coming to California he had lived for twenty years on a farm in Iowa; had given most of his attention to raising oats, wheat, and grain; had had no experience in the fruit business, other than raising fruit trees which supplied fruit for family use; had never attempted to raise fruit for commercial purposes. The plaintiff Louise S. Layton was raised on a farm in Oregon, and has lived in Sacramento ever since 1916. The plaintiff John R. Layton came to the city of Sacramento to live in the year 1921, and prior thereto, for a number of years, had lived in different places in the county of Sacramento, within a few miles of the city of Sacramento. On or about January

24, 1922, the plaintiff Layton entered into a contract with the defendant to purchase the west half of lot 134 of subdivision No. 6 of the Rio Linda tract, and thereupon went to the Rio Linda district to live, and remained there until November, 1922, when they came back to Sacramento. The return to Sacramento was made in order that the plaintiff John R. Layton might obtain work as a carpenter—that being the real vocation followed by him after coming to California in 1912. The record shows that John R. Layton, while out riding in the Rio Linda district, saw a sign on the highway indicating the persons handling the tract of land under consideration, and thereafter went and looked up the party at his office at 613 J street and inquired about the land. Thereafter a man by the name of McNaughton, on behalf of the company, called for and took the Laytons out to inspect the Rio Linda district. McNaughton, appears, was not a salesman, but a horticulturist. McNaughton showed the Laytons several pieces of land. About one-half day was spent in looking at different tracts. "McNaughton showed us the Reese place, Reese's young orchard and poultry farm. We stopped at the Reese corner and walked up about a quarter of a mile north, and McNaughton showed us a piece of land there; I think it was five acres. I didn't like that piece, so we came back and got in his car and we drove over to the west of Rio Linda. I don't remember the man's place, but a little place northwest of Rio Linda; showed us the young orchard he had out. He had a nice flock of chickens running in the orchard; he showed us how the man was taking care of it; then he took us out to Mr. Campbell's place; showed us his young orchard; showed us, also, a flock of young pullets. Campbell told us what his intentions were with his chickens and his orchard. McNaughton took us about $\frac{3}{4}$ of a mile west and showed us another piece of land; then we came back to Sacramento. McNaughton also took us out to Mr. Lydon's place, and Mr. Lydon lectured to us on the poultry-house, about raising poultry. Also Mr. McNaughton gave us a short talk to show people how to plant their trees, and also the care of them. On the next occasion we visited Rio Linda, Mr. Brennan took us out. He came to our house and took myself and wife. Mr. Brennan simply showed us the same piece of land Mr. McNaughton showed us at first that didn't suit us; then he took us on north of Rio Linda and showed us another piece that didn't suit us; then he took us over to Subdivision 6 and showed us land over there. I didn't like the way the land lay; the water was standing on it; you couldn't walk out to a part of it. Then he showed us a piece that we passed; it was really the best drained from water standing on it. I asked if that piece had been sold. Mr. Brennan said no. It was

a 10-acre tract, and I told him I couldn't handle 10 acres. Then he said he would see if the company would split it. It suited me very well. He told me that piece of land was worth \$350.00 an acre. He said it was good, fertile soil, rich loam soil, and would raise any kind of fruit that could be raised in California. He told us also that from that particular piece of land we could get an income of \$1,200 or \$1,500 a year when the orchard got to bearing, got to full bearing. Mr. Brennan told us to get a flock of chickens for the first thing, and raise chickens while the fruit was coming on. In the office of the company we asked Mr. Crinkley what kind of fruit the land would raise, and what he would suggest planting on the ground. He said peaches, plums, cherries, apricots and pears. He said it would grow commercially." The foregoing is taken from the testimony of the plaintiff John S. Layton, and covers the representations.

The witness further testified that he believed what was told him, and to the question whether that influenced him in any way in signing up the contract answered: "Nothing, only telling me it was good, rich, fertile land, will grow all this stuff." The witness further testified that, if they had not told him such things, he would not have signed. The witness also testified that, prior to the signing of the contract, Mr. Brennan told him that there was hardpan upon the land, the language of the witness being: "Brennan told me there was hardpan. Brennan said there was hardpan, but that it didn't amount to much." With reference to its effect upon fruit raising, the witness testified that Brennan said it would not hurt them at all. He said, "Just blast; the stuff didn't hurt them at all." He said, "Usually, it would be a fertilizer for the ground." The testimony is further to the effect that, after the plaintiffs moved out to the tract of land in question, a well was sunk and hardpan was disclosed by the digging of the well, or, rather, boring of the well, but that no attention was paid to it. After going out to the premises in 1922, the Laytons planted six trees. The hole in which the trees were planted was dug down about a foot or a little more. The plaintiffs did not consult any one in connection with the company about planting the trees. These trees only lived about three months. In planting the trees, the holes were not dug down to hardpan, the witness testifying: "I didn't go down to hardpan at that depth where I set out the trees." On November 22, 1922, the plaintiffs moved back to Sacramento. The plaintiffs did not set out any more trees on the land or make any further improvements or developments because they did not have any money. The plaintiffs then bought a lot in the city of Sacramento, and testified that in the laying of a sewer or sewer pipe in said lot hardpan was encountered. This, the witness stated, was

given little or no attention. It further appears that the plaintiffs inquired of Mr. McNaughton, one of the men connected with the defendant, as to the cause of the death of the six trees which they had set out in 1923, shortly after their death, and McNaughton replied that he could not tell them. John R. Layton further testified that the death of the trees did not arouse any suspicion in his mind; that he could not imagine what was the matter with the trees. The record then shows that the plaintiffs moved back to the Rio Linda district late in the year 1925, being away from the property in controversy nearly three years. After returning to the five-acre tract in 1925, the plaintiffs planted a garden thereon in the year 1926, from which they obtained no returns. The plaintiffs testified that this aroused their suspicions, and that they began to make inquiries and were told that they had been cheated. Prior to this the plaintiffs had not talked to anybody about the value of the land or to any one about its cultivation.

This action was begun on August 11, 1927, five years and eight months after the contract of purchase herein referred to, and after the plaintiffs moved out to the five-acre tract to live. The record also shows that there was some conversation between John R. Layton and a representative of the company as to being able to obtain carpenter work in the Rio Linda district, in which the witness was informed that he thought he could obtain such work. No such work, however, was obtained. The testimony of the plaintiff Louise S. Layton was substantially the same as that of the testimony of the plaintiff John R. Layton.

The record further shows that some time during the latter part of 1923 and early in 1924 the plaintiffs endeavored to sell the tract of land in question, and were informed that the price was too high.

While the record shows that the plaintiff John R. Layton had lived in the county of Sacramento for a number of years, had come in contact with farms where orchards were being planted and cultivated, it does not show that he availed himself of the opportunity to become acquainted with the various soils found in the different portions of the county where he had lived and worked. The price at which the plaintiffs offered their property for sale was less than they had contracted to pay for it, and, as just stated, were informed that the price was too high. According to the testimony of the plaintiffs, none of these occurrences caused them to make any inquiry as to the value of the land or the quality of the soil contained therein. The record further shows, as stated by the witness John R. Layton, that in planting trees it was necessary to blast. This blasting was for the purpose of breaking up the hardpan to permit drainage, and also to permit the roots of the

trees to penetrate the soil the necessary depth below the surface to maintain tree life. The testimony further shows that the plaintiffs, while living in Sacramento for a number of years and close to the lands involved, made no inquiry of any one concerning the same, either as to value or quality of soil or the adaptability thereof for fruit raising, or for any purpose. Likewise, the record shows that a number of days elapsed between the time the plaintiffs first considered purchasing the land in the Rio Linda district and the time when the final contract of purchase was entered into, during which time the plaintiffs made no inquiries of any one as to the quality of the soil, or as to the value of the property. This case differs also from that of the Stevens and Isenberger cases in that the plaintiffs were informed that there was hardpan in the five-acre tract, and that it would be necessary to blast through the hardpan when setting out trees. The plaintiffs also in this case had an object lesson as to hardpan in the boring of the well upon the premises. Likewise an object lesson as to the existence of hardpan when digging the sewer upon their lot in east Sacramento.

[8] The question presented by the foregoing is whether finding No. 3 of the trial court is supported by the testimony. That finding reads, so far as material here: "That plaintiff did not discover, and could not with reasonable diligence have discovered the falsity of any of said representations prior to February, 1927. * * *" While it is true that John R. Layton followed the vocation of a carpenter in California, he had had a number of years' experience upon a farm in Iowa, and, if possessed of ordinary intelligence, gained some knowledge of agriculture, even though it might not have acquainted him with the different quality of soils and their productive powers. However, the plaintiffs had knowledge, in the year 1922, of the existence of hardpan. That they may not have had knowledge of its unproductive qualities or deterrent qualities may also be true, but having been advised that it would be necessary to blast the hardpan before setting out trees, and having disregarded such advice and set out trees without blasting, and the trees only living for a few months thereafter, certainly constituted a discovery of facts sufficient to put a reasonable person upon inquiry as to the character and quality of the soil, and sufficient to induce any reasonable person to make inquiries as to what should be done in order to profitably cultivate trees, and whether trees could be successfully grown and profitably cultivated upon the five-acre tract. Notwithstanding this, the plaintiffs moved away from the premises and remained away nearly three years, living in Sacramento, only nine miles, or thereabouts, distant, where there were any number of real estate dealers of whom inquiries might be made, and yet no questions were asked.

As stated in the case of *French v. Freeman*, 191 Cal. 579, 217 P. 515, 518, the fact that the plaintiff visited the premises might properly, in this case, be held immaterial on the theory that the plaintiffs, at the time of the visit, were unable to judge of the quality and character of the soil. In the opinion of the case just referred to, we find the following: "If the defrauded party is not competent to judge the quality of the land, we do not see that it can make any difference whether or not he actually visits the premises. Assuming that if plaintiff had not visited the land he would be entitled to rely upon the representations, it would be unreasonable to say that he would not likewise be entitled to rely upon the representations, even though he visited the land, if as a matter of fact, by reason of his inexperience and ignorance, he was incompetent to judge the quality of the soil." In the instant case, however, admitting that the plaintiffs were ignorant, for the purposes of the argument, it is apparent that they were advised of what they complain as the "inherent defect" in the land, to wit, the presence of hardpan, and yet, according to their statements, made no inquiries until some time during the year 1926. There is nothing in the record which shows that the plaintiffs were lulled into inactivity by any act of the defendant, from the time they left the Rio Linda district until the alleged awakening of their suspicions in the summer of 1926. The complaint alleges that lands were sold to others in the same district for the same price, but there is nothing in the testimony or in the pleadings showing that the defendant practiced any concealment in this case relative to the existence of hardpan, the defect alleged to render the tract valueless. Nor is the statement of the agent of the company, Brennan, that all they needed to do before setting out the trees was to blast the hardpan, proven to be false.

The case of *Nichols v. Moore*, 181 Cal. 131, 183 P. 531, an instance of where a number of years intervened between the perpetration of the fraud and the discovery thereof, is readily distinguishable from the facts involved herein. There the plaintiff was living in the state of Ohio; the lands involved were situate in Washington in a timber district; were represented by the defendant to be covered with a valuable growth of timber available to navigation, etc. The plaintiff knew of the surrounding territory being covered with timber, but did not know that the particular tract involved had been completely denuded by fires. These were facts which were concealed and could not be readily ascertained by the plaintiff, and were not ascertained until an agent was sent by her to examine the premises. Even in that case the opinion holds that it is necessary for the parties seeking to avoid the statute of limitations to affirmatively plead facts excusing the failure to make an earlier discovery of the fraud relied upon. This, in the event of a

lapse of more than three years. It is likewise held that ignorance of the fact which a party might, with reasonable diligence, have discovered, is not sufficient to postpone the running of the statute.

In *Phelps v. Grady*, 168 Cal. 73, 141 P. 926, 928, it is held that: "A party seeking to avoid the bar of a statute on account of fraud must aver and show that he used due diligence to detect it. * * * Concealment * * * which will avoid the statute must go beyond mere silence. It must be something done to prevent discovery. * * * Concealment * * * must be the result of positive acts. * * * Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. * * * The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." As the record shows, nearly three years elapsed without the plaintiffs taking any act whatever, or making any inquiry. In other words, the record shows no diligence and no effort to ascertain what they alleged to be the truth concerning the lands involved, and likewise exhibits no act on the part of the defendant, as shown by the case of *Phelps v. Grady*, supra, necessary to exist in order to constitute an excuse for inactivity on the part of the plaintiffs.

The instant case is, in its essential particulars, similar to the circumstances involved in *Sacramento Suburban Fruit Lands Co. v. MacNair* (C. C. A.) 36 F. (2d) 950, where it was held that the testimony showed a case which was barred by the statute as a matter of law. In that case the plaintiff testified as to the discovery of hardpan, but he did not know what it was; that he finally moved off the premises for the lack of money; that he never talked with any one about fruit growing, and made no inquiries concerning the land, just as characterizes the actions of the Laytons in the case at bar.

From the foregoing we can find no escape from the conclusion that there is no testimony showing due diligence on the part of the Laytons, nor any excuse therefor, and that the finding of the trial court to such effect is without support.

[9-15] Is the defense of the statute of limitations available to the defendant in this action? The complaint alleges, and the answer admits, that the defendant is a Minnesota corporation, and therefore must comply with the act of the Legislature requiring the filing with the secretary of state of the designation of some person upon whom service of summons may be made. While the answer of the defendant did not plead the filing of such a designation, as required by the statute, it appears that the defendant did

introduce, and there was admitted in testimony, an instrument showing such designation filed with the secretary of state on the 12th day of August, 1912. While the admission of this writing was objected to as being incompetent and immaterial, it was not objected to as not being within the issues tendered by the pleadings, and must therefore be considered as though properly pleaded. Following this a stipulation was made in the following words: "It is hereby stipulated that the A. M. Jones referred to in the designation filed with the secretary of state resigned from defendant's employ in the year 1914, and since such time has not been connected with the defendant in any capacity. Dated, the 18th day of June, 1929." Counsel for the respective parties stated to the court that it was not intended by the stipulation to include anything further than that A. M. Jones had resigned from his employment, and that the stipulation did not include anything relative to his designation as a person upon whom service of summons might be made. The designation filed with the secretary of state gave the residence at the time of the resignation of A. M. Jones as Sacramento, Cal. At the date of the trial, and at the time of the stipulation, and for some years prior thereto A. M. Jones had been residing in the city of Fresno, Fresno county. It is the contention of the respondent that, when A. M. Jones, the designated agent upon whom service might be made, resigned from his employment and left the city of Sacramento, going first to one of the northern cities in the state and finally locating in Fresno, he had in legal effect severed his designation as the company agent, and had worked an abandonment thereof so that the further running of the statute of limitations in behalf of the company had ceased. In support of this contention the respondent cites the cases of *Gerrick & Gerrick Co. v. Llewellyn Iron Works*, 105 Wash. 98, 177 P. 692, and *Brown-Ketcham Iron Works v. George B. Swift Co.*, 53 Ind. App. 630, 100 N. E. 584, 860. In both of these cases there was involved the abandonment of the agency and the removal of the corporation from the state. Service of summons was had upon the designated agent after the abandonment and after the withdrawal of the corporation from the state where the designation had been filed. The service of summons in both cases was held invalid and insufficient to give the trial court jurisdiction. Here we have the corporation still doing business in the state.

The statute relative to designation of an agent upon whom service may be made, at the time the designation was filed, did not require that the residence of the designated agent should be in any particular place, or even should be stated in the designation, other than that he should be a resident of

the state of California, and, in the event that the designated agent died or departed from the state, the corporation making the designation should, within forty days thereafter, file another designation; otherwise, the statute would cease to run. The statutes as now amended, requiring residence, etc., to be given, have no application. The statute specifies only one condition for stopping the running of the statute, to wit, the failure to file a new designation within forty days after the departure or death or removal from the state of the person theretofore designated. Under no other circumstances does the statute cease to run. The mere fact that the designated agent moves from one place to another within the state has no effect upon the operation of the statute. The statute of limitations is a creature of the Legislature, and the Legislature alone has power to fix the conditions under which it may operate, and also the circumstances necessary to suspend the running of the statute. Where the corporation has abandoned its business within the state and retired therefrom, the court might very well be justified in holding that, during the absence of the corporation from the state, the statute ceases to run, just as in the case of individuals who absent themselves from the state the time of such absence is no part of the statutory period constituting a bar. When the corporation has an office within the state and a managing agent or any officer therein, as named in subdivision 2 of section 411 of the Code of Civil Procedure, summons may be readily served. In fact, such appears to have been the procedure followed in the cases presented upon this appeal. Again, the cases cited by the respondent by reason of the fact that the corporation had retired from the state where the questions arose are inapplicable. Further, it is not necessary that the designated agent be an employee or officer of the company. When such designation is made, and the designation appears on file in the office of the secretary of state, service of summons may be made upon such designated agent, even though in fact such person had no connection with the corporation, and had considered himself no longer such agent. This is the substance of the holding in the case of *Eureka L. & Y. Co. v. Superior Court*, 66 Cal. 311, 5 P. 490, 492. The facts in that case show that one David Cahn, while an officer of the company, had been designated as the person upon whom service might be made. The following quotation shows the facts and the ruling of the court: "In the action in which the injunction was issued, the summons was served by the sheriff of the city and county of San Francisco on the ninth of November, 1882, by delivering a copy of the same, together with a certified copy of the complaint, to the said David Cahn. On the motion of petitioner to set

aside the return of service of summons, affidavits were read in support of the motion, to the effect that, at the time of the service, one A. S. Bigelow, of the county of Nevada, was its managing agent, and said Cahn was not, and had not been for more than a year prior thereto, the agent, cashier, secretary, or other officer of the petitioner. In regard to this point, it is sufficient to say that the petitioner had, under the statute of April 1, 1872, designated Cahn as the person upon whom process might be served, and such designation had not been revoked at the time of service. This designation was made after the amendment of 1874 to section 411 of the Code of Civil Procedure, and the petitioner could not be heard to say, in the suit for injunction, that Cahn was not the proper person, as designated in subdivision 2 of said section 411. * * * To hold otherwise would be to permit a foreign corporation to set at defiance all processes." If, under such circumstances, a corporation is estopped from denying the validity of the service of summons upon a designated agent, so long as no change had been made by filing the necessary papers with the secretary of state, it follows as a matter of course that the corporation is not estopped to plead the statute. The weight of authority is that, the statute having provided a method of notifying the public of a change of agency, the designation continues until the specified procedure is followed.

In *S. B. Reese Lumber Company v. Licking Coal & Lumber Co.*, 156 Ky. 723, 161 S. W. 1124, the Supreme Court of Kentucky, in dealing with a like question, held as follows: "Under Ky. St. § 571, providing that all foreign corporations shall have a known place of business and an authorized agent on whom process may be served, and that it shall not be lawful for any corporation to carry on business until it shall have filed in the office of the Secretary of State a statement giving the location of its office and the name of its agent, and, if the agent shall be changed, notice shall at once be given, service of process on one who appeared as agent in the statement filed with the Secretary of State is a good service on a foreign corporation, even though the agency had been terminated."

In *Germantown Dairy Co. v. McCallum*, 223 Pa. 554, 72 A. 885, 886, the Supreme Court of Pennsylvania held that the statute "does not require that the registered agent of a foreign corporation should stand in any other relation to it than its agent upon whom process may be served, and, notwithstanding such an agent had parted with his interest in the corporation or had resigned his office as secretary and treasurer, he remained its agent, upon whom process might be served." In *De La Vergne Refrigerating Machine v. Kolischer*, 214 Pa. 400, 63 A. 971, it was held

th his appointment was canceled in the man-
that the designated agent remained such un-
ner provided by the statutes.

In the case of Gibson v. Manufacturers' Fire & Marine Insurance Co., 144 Mass. 81, 10 N. E. 729, the Supreme Court, in considering a like question, held that the appointment of an agent was irrevocable, unless the revocation be made by the appointment, duly notified upon the public records, of a new agent, who should be competent to receive service of process.

We see no escape from the conclusion that, so long as the defendant in this case was doing business in this state, and under the authorities which we have cited, estopped from denying the authority of its designated agent to accept service, if such an issue were presented, it is likewise entitled to the benefit of the statute. In other words, the estoppel to deny is equivalent to holding that the statute of limitations never ceased to run. It may be further observed that there is nothing in the record indicating an intent or purpose, on the part of the defendant, to revoke or abandon the designated agency.

In view of what we have said, the order of the court must be and is as follows:

The judgment in the case of J. S. Stevens and Esther Stevens against the defendant is affirmed. The judgment of N. E. Isenberger against the defendant is likewise affirmed. And the judgment of John R. Layton and Louise S. Layton against the defendant is reversed.



109 Cal. App. 264

PHILLIPS et al. v. LYON et al.

Civ. 4038.

District Court of Appeal, Third District,
California.

Oct. 30, 1930.

1. New trial ⇨157.

In passing on motion for new trial for inadequate damages, court could consider testimony regarding admission of contributory negligence.

2. New trial ⇨75(1), 76(1).

New trial may be granted when it appears that verdict is not justified by evidence either because it is excessive or inadequate (Code Civ. Proc. § 657).

3. New trial ⇨74.

Court may not set aside verdict and grant new trial merely because judge does not agree with amount of damages.

4. New trial ⇨77(2, 4).

Where damages awarded are so inadequate or excessive as to leave no reasonable doubt that verdict is result of passion or prejudice or that it is contrary to evidence, new trial should be granted.

5. New trial ⇨74.

Jury's province to determine amount of damages for personal injuries should not be interfered with unless their discretion has been abused.

6. New trial ⇨75(4).

\$3,000 damages for broken forearm and fractured vertebra, contusion on head, and nervous shock held not so inadequate as to require new trial.

7. Partnership ⇨174.

Members of copartnership held jointly, but not individually, liable for tort of agent.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Jack Phillips, a minor, by E. E. Phillips, his guardian ad litem, and another, against Lloyd D. Lyon and J. H. Darwin, individually and as copartners doing business under the firm name and style of Lyon & Darwin Hardware Company, and others. From an unsatisfactory judgment, plaintiff appeals.

Affirmed.

Lasher B. Gallagher and Walter E. Drobesch, both of San Francisco, for appellant.

Downey & Chester, Butler, Van Dyke, Desmond & Harris, Downey, Brand & Seymour, and Hatfield & Hatfield, all of Sacramento, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff Jack Phillips by his guardian has appealed from that portion of a judgment which was rendered in his favor in compensation of personal injuries sustained by him in an automobile collision accident. It is contended this portion of the judgment, which is for \$3,000, is grossly inadequate to compensate him for the injuries sustained.

At 8 o'clock on the morning of June 1, 1928, the plaintiff's minor son Jack, aged fifteen years, was riding as a passenger with the defendant Clifford Woodard, Jr., in his father's Studebaker machine. They were traveling westerly on Ninth avenue in the city of Sacramento. At the same time, Alden C. King, a young man who was employed by the firm of Lyon & Darwin, hardware merchants of the same city, was driving their Ford truck in the course of his employment northerly along Thirty-Third street. Both machines

were traveling along the proper side of their respective streets. Some shade trees and dwelling houses deprived both drivers of a clear view of the intersecting streets which they were approaching. Alden King testified he was traveling only 15 miles an hour, and that he actually entered upon the intersection of these streets before he saw the Woodard car approaching. Jack Phillips and Clifford Woodard, Jr., each testified they were traveling at a rate of speed not to exceed 20 or 25 miles an hour, and that he did not see the Ford truck until they reached a point 50 or 60 feet from the intersection. A collision occurred. There is a conflict of evidence as to the cause and manner of the contact of the machines. The driver of each car insists his automobile was struck on the side by the other machine. The Ford truck appears to have been shunted across the street, landing on an adjoining lawn against a dwelling house. The Ford, however, maintained an upright position upon its wheels. King, the driver, was dazed but uninjured. The Studebaker machine shot diagonally across the street and overturned at the curbing. Jack Phillips was found beneath the wreck of the machine, unconscious and seriously injured. He was taken to the county hospital where he remained under the care of a physician for several months. He sustained a fracture of the twelfth vertebra of the spinal column. Both bones of the right forearm were shattered near the wrist. It is insisted that he is permanently injured. A suit for damages was commenced against the driver of the Ford truck and his parents. The hardware firm was made a party defendant, as were also the individual members of the copartnership. The defendants answered separately, denying the allegations of negligence with which they were charged and affirmatively asserting that the driver of the Studebaker machine was guilty of contributory negligence. The cause was tried before a jury. A verdict was rendered against each of the defendants, except L. D. Lyon and J. H. Darwin, as individuals, for damages for the injuries sustained by Jack Phillips in the sum of \$3,000 and for an additional sum of \$1,786 for expenses incurred as a result of the injuries. A judgment was entered accordingly. The plaintiff was dissatisfied with the award of damages for personal injuries and moved for a new trial, which was denied. This appeal was then perfected. The defendants have not appealed. They do not complain of the judgment.

The plaintiff contends that the award of damages is grossly inadequate to compensate his ward for the injuries sustained, and that the judgment is erroneous for the reason that it was not rendered against the individual members of the copartnership which employed the driver of the Ford machine.

[1] A serious controversy existed regarding the alleged contributory negligence of Clif-

ford Woodard, Jr., who was driving the Studebaker car at the time of the accident. A judgment for the defendants would have found ample support in the evidence. Both boys who were riding in the Studebaker machine saw the approaching Ford truck when they were 50 or 60 feet away. A prompt application of the brakes on their part might have avoided the accident. If the nurse, who had charge of Jack Phillips while he was confined to the hospital, speaks the truth, he admitted they were running at a grossly excessive rate of speed which prevented them from avoiding the collision. She testified that he said regarding the accident: "We were going like hell * * * We must have been going between 65 and 75 miles an hour. * * * We were seeing how fast we could go. * * * How could the other car get out of the way? We were going too fast." The fact that the Ford truck was shunted across the street, over the lawn and up against a dwelling house, gives credence to this admission of Jack Phillips. The defendants, however, are not complaining of the judgment against them. They have not appealed. From the implied finding of the jury which necessarily follows the judgment in favor of the plaintiff, this court must assume he is entitled to a substantial award of damages. However, in determining whether the judgment is grossly inadequate and whether the award is supported by the evidence, the foregoing facts may be considered by a trial court in passing on a motion for a new trial which is based upon the ground of the alleged inadequacy of the verdict. In determining the adequacy of a judgment, an appellate court is confined to a more stringent rule.

[2] A new trial may be granted under the provisions of section 657 of the Code of Civil Procedure when it appears that the verdict is not justified by the evidence either because it is excessive or grossly inadequate.

Formerly, the rule at common law did not authorize the granting of new trials in actions for personal injuries or torts on the ground of inadequacy of damages. It was argued that, since the amount of damages is largely within the discretion of the jury in such cases where there is no standard of computation, there is then no accurate rule by which to measure the damages. The discretion of the jury may therefore not be interfered with.

In England and in the United States that rule has been greatly relaxed. The principle is now uniformly recognized that there is no greater reason for granting a new trial on the ground that a verdict is excessive than that it is inadequate. In either event it is erroneous because it does not represent just compensation for the injuries sustained.

[3-5] While a court may not set aside a verdict and grant a new trial merely because the judge does not agree with the amount of the

award of damages, where it is so grossly inadequate or excessive as to leave no reasonable doubt that the verdict is the result of passion or prejudice or that it is contrary to the evidence and constitutes a clear abuse of the discretion of the jury, a new trial should be granted for the reason that the award of damages is not justified by the evidence and does not reasonably compensate for the injuries sustained. *Taylor v. Northern Elec. Ry. Co.*, 26 Cal. App. 765, 148 P. 543; *Donnatin v. Union H. & M. Co.*, 38 Cal. App. 8, 175 P. 26, 177 P. 845; 20 Cal. Jur. 104, § 67; 20 R. C. L. 288, § 67; 46 C. J. 207, § 152; 1 Hayne on New Trial, 455, § 95. The province of the jury to determine the amount of damages to be awarded as compensation for personal injuries should, however, not be interfered with unless it clearly appears their discretion has been abused. It is difficult to determine just what state of facts will warrant a trial court in setting aside the verdict of a jury on the ground that the award is inadequate or what record will justify an appellate court in reversing a judgment on that ground. Where property values are involved it is not difficult to ascertain the approximate measure of damage. But who can accurately estimate the pecuniary damage resulting from the loss of a member of the body or an injury to some vital organ? In the *Taylor Case*, supra, where it appears the plaintiff sustained a serious injury to the spine and paralysis resulted therefrom, the trial court set aside a verdict of \$500 as inadequate. On appeal the order granting the new trial was affirmed. We are cited to no authority, however, wherein a verdict for \$3,000 as damages for injuries similar to those which were sustained in the present case, was set aside as inadequate.

[6] There is evidence in this case to indicate that Jack Phillips was seriously and possibly permanently injured. Both bones of the right forearm near the wrist were broken. The twelfth vertebra of the spinal column was fractured. This caused a lateral curvature of the spine. The periphery process of the vertebra was also injured. He received a severe contusion on the back of his head. He suffered great pain and shock to the nervous system. He was delirious for several days. He was confined to the hospital several months and was kept in a plastercast jacket for five months. There is evidence from which the jury may have assumed the injuries to his arm and spine may leave permanent damaging results, and that a future operation may become necessary to adjust the curvature of the spine and relieve the patient of pain. The doctor testified regarding the broken arm: "The bone on the outside of the arm * * * shows a deformity of this ulna, an angulation * * * (of) about two centimeters. * * * Although he has got pretty good motion in the wrist—very good

function— * * * he has not as much as he had before."

Regarding the fracture of the vertebra which left a slight curvature of the spine and a nervous condition, he said:

"He has certainly suffered nervous shock, just how permanent it will be, I do not know. * * *

"Q. If the pain does not leave, doctor, is it customary to perform an operation in that region? A. Yes. If after the brace is removed and he still has pain in his spine, it will be necessary * * * to take a graft from the leg and put into the spine in order to keep that portion of the vertebra in that region from moving. * * *

"Q. Have you any approximate idea of the reasonable cost of what such an operation would be? * * * A. Oh, I imagine a thousand dollars would be a fair fee." This is the only evidence regarding the cost of a possible necessary future operation. The necessity of such an operation is conditional and uncertain.

Where the undisputed pecuniary value of property is damaged by the ascertained tort of an individual, it is easy to determine whether a judgment is adequate or not. Where a plaintiff has been awarded a judgment which clearly entitles him to a substantial amount of damages, and the jury renders a verdict for a mere nominal sum, the inadequacy is apparent. Many authorities uphold a remedy under such circumstances. The judgment in the present case is not for a mere nominal sum. It greatly exceeds an award which might be so termed. From the very necessity and uncertainties of the situation a jury is accorded a wide latitude and an elastic discretion in assessing damages as compensation for personal injuries. We know of no equitable or accurate means of measuring the damages under such circumstances except to rely upon the sound judgment of the jurors. Under the facts of this case we are unable to say as a matter of law that the judgment is inadequate or that the award is so grossly insufficient as to lack support of the evidence and require a reversal on that account.

[7] There was no error in failing to render or enter the judgment against the individual members of the defendant copartnership. It is a partnership liability for the tort of an agent and employee within the scope of his employment which binds the partnership and the members thereof jointly. 20 Cal. Jur. 740, § 55; 20 R. C. L. 914, § 126; 47 C. J. 884, § 364. Each of the partners is individually liable for the payment of the debt. 20 Cal. Jur. 849, § 140. In 1 Rowley's Modern Law of Partnership, 639, § 504, it is said: "Partnerships and partners are bound and liable for the tortious acts of their agents or servants acting within the scope of their agency or

employment as well as for the acts of each partner acting within the scope of the firm's business."

The judgment is affirmed.

210 Cal. 572

**ROBERT MARSH & CO., Inc., v. TREMPER
et ux.****L. A. 10531.**

Supreme Court of California.

Oct. 28, 1930.

1. Contracts ⇨155.

Unexplained uncertainties in instrument providing for commissions, prepared by broker, must be interpreted most strongly against him (Civ. Code, § 1654).

2. Damages ⇨150.

Complaint for broker's commissions, claiming "\$1000 as liquidated damages for time, trouble and expense," *held* insufficient; statute allowing liquidated damages only where ascertaining actual damage is impracticable (Civ. Code, §§ 1670, 1671).

Civ. Code, § 1670, provides that every contract by which amount of damage for

breach is determined in anticipation is to that extent void, except as provided in section 1671, which allows parties to agree on amount of damage when, from nature of case, it would be impracticable or extremely difficult to fix actual damage.

3. Damages ⇨85.

Contract provision for liquidated damages is void, unless it is shown that case comes within statutory exception (Civ. Code, §§ 1670, 1671).

4. Damages ⇨163(3).

Person relying on statutory exception, allowing liquidated damages in contract only where ascertaining actual damage is impracticable, has burden of proof (Civ. Code, §§ 1670, 1671).

5. Damages ⇨79(2).

"Damages for time, trouble and expense incurred" by broker, being commonplace items readily computable, are not recoverable as liquidated damages (Civ. Code, §§ 1670, 1671).

6. Damages ⇨157(3).

Person claiming liquidated damages under contract must plead and prove facts from which court can say as matter of law that contract is valid (Civ. Code, §§ 1670, 1671).

7. Pleading ⇨208.

Special demurrer pointing out uncertainty and ambiguity caused by contract providing for liquidated damages held sufficient, although not specifically stating that contract was void under statute (Civ. Code, §§ 1670, 1671).

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by Robert Marsh & Company, Incorporated, against Theodore P. Tremper and wife. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

Clark J. Milliron, George H. P. Shaw, Leo M. Daly, George L. Reimbold, and L. B. Cramer, all of Los Angeles (H. B. Daniel, of Los Angeles, of counsel), for appellants.

Clyde C. Shoemaker, of Los Angeles, for respondent.

SEAWELL, J.

Appeal from a judgment awarding liquidated damages arising upon a real estate broker's contract for compensation on account of an exchange of real property. Judgment went for plaintiff in the sum of \$2,200—\$1,000 of which was assessed as actual and

\$1,000 as liquidated damages and \$200 as attorneys' fees.

Robert Marsh & Co., Inc., plaintiff and respondent, was a real estate broker doing business in the city of Los Angeles, this state.

Appellants, Theodore P. Tremper and May C. Tremper, his wife, were the owners of certain described real property situate in the state of Washington. Charles E. Smith was the owner of certain lots situate in said city of Los Angeles.

[1] By and through the efforts of said real estate broker or agent, said Tremper and said Smith executed certain agreements prepared by said broker for the exchange of real properties, which agreements provided for the payment by the Trempers of stated sums to said broker for its services, as will hereafter more particularly appear. The agreements providing for the exchange and the broker's compensation or commission are somewhat unusual and, it may here be added, uncertain in their provisions. Said instruments having been prepared by said broker, such uncertainties as they may contain, in the absence of testimony removing or explaining said uncertainties, must be interpreted most strongly against the party who caused them to exist. Section 1654, Civ. Code; 6 Cal. Jur. 307.

Such portions of the agreements between respondent real estate broker and the Trempers and between said broker and Smith, which constitute the basis of respondent's claim for damages, provide that said broker, Robert Marsh & Co., Inc., is to act as principal or agent of said Trempers and Smith, respectively, in said transaction. As to the Trempers, the agreement provides:

"That when he [real estate agent] has accepted or procured an acceptance of this proposition to exchange the above properties on the above terms, they will then pay the sum of One Thousand Dollars, regardless of the amount of property or money it receives in, or through the acceptance and consummation of the above exchange and have no objection to it receiving other compensation from the owner of the second piece of property [Smith] or others.

"And they hereby agree that if they fail in any way to carry out their part of the above agreement, then and in that event—agree to pay on demand of Robert Marsh & Co., Inc., the sum of \$1,000 as liquidated damages for time, trouble and expense incurred in the within deal, together with reasonable attorney's fees for the collection thereof."

The forms of agreement are doubtless stock forms used by said agent, and the concluding portion of the Smith agreement is identical with the Tremper agreement, except it contains the provision that "no com-

missions as liquidated damages for his time, trouble and expense incurred in the within deal, together with reasonable attorney's fees," shall be chargeable against Smith in the event he fails to carry out his agreement.

Both parties to the contract of exchange having become dissatisfied with their bargain, the deal was abandoned by them by mutual consent. The agent thereupon brought suit to recover damages and recovered judgment for the full amount prayed for, from which this appeal is taken.

Sections 1670 and 1671, Civil Code, provide:

"1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

"1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

[2-4] The complaint alleges the licensing of respondent as a real estate broker and sets forth in usual form a cause of action for the recovery of the amount fixed by the agreement, to wit, \$1,000 "to be paid to respondent upon procuring an acceptance of the proposition," and, in addition thereto, and without alleging or stating any facts from which an inference tending to bring the case within the provisions of said section 1671, *supra*, might arise, simply alleges that the appellants further agreed to pay respondent "the sum of \$1,000 as liquidated damages for time, trouble and expense incurred in the within deal, * * *" It has many times been held by the decisions of appellate courts of this state wherein cases involving the identical subject-matter were under consideration that such an allegation as is contained in respondent's complaint does not bring the case within the exception of said code section. Neither was any sufficient proof offered to supply the defect. The law is that the "liquidated damage" clause is void unless it is made to appear that the case comes within the exception provided by section 1671, *supra*. The burden rests upon the person who seeks to bring himself within the exception. Upon the face of the complaint and agreement itself the provision which provides for the payment of liquidated damages is void.

[5] The items which respondent specifically names as constituting the basis of its damages, to wit, "time, trouble and expenses incurred" in bringing about the exchange, are commonplace items which enter into every contract for service and they have never been held to be impracticable or extremely diffi-

cult of determination, but, on the contrary, have been held by numerous decisions to be readily computable. *McInerney v. Mack*, 34 Cal. App. 153, 166 P. 867, 868.

[6] In actions such as this the person claiming liquidated damages "must show to the court by proper pleadings and competent proof that the contract falls 'within' the law permitting liquidated damages. This does not depend entirely upon the contract itself. Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid because 'from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. The mere stipulations of the contract are insufficient for that purpose.'" *McInerney v. Mack*, *supra*, citing a long list of authorities. This principle has been reannounced in *Knight v. Marks*, 183 Cal. 354, 191 P. 531, and in many more recent decisions of this court and the District Courts of Appeal. *Hanlon Drydock & Shipbuilding Co. v. McNear*, 70 Cal. App. 204, 232 P. 1002.

[7] The respondent objects to appellants' presenting the point as to the deficiency of the complaint on appeal on the ground that they did not demur to the complaint upon the specific ground that the contract was void for the reasons which have been pointed out. The demurrer was both general and special. The general grounds went to the sufficiency of the complaint, which contained but one count, to state a cause of action.

Several special grounds of demurrer were set forth, and while none of them in direct terms made objection to that portion of the complaint which contained the liquidated damage clause on the ground that it was void, nevertheless the attention of the pleader was called to the infirmities of the liquidated damage clause and the significance of section 1671, *supra*, by a number of grounds of special demurrer as to uncertainty and ambiguity by reason of said liquidated damages clause. We entertain no doubt but that the infirmities of the complaint were fully brought to the respondent's attention by the demurrer and the attitude of opposing counsel. The allegation of the complaint as to that item of damage did not state a cause of action.

Appellants make the further point that the contract should not be interpreted to hold that the parties thereto intended that two payments of \$1,000 each were to be paid by them for services which were completed when the consent of the parties to the exchange had been obtained. In other words, it would seem that compensation for the "time, trouble and expense" specifically mentioned as constituting compensatory service in the liquidated damage clause of the agree-

ment were necessarily included in and were in fact performed and ended when the parties to the exchange consented thereto, and therefore those items were not intended to constitute a basis for a second charge against appellants. It is appellants' claim that the contract is open to, and in view of the fact that it was prepared by respondent should be given, the construction that respondent was to receive a fee of \$1,000 if and when it obtained the consent of Smith to the exchange, irrespective of the question of its consummation. The contract is somewhat ambiguous in this respect, but, whatever may have been the intention of said parties, it is very clear that the contract taken at its best fails in its attempt to fasten upon appellants a liability for payment of liquidated damages. Damages for loss of "time, trouble, and expenses" are easily determinable under all the authorities, and if said items of service were not included in the clause for stipulated or actual damages, which it would seem must be the case, they are not recoverable in an action for liquidated damages. Sections 1670, 1671, Civ. Code.

The judgment is modified by striking therefrom said \$1,000 for and on account of liquidated damages, and as so modified the judgment will stand affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

211 Cal. 1

PRESTON et al. v. HERMINGHAUS et al.

S. F. 13354.

Supreme Court of California.

Nov. 1, 1930.

Rehearing Denied Nov. 28, 1930.

1. Attorney and client ⇨144.

Any ambiguity in contract between attorney and client must be construed in favor of client.

2. Attorney and client ⇨144.

Contract between attorney and client, if unambiguous, will be enforced like other contracts.

3. Attorney and client ⇨148(3).

Where contract provided graduated scale of attorneys' fees depending on whether clients sold riparian property to power company, or whether damages were collected after prosecution of condemnation suits, attorneys, on sale by clients after commencement

of condemnation suits, were entitled to fees under condemnation clause (Civ. Code, § 1643).

At the time the contract was entered into, attorneys were engaged in prosecuting a suit to restrain the power company from diverting water. The contract provided the attorneys should receive \$85,000 in case of sale of property prior to decision of Supreme Court, and \$100,000 in case of sale thereafter. "However, in case any condemnation suit or suits are prosecuted * * * and damages are collected * * * by compromise or by judgment," payment was to be on the percentage basis in ratio increasing with the amount recovered. The reasonable construction of the contract was to allow fees under the clause relating to condemnation in view of additional work done by the attorneys in the condemnation suits, and applying test of reasonableness under Civ. Code, § 1643. The parties themselves construed the contract in this way in fixing payment to attorneys, from amount received from power company for permission to violate injunction.

4. Contracts ⇨170(1).

Practical construction placed on contract by parties is admissible to explain ambiguity.

5. Attorney and client ⇨148(3).

Sale of entire riparian property to power company after commencement of condemnation suits amounted to "compromise" of all condemnation proceedings, within contract allowing attorneys percentage of damages collected.

[Ed. Note.—For other definitions of "Compromise," see Words and Phrases.]

6. Attorney and client ⇨148(3).

Where power company purchased riparian lands in settlement of condemnation proceedings to secure water rights, amount received for entire property must be considered in determining vendor's attorneys' fees contracted for on percentage basis.

The contract for payment of the attorneys did not limit their compensation to amount received for the water rights alone, but provided that, in case condemnation suits were prosecuted and damages collected by compromise or judgment, the compensation of the attorneys should be a certain percent of "all sums realized."

7. Attorney and client ⇨148(3).

Where attorneys, who had defended suits to condemn water rights, sued clients on contract for percentage of amount received on sale of riparian lands, evidence of value of water rights was inadmissible.

The contract provided for percentages on what was actually received, and not what should have been received, and neither the seller nor the purchaser valued the land separately from the water rights.

8. Attorney and client $\Rightarrow$ 148(3).

Loss resulting from failure of clients in selling riparian land to power company to allocate value of water rights should be borne by clients themselves, and not by attorneys who contracted for percentage of amount received.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by John W. Preston and another against Amelia Herminghaus and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Everts, Ewing, Wild & Everts and C. M. Ozias, all of Fresno, and Cushing & Cushing and William H. Gorrill, all of San Francisco, for appellants.

Theodore M. Stuart, of Fresno, and James F. Peck, Robert Duncan and Robert E. Hatch, all of San Francisco, for respondents.

PER CURIAM.

This action was brought for the purpose of collecting attorneys' fees alleged to be due plaintiffs from the defendants for legal services rendered by plaintiffs as attorneys at law in protecting defendants' water rights. It appears that defendants, in the year 1924, were the owners of a tract of land containing about eighteen thousand acres in Fresno and Madera counties and adjacent to the San Joaquin river; all but one thousand acres being riparian thereto. These valuable water rights were in danger by reason of threatened and actual diversions and appropriations by the Southern California Edison Company, the San Joaquin water storage district, the Madera irrigation district, the San Joaquin Light & Power Corporation, Miller & Lux, Inc., and by other corporations and individuals. The defendants found it advisable to retain attorneys in order to properly protect themselves against the threatened invasion of their rights, and in 1924 they retained plaintiffs for that purpose and for the purpose of recovering damages for any unlawful interference with their interests. The terms of this original contract of employment are not important on this appeal, for reasons that will presently appear. The plaintiffs, as attorneys for the defendants, started proceedings against the chief diverter and appropriator, the Southern California Edison Company, to

enjoin that company from diverting and appropriating any water to the injury of defendants' riparian rights. This action will hereafter be referred to as the injunction suit. After a long and arduous trial the plaintiffs secured an injunction in defendants' favor. From this judgment the Southern California Edison Company appealed to this court. While the appeal was pending, the plaintiffs and defendants herein entered into a written contract on October 8, 1925, purporting to fix the fee of plaintiffs for the legal services rendered and to be rendered in protecting defendants' riparian rights. It is the interpretation of this contract that is involved in this action.

Under the terms of this contract the plaintiffs defended the judgment on appeal in the injunction suit and secured in this court an affirmance of the judgment of the trial court. *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 252 P. 607. The Edison Company then appealed to the United States Supreme Court, but the plaintiffs succeeded in securing a dismissal of the appeal on the ground of lack of jurisdiction.

Immediately after the affirmance by this court of the judgment in the injunction suit on December 24, 1926, the Southern California Edison Company filed two actions, one in Madera county and one in Fresno county, for the purpose of condemning a portion of defendants' water rights. These actions will hereafter be referred to as the condemnation suits. The first of these actions was set for trial in October, 1927. Under the terms of their contract of employment, plaintiffs took the necessary steps for the proper defense of these actions, and handled all matters incident thereto until the same were dismissed under circumstances to be discussed later. In the meantime, and during and after the pendency of the appeal in the injunction suit, the Southern California Edison Company, by an arrangement with the defendants consummated by plaintiffs as attorneys, made payments to the defendants herein of sums of money totaling \$260,000, the consideration for which was the temporary waiver by defendants of their right to complain of the use of the water by the Southern California Edison Company, contrary to the provisions of the injunction. From this \$260,000 defendants paid plaintiffs the sum of \$35,000 on account of attorneys' fees, upon which point there is no dispute on this appeal.

As previously stated, the first of the condemnation suits was set for trial in October, 1927. On or about October 17th, P. H. Bottoms, the official representative and agent of the Herminghaus people, without the attendance of any of their counsel, and without consulting them as to his purpose, sold to the Southern California Edison Company the en-

ture holdings of the Herminghaus people on the San Joaquin river. During the conference with the representatives of the Edison Company, Bottoms made no attempt to consult with plaintiffs, and in no way informed them of the proposed sale until after it was consummated. By the terms of this sale defendants received the sum of \$873,200 in cash for the property on the basis of \$50 an acre for the acreage involved. If this sum be added to the sum already received, the total is \$1,133,200. As a part of this deal the defendants gave a full release to the Southern California Edison Company and conveyed the property to its subsidiary, the Edison Securities Company, and then instructed plaintiffs to participate in the dismissal of the condemnation suits. It should here be noted that it is agreed between the parties to this appeal that, in consummating the above deal with the Southern California Edison Company, neither the defendants nor the Edison people made any attempt to allocate any part of the purchase price to water or water rights alone; the entire sum having been paid for the land and water rights together, or, more correctly, for the riparian land. The sale of the entire property, of course, terminated plaintiffs' employment; there no longer being any water rights of the defendants to protect. Furthermore, it is conceded by defendants that this termination of the contract of employment amounted to complete performance on the part of plaintiffs.

The contract of employment herein involved was, as before stated, entered into on October 8, 1925, after the employment of plaintiffs had begun and while the relationship of attorney and client existed. The final draft of the contract was prepared by plaintiffs, and there can be but little doubt that both parties thereto were attempting to provide, and intended to provide, for all contingencies that might thereafter arise. The contract first provides that the water rights of the defendants are in danger by diversions and appropriations, both threatened and actual, by certain enumerated corporations and individuals, and that it has therefore become necessary for defendants to employ attorneys to represent them in protecting and preserving their water rights; that the plaintiffs have already instituted and successfully prosecuted the injunction suit in the trial court, which case is now on appeal, and then continues as follows:

"Now, therefore, it is agreed as follows:

"(1) That the parties of the first part [defendants herein] do hereby retain and employ the parties of the second part [plaintiffs herein] as their attorneys in the matter aforesaid for the period of five years from the date hereof unless said matters are sooner accomplished or otherwise terminated by mutual consent and also so long after said date as may be necessary to complete any unfinished

litigation which is in good faith being prosecuted at said expiration date, whether for parties of the first part as plaintiffs or defendants.

"(2) Parties of the second part agree to commence and prosecute any further action or actions that may be necessary or advisable to fully protect the interests of said first parties, and, if so advised, will at the request of said first parties appear in and prosecute a suit now pending in the Superior Court of the State of California in and for the county of Fresno wherein parties of the first part are plaintiffs and Madera Irrigation District is defendant.

"(3) Said second parties also agree to defend for first parties any and all condemnation suits or other proceedings that may be entered against them or either of them respecting the said water rights of said river. In other words, the second parties agree to fully represent said first parties as attorneys during the life of this contract in any and all matters affecting the legal status of the water rights that belong to or appertain to the said above mentioned and described lands.

"(4) The said second parties in this behalf agree to give their personal attention to said work; to exercise their best skill and ability in the pursuance thereof and to in every way and in good faith protect to their utmost the rights of the first parties in and to said San Joaquin river and its tributaries.

"(5) It is expressly understood and agreed that this contract be and is unassignable.

"(6) For the services of parties of the second part hereunder, both past and future, it is agreed that the same shall be as follows and not otherwise, to-wit:

"That in case of sale of said property by parties of the first part prior to a decision by the Supreme Court of the State of California upon the appeal now pending therein, the compensation of said second parties shall be the sum of eighty-five thousand (\$85,000) dollars and no more." [It is to be noted that this compensation clause could not possibly apply, because the termination of plaintiffs' employment occurred after, and not prior to, a decision by this court in the injunction suit.]

"If the above referred to judgment now being appealed from is substantially affirmed but not otherwise and thereafter a sale is made of said property by parties of the first part, the parties of the second part shall receive a minimum compensation of one hundred thousand (100,000) dollars, or in lieu of such sum may at their option require for their said services thirty percent of all sums received on such sale in excess of eight hundred thousand (\$800,000) dollars and less than two million (2,000,000) dollars." [This clause will hereafter be referred to as the sales clause.]

"However, in case any condemnation suit or suits are prosecuted against said parties of the first part and damages are collected by said parties of the first part by compromise or by judgment, compensation for said parties of the second part for their services shall be as follows, and not otherwise:

"Twenty (20) percent of all sums realized in excess of one hundred thousand (100,000) dollars and less than two hundred thousand (200,000) dollars.

"Twenty-five (25) percent of all sums realized in excess of two hundred thousand (200,000) dollars and less than three hundred thousand (300,000) dollars.

"Thirty (30) percent of all sums in excess of three hundred thousand (300,000) dollars.

"It being, however, understood and agreed that if less than one hundred thousand (100,000) dollars is recovered by and paid to parties of the first part, nothing shall be paid to parties of the second part on account of said services." [This clause will hereafter be referred to as the condemnation clause.]

Defendants strenuously contend that since the property was sold to the Edison people, the plaintiffs' compensation should be measured by the provisions of the sales clause, *supra*, and not otherwise. It is therefore defendants' contention that the compensation of plaintiffs should be \$100,000, and no more, of which \$35,000 admittedly has been paid. The defendants at all times have been and are now willing to pay the balance of \$65,000 for a full release of all of plaintiffs' claims under the contract. On the other hand, the plaintiffs, with equal vigor, contend that the sale of the property to the Edison Securities Company was, in effect, no more than a compromise and settlement of all condemnation proceedings, and for that reason the condemnation clause, *supra*, governs the compensation. Under this provision of the contract, if the \$260,000 already received by defendants is included as part of the compromise, the compensation of plaintiffs would be \$294,900, plus interest, less the \$35,000 already received, and less the sum of \$500 which appellants paid to an outside attorney. This would fix respondents' fee at \$259,460 (erroneously found by the trial court to be \$259,400), plus interest; or, using the figures of the trial court, the sum due respondents at the time of judgment was \$273,018.50. This was the amount of the verdict of the trial court.

The complaint sets forth three causes of action, only the first being important on this appeal, the plaintiffs electing to rely on this count at the trial. This cause of action sets forth the contract and alleges that the sale of the property was a compromise and settlement of the condemnation suits. During the course of the trial the plaintiffs were permitted to amend this count of the complaint to the effect that the sale was only a disguise

for a compromise and settlement of the condemnation suits, thus, in effect, setting forth bad faith. The defendants, in their answer, contend that no compromise was in fact entered into, the transaction being no more than a sale of the property. They deny any bad faith.

The case proceeded to trial before the court and jury. During the course of the trial, the court, with the approval of both parties, stated to the jury that there were but two issues of fact involved, to-wit: (1) The proper application in determining the amount of fee due the plaintiffs of the \$260,000 paid the defendants by the Southern California Edison Company for permission to violate the injunction; (2) whether the termination of the condemnation suits in the manner already set forth was a compromise within the meaning of the contract. After both parties had closed their evidence, the plaintiffs made a motion for a directed verdict for the full amount prayed for in the complaint, plus interest, and less the sum of \$500, which amount defendants had paid to an outside attorney. The trial judge granted plaintiffs' motion, and instructed the jury to return a verdict for plaintiffs in the amount specified, together with interest. The jury thereupon returned a verdict in favor of plaintiffs in the sum of \$273,018.50. From this judgment defendants prosecute this appeal.

Appellants' principal contentions can be summarized as follows: (1) That, since the entire property of appellants was "sold," the fee of respondents should be measured by the sales clause of the contract, which fixes the fee at \$100,000; that since respondents have already admittedly received the sum of \$35,000, the balance due is \$65,000. (2) That even if the condemnation clause applies, the judgment must be reversed because that clause provides that the fee shall be a percentage based on the "damages" received by way of compromise or judgment in the condemnation suits, while the verdict of the jury is based on the selling price of the entire property, including the value of the land as distinguished from the value of the water rights, and including the value of one thousand acres of nonriparian land. In this connection appellants contend that the trial court was in error in excluding evidence offered by them of the value of the water rights involved in the condemnation suits. (3) That in the event that neither of the above theories is correct, then a situation not provided for in the contract has arisen, and the respondents must recover, if at all, upon a quantum meruit.

[1, 2] It is admitted that the contract here involved was entered into after the relationship of attorney and client had come into existence. In such cases the law is well settled that any ambiguity in the contract must be

construed in favor of the client and against the attorney. *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625, 630, 66 P. 21; *Bennett v. Potter*, 180 Cal. 736, 740, 183 P. 156; *Boardman v. Christin*, 65 Cal. App. 413, 418, 224 P. 97. However, there is no rule of law which makes such contracts void, and, if certain, clear, and unambiguous, they will be enforced as any other contract. The rule of interpretation above noted cannot be used to frustrate the obvious intent of the parties. See *Pinto v. Seely*, 22 Cal. App. 318, 326, 135 P. 43.

[3] The first question to be considered is whether, under the facts as herein stated, the sales clause or the condemnation clause applies. Upon reading the contract, we agree with the trial court that the contract clearly and unambiguously provides for the present situation, and that the condemnation clause, and not the sales clause, applies. This is obvious from the very nature of the compensation provisions of the contract. The parties carefully provided for every contingency that might arise, with a corresponding provision for compensation. The provisions are clearly progressive and exclusive. Thus, if the property was sold before affirmation of the injunction suit, respondents were to receive a fee of \$85,000. Upon affirmation, however, that clause no longer applied, and the sales clause, providing for a fee of \$100,000 in the case of a sale after affirmation, applied. When the defense of the condemnation suits was undertaken by respondents, the condemnation provision of the contract applied, to the exclusion of all other clauses of the contract. That this is the proper interpretation of the contract clearly appears from its express terms, from the practical construction placed on it by the parties, and from an application of the test of reasonable construction, which is, inherently, the fundamental test in the interpretation of all contracts.

The contract expressly provides that once the condemnation suits have been "prosecuted," the condemnation clause, and no other, shall be used in fixing respondents' fee. That clause starts with the word "however" and provides that if condemnation suits are prosecuted against the defendants and damages are collected by compromise or judgment, the compensation "shall be as follows, and not otherwise." The word "however" and the phrase "and not otherwise" are clearly terms of exclusion. They are undoubtedly used as a contrast with the previous compensation provisions, and to exclude them if the condemnation clause applied.

In the case of *Lewis' Appeal*, 18 Pa. (6 Harris) 318, the court was interpreting the meaning of the word "however" as used in a will. The will in question, after devising property to five children of the niece of the testatrix, provided (page 319 of 18 Pa.): "If one or more of the said children should happen to

die before their mother, without leaving any children, the share of such child or children so dying shall be equally distributed among the survivors of the said brothers and sisters; if, *however* [italics added], such child or children so dying shall leave a child or children, such child or children shall be entitled to their parent's share." Concerning the meaning of the term "however," the court had the following to say (page 325 of 18 Pa.): "'However' is most emphatic here, if we keep up the connection of the thought. It indicates an alternative intention, a contrast with the previous clause, and a modification of it under other circumstances. It is thus—I do not however so dispose of the survivorship in the case of those who die leaving children, but such children shall take the share which their parent, if surviving, would have taken." The meaning of the phrase "and not otherwise" in a statute was under consideration in the case of *County of Plumas v. Wheeler*, 149 Cal. 758, 87 P. 909. Concerning its meaning this court said (page 761 of 149 Cal., 87 P. 909, 910): "Section 3366 of the Political Code, enacted in 1901, provides that 'boards of supervisors of the counties of the state * * * shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions. * * *' The effect of this statutory provision was to cut off the power, theretofore residing in boards of supervisors under the county government act * * * to collect a license tax for revenue. 'The words "not otherwise" curtail and cut off all power boards of supervisors theretofore had to issue licenses and charge therefor as a revenue measure. * * *' *Ex parte Pfirrmann*, 134 Cal. 143, 66 P. 205." It was in this sense that the terms under discussion were undoubtedly used in the contract herein involved. This view is made even clearer by other considerations.

[4] It is a fundamental rule of interpretation that the practical construction placed upon a contract by the parties is admissible to explain any ambiguity that may exist. *Keith v. Electrical Engineering Co.*, 136 Cal. 178, 181, 68 P. 598. If any ambiguity did exist in the contract under consideration, which fact we do not concede, such ambiguity has been fully explained by the construction of the contract by the parties themselves, who, by their actions, have clearly shown that in their opinion the condemnation clause had attached. As stated above, after the contract was entered into, and both before and after the condemnation suits had been started and while those suits were pending, there were various divisions of money between appellants and respondents. The money so divided was not for the sale of any riparian land or

riparian rights, nor was it technically for damages. It was received by appellants as consideration for permission given the Southern California Edison Company to violate the injunction. The amount over a period of years totaled \$260,000, of which respondents were paid \$25,000. This money was divided under the percentages provided for in the condemnation clause. A simple mathematical calculation will show that if \$100,000 is deducted from the total thus received, as provided for in the condemnation clause, and the percentages provided for in that clause applied to the balance, the result will be \$35,000. Moreover, Bottoms stated in several letters sent to respondents in which were enclosed checks as part of the payments aggregating \$35,000, that the money thus received was being divided under the condemnation clause. The uncontradicted testimony of respondent Preston was to the same effect. This testimony is consistent only with the fact that both appellants and respondents understood that the condemnation provisions had become effective because of the commencement of the condemnation suits, and that the sales clause had been excluded from consideration.

Under another test, there can be no doubt that the condemnation clause of the contract had attached to the exclusion of the sales clause. If we apply the fundamental test of reasonableness (Civ. Code, § 1643; 6 Cal. Jur. 271, § 169), no other result can be reached than to hold that the compensation clauses were progressive and exclusive. A reading of the contract shows that the parties provided for all contingencies that might occur, and provided for them in the order they were likely to occur. Obviously, as each step in the proceedings was reached without a termination of the litigation, the respondents would be called upon to do more work, and, accordingly, as was just, fair, and reasonable, the compensation provided for became increasingly large. It was contemplated, as it eventually transpired, that condemnation suits would be brought after the affirmance of the injunction suit, if that should occur. At the time the contract was entered into, it could not be determined how many of these condemnation suits the respondents might be called upon to defend. Therefore, the contract expressly provided that the damages recovered in all of them should be added together and the percentages designated in the condemnation clause applied to the total. This was fair and reasonable. An interpretation of the contract that would permit appellants to refer back to the sales clause to fix the compensation, after the condemnation clause had attached and respondents had performed the additional work incident to defending the condemnation suits, would be an unjust and unreasonable construction.

From the foregoing analysis we conclude that the condemnation clause had attached, and that once that clause attached, the sales clause was entirely excluded from consideration. We reach this conclusion from the clear and certain language used in the contract, from the fact that the parties themselves have so interpreted the contract, and for the further reason that any other interpretation would be unjust and unreasonable.

[5, 6] Appellants' second contention is that the percentages in the condemnation clause shall be applied only to "damages" received by way of compromise or judgment in the condemnation suits, and that the jury in this case based its verdict upon the selling price of the entire property, including the value of the land as distinguished from the value of the water rights, and including the value of one thousand acres of nonriparian land. In this connection appellants contend that the trial court was in error in excluding evidence offered by them of the value of the water rights involved in the condemnation suits. We cannot follow the logic of these contentions. It seems clear to us that the practical result is the same whether the \$873,200 is called "price," or whether it is called "damages." Whatever view is adopted, the sale of the entire property to the Edison Securities Company, from a practical standpoint, amounted to a compromise and settlement, not only of the two condemnation proceedings then pending, but of all condemnation proceedings that might later have been brought. This was the view of the trial court.

Furthermore, it clearly appears that it was the water rights that were primarily involved in the sale. From our familiarity with the record on appeal in the injunction case, and from an examination of the findings in that case introduced in evidence in this case, we know that the property, with the exception of the one thousand acres of nonriparian land, gains its principal value from the water rights inseparably connected therewith. When the Southern California Edison Company decided to purchase the property it was primarily interested in the water rights, and not in the land. The only object in purchasing the land was that it was, in the opinion of the purchaser, the most feasible way of securing the water rights. Mr. Brackenridge, the representative of the Southern California Edison Company who consummated the deal with Bottoms and who was produced as a witness for defendants, testified as follows on cross-examination:

"Q. What would you have paid, if anything, for the Herminghaus land without the water right? A. I suppose I have got to answer the question. *It is self-evident that we would not have taken the ranch if they had given it to us without the water right.*

"Q. It is perfectly valueless to you without the water right? A. Yes, we are not in the farming business.

"Q. And you took this land to get the water right? A. Yes, sir.

"Q. And for no other reason? A. That is all." (*Italics ours.*)

Mr. Brackenridge further testified that one of the reasons that the land was purchased was that thereby the Southern California Edison Company would be substituted for the Herminghaus people so far as other diverters and appropriators were concerned. In fact, before Brackenridge closed the deal with Botoms he had secured a contract from the San Joaquin water storage district to sell them part of the water right for \$265,000. Appellants constantly refer to "water rights" as if such rights existed separate and distinct from the land. It must be remembered that whatever water rights the appellants possessed were wholly riparian in nature. Therefore there was no such thing as a water right separate and distinct from the land itself. *Duckworth v. Watsonville*, 150 Cal. 520, 526, 89 P. 338; *Id.*, 158 Cal. 206, 216, 110 P. 927. The purchase price received was for riparian land, in which land and water were inseparably connected.

[7, 8] Even if the value of the water right could, for the purpose of the contract, be separated from the value of the land, it must be remembered that appellants, by their own acts, have forever rendered it impossible to distinguish in that particular sale what portion, if any, of the moneys received should be credited to the lands. Obviously, evidence of the value of the water rights involved in the condemnation suits was not admissible, nor, in fact, would evidence of the value of the entire water right have been admissible, for the reason that the contract provided for percentages upon what was received, not what should have been received. To have admitted such evidence would have been for the court to make a new and different contract for the parties. Neither the seller nor the purchaser valued the land separately. Whatever confusion exists, therefore, was due to the acts of the appellants in making such a sale without allocating a value to the rights upon which respondents' compensation was to be based. In such a situation the law is well

settled that the party causing the intermixture must stand the loss. *The Idaho*, 93 U. S. 575, 23 L. Ed. 978. See, also, *Huff v. Hardwick*, 19 Colo. App. 416, 75 P. 593, where the situation was quite similar to the one involved here. In this case the appellants have, by their own act, converted the land and water into money, and the proportions received for each cannot be ascertained.

Another analogy exists in the law which appears to be applicable to the situation here involved. In actions for damages for infringement of a patent and an accounting of the profits, where the profit attributable to the use of the trademark cannot be segregated from the profit due to the merit of the goods, the law is well settled that the plaintiff is entitled to the entire profit. As was said in the *Case of Dickinson v. O. & W. Thum Co.* (C. C. A.) 8 F.(2d) 570, at page 573: "The infringer must account for the entire profits derived from the sale of the infringing goods. The recovery will not be limited to such amount as can be shown by direct and positive evidence to have resulted from the use of the infringing mark." In *William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co.* (D. C.) 5 F.(2d) 731, at page 739, the court quoted with approval the following language from *Graham v. Plate*, 40 Cal. 593, 598, 6 Am. Rep. 639: "In sales made under a simulated trade-mark it is impossible to decide how much of the profit resulted from the intrinsic value of the commodity in the market, and how much from the credit given to it by the trade-mark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales and at what prices, except for the use of the trade-mark. No one will deny that on every principle of reason and justice the owner of the trade-mark is entitled to so much of the profit as resulted from the use of the trade-mark * * * it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods."

For the foregoing reasons, the judgment appealed from should be and is affirmed.

PRESTON, J., does not participate in the foregoing opinion.

210 Cal. 592

McINTOSH et al. v. FUNGE.**SMITH LUMBER CO. OF SAN FRANCISCO
v. SAME.****MASSAGLI et al. v. SAME.****S. F. 13365.****Supreme Court of California.****Oct. 28, 1930.****Rehearing Denied Nov. 24, 1930.****1. Appeal and error ⇨994(3).****Evidence ⇨589.**

Trial court was entitled to accept plaintiffs' testimony as true, and Supreme Court will likewise accept it as true.

2. Appeal and error ⇨1011(1).

Findings on conflicting evidence will not be disturbed.

3. Contracts ⇨284(4).

Arbitrators' award, even if conclusive, requiring contractors to make changes demanded by owner, *held* not to preclude contractors' recovery; owner preventing fulfillment of award.

Evidence showed that contractors, when peremptorily notified by owner to stop work, were correcting defects set out in award, and that, contrary to owner's contention, such defects could be corrected by replacing defective materials without tearing down entire framework of house.

4. Contracts ⇨322(4).

That board of public works ordered unfinished house to be demolished did not prove defective workmanship, precluding contractors' recovery; noncompliance with building laws being due to owner's errors.

Evidence showed that, after controversy respecting manner of construction had arisen, building remained in uncompleted condition for almost two years, and that board of public works at that time ordered owner either to comply with building laws and proceed with construction, or cause building to be torn down.

5. Mechanics' liens ⇨231.

Materialmen *held* entitled to lien on land, notwithstanding house, because of owner's noncompliance with building laws, was completely demolished by order of board of public works.

6. Work and labor ⇨14(1).

Subcontractor furnishing concrete, although prevented from completing contract by owner's notifying principal contractors to stop work, could recover for work actually performed.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Separate actions, consolidated for trial, by William McIntosh and another, copartners doing business under the fictitious name and style of McIntosh Brothers, by the Smith Lumber Company of San Francisco, and by Eugenia Massagli and another, copartners doing business under the firm name and style of G. Massagli & Company, against W. W. Funge, Jr., and others, with a cross-complaint by defendant named against plaintiff in the first-named action. From a joint judgment for plaintiffs defendant named appeals.

Affirmed.

Robert L. McWilliams, of San Francisco, for appellant.

Sylvester J. McAtee and Hartley F. Peart, both of San Francisco, for respondents McIntosh.

Carey & Gorfinkel, and Maurice R. Carey, all of San Francisco, for respondent Smith Lumber Co.

Bacigalupi, Elkus & Salinger, of San Francisco, for respondent G. Massagli & Co.

CURTIS, J.

This is an appeal by defendant from a joint judgment rendered in favor of the plaintiffs in three actions, originating in the same controversy, which had been consolidated for trial. These actions grew out of an alleged breach of contract for the construction of a two-story dwelling house in the residential district of San Francisco, known as St. Francis Wood. Due to a disagreement which arose between the defendant owner, W. W. Funge, Jr., and the principal contractors, McIntosh Bros., shortly after the commencement of building operations, the building was never completed. Action 173914 was begun by McIntosh Bros., the principal contractors, for the reasonable value of the services rendered and materials supplied to the defendant owner in the construction of said building and for the profit which would have been realized had the contract been completed. Action 171926 was commenced by Smith Lumber Company of San Francisco against McIntosh Bros., as defendants, for the agreed price of the lumber furnished by said company and used by McIntosh Bros., in the construction of said building, and against the owner, as codefendant, to foreclose a materialman's lien against the property. Action 174168 was instituted by G. Massagli & Co. against McIntosh Bros., as defendants for the agreed value of the services rendered and the materials furnished in the construction of the concrete work upon said building, and

against the owner, as codefendant, to foreclose a mechanic's and materialman's lien against said property. A cross-complaint was filed by the defendant owner, W. W. Funge, Jr., against McIntosh Bros., in action 173914, for damages alleged to have resulted to said defendant by reason of the failure of McIntosh Bros. to furnish necessary labor and materials to complete in a workmanlike manner said dwelling house. Upon the consolidated trial of the three actions the court found in favor of the plaintiffs in the above-entitled actions that McIntosh Bros. were entitled to a judgment for \$877 against the defendant W. W. Funge, Jr.; that Smith Lumber Company were entitled to a personal judgment of \$731.20 against McIntosh Bros. and to have their lien in the sum of \$674 foreclosed against the property; and that G. Massagli & Co. were entitled to a personal judgment of \$476.80 against McIntosh Bros. and to have their lien in that sum foreclosed against the said property. From said judgment in favor of McIntosh Bros., and from those portions of the judgment which decree that the sums due Smith Lumber Company and G. Massagli & Co. shall be a lien against said property, the defendant owner appeals.

The circumstances which gave rise to this controversy, briefly stated, are as follows:

On February 11, 1926, appellant W. W. Funge, Jr., as owner, entered into a contract with William McIntosh and David McIntosh, doing business under the firm name and style of McIntosh Bros., for the construction of a building on appellant's lot in the city and county of San Francisco. The plans, drawings, and specifications were personally prepared by the owner, who was not, however, a licensed architect. The owner also acted as his own superintendent of construction. On February 24, 1926, McIntosh Bros. commenced work upon the construction of the building. Two subcontracts were entered into by McIntosh Bros., one contract with Smith Lumber Company for lumber to be furnished for the construction of said building, and the other contract with G. Massagli & Co. for the labor and materials used for all of the concrete work specified in the construction of said building. Differences arose between the owner and the principal contractors with reference to the construction of the building, which the owner claimed was not being constructed according to the plans and specifications, and on March 16, 1926, the owner gave notice to the contractors to discontinue work on the house. On March 29, 1926, he wrote to the General Contractors' Association of San Francisco, an organization of building contractors of San Francisco, complaining of faulty work and faulty materials being used in the construction of the

building. The board of arbitration of said association, consisting of three members, made a personal inspection of the construction of the structure and of the workmanship and materials used and rendered its report in writing on April 1, 1926. The owner refused to accept this report and on April 12, 1926, filed his dissent with the association. The association thereupon made further inspection and investigation and on April 22, 1926, made a supplemental report and finding. In this supplemental report it was stipulated that a competent superintendent of construction should be employed by the owner. The owner refused to accede to this requirement, repudiated the report of the General Contractors' Association and refused to employ a superintendent of construction. The matter having come to a deadlock, McIntosh Bros., in accordance with the provisions of paragraph 10 of the contract, demanded that the matter be submitted to arbitration. In accordance with the provisions of the contract each of the parties selected one arbitrator and the report and findings of these arbitrators were made on August 13, 1926. On August 19, 1926, McIntosh Bros. notified the owner in writing that they accepted said report and offered to make any changes in the construction required by the report of the arbitrators. The contractors believed that it was possible for them to conform to the award by replacing certain pieces of lumber and strengthening others, and on August 30, 1926, they resumed work. The owner, on the other hand, insisted that in order to conform to the report of the arbitrators it would be necessary for the contractors to take down the frame to the first floor and entirely rebuild it. Upon the refusal of the contractors to tear down the frame, the owner refused to permit them to continue and on August 31, 1926, gave them formal notice to stop work. Thereafter on October 11, 1926, the plaintiff contractors instituted the first of these actions. The consolidated cases went to trial on November 3, 1927. However, the findings were not signed and judgment formally entered until July 30, 1928. During this interim, from the time the plaintiff contractors were notified to stop work on August 31, 1926, until April 14, 1928, the frame of the building stood unfinished, an eyesore to the district and a menace to the children of the neighborhood. On the latter date, the owner, pursuant to a resolution of the board of public works, had said building torn down and the concrete foundation broken up and removed. At the date, therefore, of the formal rendering of the judgment the building had been completely demolished and only the excavation of the basement remained.

The complaint of the plaintiff contractors alleged in substance the making of the contract; that plaintiffs commenced to furnish

the necessary labor and materials and to perform the work in accordance with the plans and specifications of said contract; that a dispute arose respecting the true construction of said specifications and the sufficiency of the performance of said work; that two arbitrators were selected to settle said dispute; that the plaintiffs accepted the decision of said arbitrators and so notified the defendant owner in writing; that plaintiffs thereafter commenced to again perform said contract but were notified by the defendant in writing that said contract was terminated.

The answer of the defendant owner denied that the plaintiffs furnished the necessary labor and materials in fulfillment of the contract; denied that plaintiffs accepted or were bound by the award of the arbitrators; and alleged that plaintiffs violated said award, disregarded its terms and provisions, and failed and refused to act in accordance with the provisions of said report. The answer further sets out in detail the various particulars in which the plaintiff contractors failed to comply strictly with the plans and specifications.

At the trial of the consolidated cases the criticisms and complaints of the owner were taken up individually and in detail. The evidence in the record shows that many of the criticisms of the owner were not fair in that the defects were either actually caused by the owner himself, or were due to deficiencies in the plans and specifications prepared by him. In some instances complaint was made by the owner that the contractor failed to perform certain work no mention of which was contained in the plans and specifications. In still other instances, the owner complained of the manner in which certain work had been performed although he had been present at the time of the performance and had made no protest at the time and had apparently acquiesced in the performance. Moreover, it appears that several of the apparently justifiable complaints of the owner were due to the fact that only the skeleton frame had been put up and the contractors had not had an opportunity to complete the work and thus supply the deficiencies complained of when they were notified by the owner to stop work. There is no testimony in the record which directly or by inference would indicate that the contractors willfully and deliberately used poor workmanship and defective materials in the building. On the contrary, there is evidence which indicates that an honest effort was made to construct the building in a satisfactory manner. This is evidenced by the fact that, according to the testimony of several witnesses, a better grade of flooring was furnished by the contractors than was called for by the specifications and further by the expressed willingness of the contractors to comply with the terms of the arbitration award although this award required addi-

tional work and material not called for by the specifications.

[1, 2] We deem it unnecessary to incumber the reports with any further statement of the details of the controversy. Findings were made with reference to each of the complaints and criticisms and were to the effect that such complaints and criticisms were unwarranted and unjustified. These findings were supported by evidence in the record. True, in many instances, the supporting evidence was the testimony of the plaintiffs to the actions. The lower court, however, was entitled to accept this testimony as true, and upon appeal this court will likewise accept it as true. There is evidence in the record supporting the criticisms and complaints of the defendant owner, but this evidence at most only created a conflict in the evidence which was resolved by the trial court in favor of the plaintiff contractors. This phase of the case, therefore, resolves itself into a mere question of a conflict in the evidence which must be settled by a reiteration of the well-established rule that where there is conflicting evidence the findings of the trial court will not be disturbed on appeal.

[3] Appellant contends that any testimony adduced at the trial with reference to his specific complaints and criticisms is beside the point for the reason that the parties to the contract were bound by the contract to abide by the terms of the arbitrators' award. He insists that the arbitrators' award is conclusive proof that his complaints were well-founded, and that he was justified in peremptorily notifying the contractors to stop work. Conceding, for the sake of argument, that appellant's contention that the arbitrators' award is conclusive proof that certain of his complaints and criticisms were well founded, we are confronted by the finding of the trial court to the effect that at the time the plaintiff contractors were notified by the owner to stop work they were correcting the defects set out in the award. This finding of the trial court is supported by evidence in the record. Moreover, there is substantial evidence in the record that it was possible to correct such defects by replacement of defective materials and workmanship without the tearing down of the entire framework of the building. This evidence is embodied in the testimony of Mr. Thurston, one of the arbitrators, and Mr. Monk, chairman of the board of arbitration of the General Contractors' Association of San Francisco. The appellant insisted that the frame should be torn down and rebuilt. The question of whether the contractors were carrying out the terms of the award was a question to be determined not by any of the parties to the controversy but by the arbitrators. Inasmuch as the appellant owner gave peremptory notice to the contractors to stop

work, thereby depriving them of the opportunity of attempting to rectify the defects by replacing the defective material, the owner eliminated the possibility of arbitration from the controversy and forced the contractors to seek the forum of the courts for a decision of the dispute as to whether they were actually carrying out the terms of the arbitrators' award. In that forum the decision was in favor of the contractors.

It is apparent from the foregoing discussion that if the original controversy between the owner and contractors be inquired into, the findings of the trial court, supported by evidence, are in favor of the contractors, and if the award of the arbitrators be conceded to be binding upon the parties, the findings of the trial court relative thereto, supported by evidence, are in favor of the contractors, and that in either event the judgment on appeal must be affirmed.

[4] Appellant advances the argument that the fact that the building subsequent to the trial was torn down by order of the board of public works is conclusive proof that the work performed by the contractors was of no value to him and that as he received no benefit therefrom the contractors are not entitled to recover judgment. This, of course, does not follow. This argument is valid only if the resolution of the board of public works was due to derelictions of the contractors or defects in the work performed by them. If the order to remove the building was not due to the fault of the contractors, then the fact that the building was subsequently torn down, whether voluntarily by the owner or involuntarily pursuant to an order of the board of public works, has no bearing upon the question of whether or not the contractors are entitled to recover against the owner. It is to be noted that the direction of the board of public works was in the alternative, "to comply with building laws and to proceed with said construction of building in accordance with the plans filed with the Board of Public Works * * * or cause the same to be torn down." The principal obstacle to the carrying out of the alternative order of the board of public works was the fact that the foundation of the house had not been set far enough back on the lot to comply with the building restrictions of the district. It was the finding of the trial court, supported by evidence in the record, that the mislocation of the foundation was due to an error on the part of the owner in measuring the distance from the curb line to the front line of the house. There is testimony in the record of both Mr. McIntosh and of a workman that while Mr. McIntosh held the end of the tape at the curb line, the owner held the other end of the tape and designated the front line of the house. The other obstacle to the fin-

ishing of the house was the fact that the walls of the foundation did not extend twelve inches above the ground. There is evidence in the record that the ordinance which it is alleged specified such requirement did not apply to the district in which the house was situated. However that may be, the lower court expressly found that inasmuch as the plans and drawings furnished by the owner specified that the height of the concrete foundation should be twenty inches and provided that the concrete foundation should extend not less than twelve inches into the ground, a strict compliance with the plans and specifications made it impossible to extend the foundation twelve inches in the ground and at the same time twelve inches above the ground. It will thus be seen that the owner's inability to carry out the alternative order of the board of public works was not due to any fault of the contractors, but was due to his own errors.

[5] Appellant also insists that by the complete demolition of the building on April 14, 1928, the liens of the Smith Lumber Company and G. Massagli & Co. were lost and the decree of foreclosure which was formally rendered on July 30, 1928, was improperly rendered. The fact of the demolition of the building was presented to the lower court on the motion for a new trial which was denied. There is a conflict of opinion in the decisions of the various states as to whether a mechanic's lien attaches to land where the improvement giving rise to the lien has been destroyed or removed. California has adopted the so-called Pennsylvania rule which holds that the destruction of the building, without fault of the owner, before a notice of lien is filed, does away with the right to a lien, no lien attaching to the vacant site. *Humboldt Lumber Mill Co. v. Crisp*, 146 Cal. 686, 81 P. 30, 106 Am. St. Rep. 75, 2 Ann. Cas. 811; *Pilstrand v. Greenamyre*, 34 Cal. App. 799, 168 P. 1161; *Kern v. San Francisco Co.*, 19 Cal. App. 157, 124 P. 862; *Watson v. Alta Investment Co.*, 12 Cal. App. 560, 108 P. 48. In the instant case, however, another important factor, determinative of the question in our opinion, enters into consideration. In the cases above cited the buildings were accidentally destroyed by fire without any fault on the part of either the owner or the contractor. And in *Humboldt Lumber Mill Co. v. Crisp*, supra, and *Watson v. Alta Investment Co.*, supra, it was specifically stated as a premise to the conclusion reached that the building had been destroyed without any fault of the owner. The Pennsylvania cases, which are cited with approval by the California authorities, likewise involve situations in which the buildings were destroyed by fire, tornado or flood. As the building here was torn down pursuant to a resolution of the board of public works, perhaps it cannot be correctly said that it was vol-

untarily destroyed by the act of the owner. However, as before noted, the resolution of the board of public works was in the alternative and the inability of the owner to comply with the alternative order and complete the building was due to his own error in locating the front line of the building and the mistakes in his own plans and specifications. In the final analysis, therefore, the destruction of the building was due to the fault of the owner. In *Johnson v. Smith*, 97 Cal. App. 752, 276 P. 146, 147, it was held that the fact that hardwood flooring sold by plaintiff to a contractor was torn out by order of the architect employed by the defendant owners because of the defective manner in which the flooring was laid did not defeat plaintiff's right to a mechanic's lien. The court said, "The fact that by the act of the owner of the building the 'materials furnished' may have been rendered useless should not defeat the rights of an innocent materialman." The reasoning therein enunciated is of compelling force and is applicable to the present case. The liens, therefore, were in existence at the date of the judgment of foreclosure herein, and that judgment was proper.

There is no merit in the contention that the judgment in favor of the Smith Lumber Company for \$674.70 is too large by reason of the fact that some of the material delivered on the job was not actually used in the construction of the building. The record clearly shows that the lower court was cognizant of this fact and that a proper reduction was made of the value of the lumber not incorporated in the building from the total price of the lumber delivered.

[6] Although it is true that under the contract G. Massagli & Co. was obligated to construct the foundation, basement floors and walks, garage floor, and cement steps in addition to rat-proofing the building, and that the only work performed by the company was the putting in of the foundation and the rat-proofing, nevertheless the failure of the company to complete the contract was caused by the action of the owner in notifying the principal contractors to stop work. Under such circumstances the company is entitled to recover for the work actually performed. It should be noted that the testimony of Albert Massagli as to the value of the work was limited to the value of the work actually performed.

It should also perhaps be noted that the contention of appellant that the lien of G. Massagli & Co. had been filed too late was subsequently abandoned.

Judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.

OLCESE v. SUPERIOR COURT IN AND FOR KERN COUNTY et al.

S. F. 13959.

Supreme Court of California.

Oct. 27, 1930.

Rehearing Denied Nov. 24, 1930.

1. Executors and administrators ⇨22(3).

Appointment of special administrator without notice of hearing, pending appeal from appointment of general administrator, *held* beyond court's jurisdiction (Code Civ. Proc. § 1412, as amended by St. 1921, p. 536, § 1).

Code Civ. Proc. § 1412, as amended by St. 1921, p. 536, § 1, provides that the appointment may be made at any time on such notice to such of the persons interested in the estate as the court may deem reasonable.

2. Executors and administrators ⇨22(3).

Statute permitting appointment of special administrator on "such notice as court may deem reasonable" *held* to require reasonable notice, and not to authorize entirely dispensing with notice (Code Civ. Proc. § 1412, as amended by St. 1921, p. 536, § 1).

3. Executors and administrators ⇨22(3).

Appointment of special administrator is special proceeding, and probate court's jurisdiction in premises must be strictly construed (Code Civ. Proc. §§ 1412, 1415, as amended by St. 1921, p. 536, §§ 1, 3).

In Bank.

Petition by Victor Olcese for writ of certiorari to test jurisdiction of Superior Court of Kern County to appoint a special administrator in the matter of the estate of Louis V. Olcese, deceased, without notice of hearing.

Proceedings of probate court in matter of appointment of said special administrator and order of appointment annulled.

Rehearing denied; SHENK, J., dissenting.

W. H. Metson, of San Francisco, for petitioner.

Borton & Petrini, of Bakersfield, and A. E. Ooghe, of San Francisco, for respondents.

RICHARDS, J.

Petitioner applied for a writ of certiorari in order to test the jurisdiction of the superior court of the state of California, in and for the County of Kern, to appoint a special administrator in the matter of the estate of Louis V. Olcese, deceased, without notice of hearing upon the application for such order and after an appeal had been perfected from a prior order appointing a general administrator in the matter of said estate. The

facts of this family controversy, in so far as they relate to the appointment of the general administrator and the appeal therefrom, are fully set forth in our opinion reversing the order made therein, filed on August 30, 1930, and in which matter our decision has become final through the issuance of a remittitur therein. Estate of Olcese, 291 P. 193.

[1-3] We are satisfied that the order of the superior court herein sought to be reviewed was void as beyond the jurisdiction of the court to make such order. Prior to the year 1921, under the provisions of the Code of Civil Procedure relating to the appointment and powers of a special administrator, there was no requirement for an order for the giving of notice on application for the appointment of a special administrator, or for any notice to be given prior to such appointment. By an amendment however, to sections 1412 to 1415, inclusive, of the Code of Civil Procedure, made in the latter year, such notice of the application for such appointment "as the court may deem reasonable" was required to be given. Section 1412 as thus amended (St. 1921, p. 536, § 1), reads as follows: "The appointment may be made at any time upon such notice to such of the persons interested in the estate as the court may deem reasonable. After the person appointed has given bond, the clerk must issue special letters of administration to such person." Under the amendment to section 1415 of said Code (St. 1921, p. 536, § 3), the powers of a special administrator were, under certain conditions, greatly enlarged, the provisions of said amendment reading, in part, as follows: "When a special administrator is appointed pending determination of a contest of a will instituted prior to the probate thereof, or pending an appeal from an order appointing, suspending or removing an executor or administrator, such special administrator shall have the same powers, duties and obligations as a general administrator, and the letters of administration issued to him shall recite that such special administrator is appointed with the powers of a general administrator."

It is plain to perceive why, in view of the thus enlarged powers of special administrators under the foregoing conditions, some reasonable notice to the persons interested in the estate prior to the making of the appointment of such special administrator with such enlarged powers should be required. The requirement of section 1412 of said Code that such reasonable notice must be given cannot, by any stretch of construction, be held to mean that no notice whatever of the application for such appointment or of the hearing thereon shall be required. The appointment of a special administrator is a special proceeding, and the jurisdiction of the probate

court to entertain an application for such appointment must be strictly construed in order to give to such court jurisdiction to make the same. In the instant case not only was the giving of such notice not provided for, but in the order of the court appointing such administrator it was expressly provided that no such notice was to be required or given; the order of the court in that respect reading as follows: "Whereas, in the judgment and opinion of the court no notice of the application for this order is necessary, and such notice is now hereby dispensed with. Now, therefore, it is ordered, adjudged and decreed that * * * on application of said Bank of Italy National Trust & Savings Association, said Bank of Italy National Trust & Savings Association is hereby appointed special administrator of the estate of L. V. Olcese, deceased, and by reason of the pendency of such appeal, shall have as such special administrator the same powers, duties and obligations as a general administrator." The authorities cited by the respondents herein in support of the making and entry of the foregoing order have no application to the situation herein presented, and the specious argument of the respondents in attempted support of such order is, in our opinion, unfounded in reason and of no avail.

It is ordered upon the hearing on the alternative writ of review issued herein that the proceedings of the probate court in the matter of the appointment of said special administrator and the order appointing the same shall be, and they are hereby, annulled.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

210 Cal. 476

PEOPLE v. PAINETTI et al.
Cr. 3317.

Supreme Court of California.
Oct. 16, 1930.

Criminal law ⇨200(4).

Prosecution for violation of "Still Act" held not barred by prior convictions of "unlawful possession" and "unlawful manufacture" of liquor under "Wright Act"; offenses being separate and distinct (St. 1927, p. 497, § 1; St. 1921, p. 79).

St. 1927, p. 497, § 1, makes the ownership or possession of a still or stilling device, intended for use in the manufacture and production of intoxicating liquor for beverage purposes, a felony. St. 1921, p. 79, punishes unlawful possession or un-

lawful manufacture of intoxicating liquor as misdemeanors.

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Fernando Painetti and Fred Casalichio were convicted of a violation of St. 1927, p. 497, § 1, and they appeal.

Affirmed.

Superseding opinion in 289 P. 839.

Jesse R. Shafer, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie and Lionel B. Browne, Deputy Attys. Gen., for the People.

PER CURIAM.

The defendants herein were charged with and convicted of a felony, consisting in the violation of an act of the Legislature adopted in 1927 (Stats. 1927, c. 277, p. 497), which provides that "any person whether acting in his own behalf or as the agent, servant, officer or employee of any person, firm, association or corporation, who shall be the owner of or have any interest in or who shall operate or cause to be operated or knowingly have in his possession or control, any still, still worm, still cap, still condenser or stilling device of any kind, designed, used or intended for use in the manufacture or production of intoxicating liquor for beverage purposes, shall be guilty of a felony. Section 1.

When the cause was called for trial, the defendants entered, among other pleas, a plea of "once in jeopardy." In attempted support of this plea, it was shown upon the trial that these two defendants had previously been charged with and convicted of one or more misdemeanors, consisting of (1) the unlawful possession of intoxicating liquor, and (2) the unlawful manufacture of intoxicating liquor. It further appeared upon the trial of the felony charge that the acts of unlawful possession of intoxicating liquor and unlawful manufacture of intoxicating liquor were committed at the same time and place as that designated in the information and shown upon the trial of the felony charge as being the time and place when said felony, consisting in the ownership and illegal operation of a still, was charged with having been committed. The trial court upon such trial directed the jury to find against the defendants upon their pleas of prior conviction and former jeopardy.

It is now contended by defendants that the trial court was in error in so doing. We are of the opinion that the trial court was entirely correct in so doing, since the alleged misde-

meanors of which the defendants had theretofore been convicted, consisting as they did merely in the "unlawful possession" of intoxicating liquor and in the "unlawful manufacture" of intoxicating liquor, were separate and distinct offenses from that greater offense provided for in the "Still Act" of 1927, which makes the ownership or possession of a still intended for use in the manufacture and production of intoxicating liquor for beverage purposes a felony.

The cases of *People v. Brannon*, 70 Cal. App. 225, 233 P. 88, and *People v. Clemett*, 208 Cal. 142, 280 P. 681, relied upon by defendants, have no application to the instant situation. In the latter case particularly, both trials were conducted under the provisions of the "Still Act," and this court properly held that the possession and control of a still and the operation of the same still upon the same date constituted but a single offense. This case is not parallel to the case at bar, wherein the defendants were charged in the municipal court with a mere misdemeanor, consisting of the unlawful possession and manufacture of intoxicating liquor, which are offenses under the Wright Act (St. 1921, p. 79), having no necessary connection with the ownership, possession, or operation of a still as distinguished from the felony or felonies provided for in the "Still Act," which makes the ownership, possession, and operation of a still a felony.

The judgment and order appealed from herein should be and are affirmed.

I dissent: PRESTON, J.

210 Cal. 636

WAACK v. MAXWELL HARDWARE CO.
et al.

S. F. 12904.

Supreme Court of California.

Oct. 31, 1930.

Rehearing Denied Nov. 28, 1930.

1. Automobiles ⇨245(30).

Issue as to whether truck driver at time of collision was acting within scope of employment held for jury.

2. Master and servant ⇨302(1).

Servant deviating five miles on errand for relative is, as matter of law, acting without scope of employment as respects master's liability for tort.

3. Trial ⇨194(16).

Instructions respecting truck driver's authority to operate truck at time of collision

held erroneous as encroaching on province of jury.

Although determinative question of fact was as to time and place when driver re-entered service of employer after deviating on personal errand, the instructions respecting authority of driver to operate automobile at time of collision made a pivotal question of fact that driver had passed garage where he was to take car, and excluded all reference to deviation, presupposing that driver had specific and definite instructions as to route he must travel.

In Bank.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Charles Waack against Maxwell Hardware Company, Arthur B. Vogel, and others. From the judgment in favor of defendant first named, plaintiff appeals.

Reversed.

J. E. Reardon, Wm. M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellant.

Ford, Johnson & Bourquin and Ford & Johnson, all of San Francisco, for respondents.

PRESTON, J.

Plaintiff seeks by this action to recover damages for personal injuries sustained by him as the result of a collision between an automobile in which he was riding as a guest and defendant company's autotruck, operated by its employee, the defendant Vogel.

It is not necessary to detail the facts surrounding the actual happening of the accident, as the evidence, beyond any shadow of a doubt, establishes the undeniable negligence of said truck driver and the fact that plaintiff suffered severe and permanent injuries. Defendant company interposed the defense that said driver was not acting within the scope of his employment at said time, but was returning from an errand of his own. The jury found for plaintiff, assessing damages against defendant Vogel in the sum of \$11,000, but further found in favor of defendant company. Judgment was entered upon this verdict. Plaintiff now appeals in an endeavor to have liability imposed against defendant company as well as against defendant employee. The contentions upon appeal relate solely to the question of whether the said driver was at the time of the accident acting within the scope of his employment by defendant company. The facts bearing upon this issue, as shown by the evidence, will now be set forth:

Defendant Vogel as truck driver, was employed by defendant company generally to make deliveries from its store to the resi-

dences of purchasers; his usual working hours were from 7:30 a. m. to 5:30 p. m., during the six days of the week from Monday to Saturday, inclusive. The truck belonged to the company, but he was permitted to garage it at his home and to use it in traveling to and from his work. He did not always keep within his regular hours of employment; prior to the accident, on many occasions when deliveries were heavy, he had worked overtime and at night, and once or twice he had even made deliveries on Sunday. On the Thursday preceding the accident, he left the battery of the car at McCarty's garage to be recharged, had a rented battery installed therein, and found that the generator was in need of repair. The garage man told him to return Sunday, at which time the charged battery would be ready to replace and he would also have a special man on hand to repair the generator. It was the driver's custom to have minor repairs made on the car himself, but to have his employer authorize the expenditure of any items over 50 cents or a dollar. On Thursday afternoon, therefore, he reported the condition of the battery and generator at the store and secured authority to proceed under his arrangement with the garage man. Defendant company, of course, was to pay for the rental of the battery, and, if he failed to call at the garage on Sunday it would mean that the company would be charged with an extra day's battery rental.

On Sunday morning however, he did not proceed directly to the garage. He was not supposed to use the truck for his own purposes, but nevertheless he and his brother-in-law drove in it from his home to the Athenian Nile Club, a distance of 2.5 miles, where they secured a cabinet belonging to the brother-in-law; from the club they proceeded to the brother-in-law's home, passing the said garage en route, a distance of 4.1 miles from the club to the garage and 1.1 miles from the garage to the brother-in-law's home, where they left the cabinet. Defendant driver then started in the truck for the garage, with the intention of leaving it there for said repair work; the brother-in-law was to follow in his own machine, pick up said defendant at the garage, and drive him home. However, when the truck was an even mile from the house of the brother-in-law and one-tenth of a mile from the garage, the accident occurred.

Had the driver gone straight from his own home to the garage that morning, he might have proceeded over any of several routes, but by the most direct one he would have traveled a distance of only 1.7 miles, and would not have crossed the intersection where the accident took place, but in traveling any of the other routes he might have passed the place of the accident without unreasonable deviation. Had he, however, gone first to the home of his brother-in-law to make arrangements for the latter to follow him in his own

machine to the garage in order to pick defendant up there and drive him home after leaving the truck for repairs then said defendant would have traveled approximately 3.9 miles, and would have crossed the intersection where the accident occurred while acting presumably in the interests of his employer in having said repair work done.

It is, of course, the contention of defendant company in denying liability that the accident happened while said driver was acting purely in the pursuit of his own personal business; that it occurred at a point on the driver's route of deviation, a point where he would not have been had he attended to his business in the manner authorized by the employer; that the case may not be brought within the rule governing that class of case where a slight or immaterial deviation from his path of duty will not affect the relation of a servant to his master; that here the deviation was so substantial as to amount in fact to an entire departure from the employer's business, and was sufficient to bring the cause within the rule announced in those cases wherein the employee is held to have abandoned his master's business. Further, defendant company urges that the jury had before it a map of the city of Oakland, upon which the routes traversed were delineated, and that evidence bearing upon this issue was submitted by both sides; that therefore the most that can be said here is that the question was properly submitted to the jury under appropriate instructions, and their finding in favor of defendant company is conclusive.

[1] Appellant, on the other hand, contends that it clearly appears as a matter of law from the undisputed evidence that said driver was engaged in discharging his employer's business; that at the time the accident occurred he was proceeding directly to and was within two or three blocks of, the garage for the express purpose of returning the rented battery, having the employer's battery reinstalled, and leaving the truck for repairs to the generator; that his personal mission with respect to the cabinet had absolutely terminated, for he had completed the delivery of it to his brother-in-law's home, and he was thereafter acting solely in the interests of his employer. What the driver did on the morning in question before he started to attend to his employer's business, appellant contends, would be no more material than to consider what he did thereafter.

The cases relied upon by the parties to throw light upon this issue (*Kish v. California S. Auto. Ass'n*, 190 Cal. 246, 212 P. 27; *Brimberry v. Dudfield Lumber Co.*, 183 Cal. 454, 191 P. 894; *Kruse v. White Bros.*, 81 Cal. App. 86, 253 P. 178; *Dennis v. Miller Auto. Co.*, 73 Cal. App. 293, 238 P. 739; *Aubel v. Sosso*, 72 Cal. App. 57, 236 P. 319; and *Gousse v. Lowe*, 41 Cal. App. 715, 183 P. 295) are to

some extent similar in fact, and are helpful, but they do not solve the question before us, because in the last analysis each case of this character must be determined upon its own peculiar facts and circumstances. In other words, after a careful consideration of these authorities, we are but led to agree with defendant company, that the issue was properly one for determination, under proper instructions, by the jury. As said in the case of *Kruse v. White Bros.*, supra at page 93 of 81 Cal. App., 253 P. 178, 181: "Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact. In some cases the deviation may be so marked, and in others so slight relatively, that the court can say that no conclusion other than that the act was or was not a departure could reasonably be supported; while in still others the deviation may be so uncertain in extent and degree in view of the facts and circumstances as to make the question of what inferences should be drawn from the evidence properly one for the jury. *Healey v. Corkrill*, 133 Ark. 327, L. R. A. 1918D, 115, 202 S. W. 229; *Ritchie v. Waller*, 63 Conn. 155, 38 Am. St. Rep. 361, 27 L. R. A. 161, 28 A. 29; *Gousse v. Lowe*, supra; *Dennis v. Miller Auto. Co.*, 73 Cal. App. 293, 238 P. 739."

[2] It is, of course, true that as a matter of law a servant who deviates so far as to go some five miles on an errand for his relative is acting without the scope of his employment, and any tort committed by him prior to the resumption of his master's business is one for which the master is not liable. The question seems to be reduced then to this proposition: In this case, when did a question of fact arise as to the time and place when the servant re-entered the service of the master? If the servant had gone first to the brother-in-law's residence for the purpose of having the brother-in-law assist him in reaching home after depositing the truck at the garage, would not a question of fact arise as to whether he had abandoned his master's service, and would not this be true even though in so doing he passed en route the garage? If so, does not a similar question arise as to whether or not, on reaching his brother-in-law's home, he there resumed his master's business? Again, it is not disputed that the servant might have logically traveled either of three routes in going to the garage which might have taken him by the place of the accident. If, therefore, the servant might have passed the place of the accident while en route from his home to the garage, even though in so doing he might have deviated slightly from the most direct route, would not a question of fact have arisen as to whether or not he had abandoned his master's service? If this be so, does not an issue of fact arise as to whether or not at this point again the servant re-entered the employment of his master?

[3] If the foregoing propositions are sound, it seems to clearly follow that the trial judge, by certain of his instructions, encroached upon the province of the jury. In this connection, he gave the following instructions:

"If you believe from the evidence in this case that the defendant Vogel was authorized by his employer to operate the Dodge automobile in question only from his residence to the High Street Garage on the day of the accident, for the purpose of having the same repaired, and you further believe that for some purpose of his own, not connected with his employer's business, Vogel delivered a certain cabinet to a point beyond and past said garage and further distant from his home than he would have been required to travel in performing the duties authorized by his employer; and if you further find from the evidence that after delivering said cabinet and while returning from the place where said cabinet was delivered to the garage where the repairs were to be made to the automobile, but while still at a place where he would not have been except for the delivery of the cabinet, the accident occurred, I instruct you that your verdict must be in favor of the defendant Maxwell Hardware Company, for if an employee goes on an independent mission of his own at a point beyond and past the point where he was authorized to go by his employer, this mission does not terminate until he has returned to the point of departure or to a place where he would have been in the service of his employer. * * *

"* * * If in this case you believe from the evidence that the defendant Vogel in operating the Dodge automobile * * * drove the same for some purposes solely of his own to a point beyond and past that authorized by his employer, and at the time of the accident was still beyond and past a point authorized to be traveled by his employer although on his return journey to the point of deviation, then I instruct you that your verdict must be in favor of the defendant Maxwell Hardware Company."

"The Maxwell Hardware Company is not responsible for any act of the defendant Vogel in operating the Dodge automobile, which act took place at a locality to which Mr. Vogel had traveled in either going to or returning from a private mission of his own, provided you find that such locality was not one where his duties for the Maxwell Hardware Company would reasonably have required him to be."

The elements above referred to seem to be entirely excluded from said instructions. It is nowhere stated therein that the servant might not have been authorized to go with the truck to a point where he could procure a conveyance in which to return home. The instructions make a pivotal question of the fact

that the servant passed the garage. They likewise exclude all reference to deviation. They presuppose that the servant had specific and definite instructions as to the route he must travel. They contain references to a point where "he would not have been," and thus make a geographical test of the matter determinative, as they exclude the possibility of a slight deviation and presuppose an inflexible route of travel. They exclude the possibility of authorized travel by any other than the most direct route. The last-quoted instruction seems to exclude the idea of authority on the part of the servant to go to the brother-in-law's home for assistance. The word "required" in said last-mentioned instruction seems to be inappropriate, as the word "permitted" would have been much better. On the whole we are convinced that, if the court had confined his instructions to the general principles of law and had not made a portion of the facts only the basis of certain instructions to the exclusion of the other facts and inferences in the case, the jury might have reached another result. This is manifested by the fact that the record shows that the jury were in fact confused as to their duty under the instructions as given by the court, for, after hearing the charge of the court, the jurors retired for deliberation at 4:30 p. m. At 5:35 p. m. they returned into court, and the following proceedings were had, after which, with the exception of a short time out for dinner, they deliberated until 9:45 p. m. before reaching a verdict:

"The Court: * * * I understand you have not agreed upon a verdict. * * * And that you desire some further information concerning instructions? * * * On what issue was it you desired further information on the instructions?"

"The Jurors: The fifty per cent. responsibility. There was two papers that you read about that, as near as we could explain it."

"The Court: You mean having to do with the scope of employment and whether or not the other defendant was or was not liable, the law relating to that point?"

"The Jurors: Yes, sir. We think you were about half through when you read it, the last paper, there were two papers. * * *

"The Court: * * * If the matter in which you are in doubt involves the instructions on the question of scope of employment, I feel it my duty at this time to repeat those instructions to you on that point. Is that the point on which you are at sea and are having difficulty. That is the point, is it?"

"A Juror: There was one paper that you read, perhaps there was about that much (indicating). * * *

"The Court: Well, did it have to do with that phase of the case?"

"The Juror: Yes."

"The Court: If that was to be re-read, I would think it only right to re-read all instructions on that point, although there were several of them. * * *

The court thereupon re-read to the jury the instructions numbered 23 to 40 inclusive, bearing upon the issue in question, and including the alleged erroneous instructions above quoted.

To our mind the above colloquy clearly indicates that said erroneous instructions may have constituted the very stumbling block which confronted the jurors in their endeavor to reach a fair verdict under the charge of the court.

Lastly, in support of the conclusion here announced, the case of *Weber v. Wiley B. Allen Co.*, 64 Cal. App. 274, 221 P. 663, may be cited as directly in point. There, to an instruction requested by the employer to the effect that, if at the time of the accident the employee was on a trip for his own pleasure, the employer would not be liable, the trial court added language to the effect that, if the jury should find that the employee went on the trip to see a prospective purchaser on business of the employer, then the return trip at the time of the accident was a part of the business trip for the employer, the court held that the added language had the effect of charging the jury on a question of fact and reversed the judgment.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.

210 Cal. 580

JOHNSTONE v. MORRIS.
S. F. 13374.

Supreme Court of California.
Oct. 28, 1930.

1. Partnership §104.

Law action cannot be maintained between partners with respect to partnership transactions, in absence of statute.

2. Partnership §104.

Mere fact of dissolution of partnership before bringing action does not remove bar against law actions between partners in absence of statute.

3. Partnership §104.

Where partner's interest is purchased under give or take proposition without complete accounting, and subsequently purchas-

ing partner discovers misappropriation by other during partnership's existence, he may rescind and sue for accounting, or affirm and sue at law in deceit.

4. Partnership §104.

Where partner purchasing copartner's interest under give or take proposition subsequently discovers misappropriation by others and sues for damages, action is at law.

5. Jury §13(18).

Partnership §104.

That defendant, sued by former partner on note, in cross-claiming for damages for misappropriations by plaintiff during partnership's existence, asked incidentally for accounting to determine misappropriated amount, *held* not to make cross-action of equitable cognizance or deprive defendant of right to jury trial.

The essential nature of defendant's cross-action was for fraud and deceit in the alleged misappropriation, by plaintiff, of funds during the existence of the partnership. Defendant asked that court order accounting to determine exact amount misappropriated and for damages for alleged fraud.

6. Trial §11(2).

That many items are involved in determining damages does not deprive law courts of jurisdiction.

7. Accord and satisfaction §23.

Dissolution under give or take proposition *held* not accord and satisfaction of claim for partner's misappropriations, where injured partner was ignorant of misappropriations.

8. Set-off and counterclaim §34(2).

In action on note given for partnership interest, *held* defendant's claim for plaintiff's alleged misappropriations during partnership could be set up as counterclaim or cross-complaint (Code Civ. Proc. §§ 438, 442).

9. Evidence §177.

Where issue was misappropriations by partner, accountant's summary of partnership books *held* admissible (Code Civ. Proc. § 1855, subd. 5).

Accountant, a certified public accountant, testified that he had made examination of available books of concern, but that some of detail work was delegated to assistants, who worked under his supervision and control. Code Civ. Proc. § 1855, subd. 5, provides that evidence of the contents of a writing other than the writing itself is admissible when the original consists of numerous accounts or other documents, which cannot be exam-

ined in court without great loss of time, and the evidence sought therefrom is only the general result of the whole.

10. Trial ⇨139(1), 140(1).

Weight of evidence and credibility of witnesses is for jury.

11. Appeal and error ⇨1001(1).

Jury's determination, finding support in evidence, is conclusive on appeal.

12. Conspiracy ⇨47.

Conspiracy to defraud may be inferred from circumstances.

13. Conspiracy ⇨48.

Jury *held* entitled to determine, from circumstances, whether evidence that plaintiff and wife had not conspired to defraud defendant, though not directly contradicted, was inherently improbable.

14. Fraud ⇨58(1).

Evidence *held* to sustain inference of joint fraud by plaintiff and wife upon defendant by misappropriating partnership funds.

15. Appeal and error ⇨928(1).

Where appeal record does not include all given instructions, it will be assumed that entire charge showed no error and that imperfections in instructions were harmonized.

16. Trial ⇨260(5).

Where misappropriations were alleged and items and errors in partnership bookkeeping system were clearly presented, refusing instruction that faulty bookkeeping does not necessarily cause loss *held* proper.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by John Johnstone against M. E. Morris. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

Hugh K. McKevitt, of San Francisco, for appellant.

James M. Hanley, of San Francisco, for respondent.

PER CURIAM.

This is an action on a promissory note. The complaint alleges the execution and delivery of a promissory note by defendant to plaintiff in the sum of \$16,800; that \$4,250 has been paid thereon; that \$12,550, together with interest and attorney's fees, are due, owing, and unpaid. The defendant's answer

admits the execution and delivery of the note, admits that but \$4,250 has been paid thereon, and by way of defense alleges that plaintiff has in his possession approximately \$15,000 belonging to this defendant, and sets up the same by way of counterclaim. The defendant also filed a cross-complaint, in which it is substantially set forth that the above note was given by defendant to plaintiff upon the dissolution of a partnership theretofore existing between the parties; that on September 30, 1923, said partnership was dissolved by the defendant purchasing the plaintiff's interest for the sum of \$26,800, \$10,000 of which was paid in cash, the balance being represented by the promissory note above mentioned; that no extensive accounting was had at the time of dissolution; that during 1922 and 1923 the wife of plaintiff, Corrine Johnstone, acted as the bookkeeper of the partnership; that during that period plaintiff and his wife entered into a conspiracy to defraud the defendant by means of false entries in the account books and misappropriations of funds belonging to the partnership; that \$30,000 is the approximate sum so misappropriated, of which one-half, or \$15,000, belongs to this defendant by virtue of the partnership relationship. Defendant and cross-complainant prays that plaintiff take nothing by his action; that the court order an accounting to determine the exact amount misappropriated; that the defendant have as damages for the alleged fraud the difference between the amount misappropriated and the amount due on the note.

Plaintiff, in answering the cross-complaint, denied the existence of the conspiracy and fraud; alleged that during the entire existence of the partnership from 1917 to 1923, defendant was a silent partner in the business, that neither the public nor Corrine Johnstone knew that in fact defendant was a partner, that Corrine Johnstone, in the honest belief that her husband was the sole owner of the business, had invested \$1,825 of her own money in the business and \$1,200 belonging to her mother, admitted that in 1922 Corrine Johnstone withdrew \$500 from the business, and admitted that she withdrew \$3,500 in 1923, but alleged that the same was done without her husband's knowledge and consent, and in the honest belief that plaintiff, her husband, was the sole owner of the business.

Over the protest of plaintiff and at the request of the defendant the court granted a jury trial on all the issues. The jury rendered a verdict "in favor of the defendant M. E. Morris and against the plaintiff John Johnstone," thus in effect finding that plaintiff had misappropriated \$12,550 of defendant's money, since that was the amount due on the note, and the verdict determines that

plaintiff is entitled to nothing. From the judgment duly entered in accordance with the above verdict, plaintiff prosecutes this appeal.

Appellant contended in the trial court, and, having been overruled there, contends on this appeal, that the cross-complaint of respondent, both by the issues raised and the relief demanded, appeals to the equity side of the court, and that on those issues a right to trial by jury does not exist. Furthermore, appellant contends that these equitable issues should first have been determined by the court without a jury. The basis of appellant's contentions in this respect is that the cross-complaint is fundamentally based on the partnership relation, and the action is essentially no more than an action for an accounting between partners.

[1-4] It is an almost, if not universally, accepted rule, that, in the absence of statutory permission, an action at law as distinguished from an action in equity cannot be maintained between partners with respect to partnership transactions. It is also well settled that the mere fact a dissolution of the partnership has taken place before the action is brought does not change the rule that no action at law can be maintained between partners. See exhaustive annotation, "Actions at Law between Partners and Partnerships," 21 A. L. R. 21, particularly at pages 34 and 84. But to this rule that no action at law will lie between partners, even after dissolution, there is one well-recognized exception. Where a partnership has been dissolved by one partner purchasing the other partner's interest under a give or take proposition without a full and complete accounting, and later the purchasing partner discovers that the selling partner was guilty of fraudulently hiding assets or misappropriating partnership funds during the existence of the partnership, the purchasing partner may elect to rescind the purchase and sue for an accounting in equity, or he may affirm the purchase and sue at law for damages suffered by virtue of the fraud and deceit. If this last alternative be selected, it seems to be well settled that equity has no jurisdiction; the action being one at law. The courts of this state seem never to have directly passed on this question, but there is ample authority to be found in decisions from other jurisdictions. In the case of *French v. Mulholland*, 218 Mich. 248, 187 N. W. 254, 21 A. L. R. 1, the following factual situation existed: French and Mulholland, after having been engaged in a partnership, dissolved the same by a give or take proposition; French buying out Mulholland. Later French discovered that Mulholland, while acting as manager of the partnership before its dissolution, had failed to account for certain profits. French affirmed the sale and then brought

an action in equity for an accounting. The court held that under these circumstances an action at law for the fraud and deceit was the proper remedy, and that an action in equity would not lie. The Supreme Court of Michigan, at page 255 of 187 N. W., summed up the situation as follows:

"Plaintiff, by affirming the sale to him, has affirmed the dissolution of the copartnership and the settlement, except as he may, if he has been defrauded, have a remedy for the fraud and deceit practiced upon him.

"If plaintiff has suffered loss in adjusting the partnership relation with defendant, through fraud or deceit of defendant, his remedy does not lie in a partnership accounting, but in an action planted upon such fraud and deceit. * * *

"Plaintiff in this case had a right to impeach the settlement with his copartner, for the fraud and deceit alleged, if practiced upon him, but such is not the remedy he seeks. The allegations in the bill state an action for fraud and deceit in making a settlement of the partnership affairs, and plaintiff elected to have such settlement stand."

After considering several authorities, the court concludes (at page 256 of 187 N. W.): "Plaintiff has an adequate remedy at law, and the learned circuit judge was right in holding that the equity court had no jurisdiction."

The case was therefore transferred to the law side of the court. See 240 Mich. 156, 215 N. W. 350, for the same case on appeal after decision by the law side of the court.

Another case laying down the same rule is *Crockett v. Burleson*, 60 W. Va. 252, 54 S. E. 341, 6 L. R. A. (N. S.) 263, where, after dissolution caused by one partner purchasing the other partner's interest, the purchasing partner discovered that the seller had fraudulently represented the status of the account between them, and brought an action at law for the fraud. The sole question on appeal was whether such action could be maintained. The Supreme Court of Appeals of West Virginia held that it could, stating, among other things (page 342 of 54 S. E.): "The gravamen of the action in this case is the alleged tort—the alleged personal wrong done to one partner by another, as to which there can be no partnership relation. The late partnership is in no way concerned. It cannot be conceived that there is anything in the former partnership relation which prevents the maintenance of this action, brought for damages for the alleged deceit."

In the fairly recent case (1929) of *Wright v. Lake*, 178 Ark. 1184, 13 S.W.(2d) 826, at page 827, it is said, in reference to this type of case: "The contract of dissolution stands, and the partnership relation no longer exists. The ground of action is in no way con-

nected with the state of the partnership business, except that the defendant is alleged to have withheld from the plaintiff a part of the profits for three different years and to have converted the same to his own use. A certain specified and definite amount is alleged to have been withheld by the defendant for three different years and to have been fraudulently converted to his own use. The alleged fraud and deceit is not asked to be a ground for setting aside the settlement between the partners or for reforming the accounts. The right of the action in this case is the alleged tort of Lake in fraudulently withholding from the plaintiff in each case a certain part of the profits of the partnership for three different years and converting the same to his own use. The former partnership between the parties is in no way concerned, and there is nothing in the former partnership relation which prevents the maintenance of this action, for the alleged deceit."

See, also, *Farnsworth v. Whitney*, 74 Me. 370; *McAuley v. Cooley*, 45 Neb. 582, 63 N. W. 871; *Binney v. Delmar* (Com. Pl.) 17 N. Y. S. 524; *Kelly v. Delaney*, 136 App. Div. 604, 121 N. Y. S. 241, affirmed in 205 N. Y. 618, 98 N. E. 1105; *Wicks v. Lippman*, 13 Nev. 499; annotation, 21 A. L. R. 21, at page 97.

[5, 6] The reasoning of the above cases appeals to us as stating the proper rule. It is true that respondent herein has, among other remedies, asked for an accounting, but that relief is merely incidental as part of the proof of the fraud. The essential nature of the action was for fraud and deceit in the misappropriation of funds. The action was not one for an accounting. The mere fact that in determining the damages many items were involved would in no way change the nature of the action, nor would it deprive the law courts of jurisdiction. As stated in *Otsego Sanitary Milk Products Co. v. Allegan Circuit Judge*, 234 Mich. 277, 207 N. W. 890, at page 890: "The only relief sought by either party in the original case is a money judgment or decree. It is said by one of the parties that the number of items involved approximates 3,000, and by the other that the number does not exceed 50 * * * but the fact that the items are numerous does not deprive a court of law of jurisdiction."

From the above reasoning it follows that, the action being one at law, the defendant was entitled to a jury trial.

[7] Just as appellant has misconceived the nature of respondent's pleading, so has he misconceived the nature of the dissolution agreement. The evidence shows that the parties arrived at the value of the business by roughly estimating the actual value of the stock on hand. Respondent then agreed to pay one-half of this sum as and for the appel-

lant's interest. Appellant therefore contends that respondent got full value for the note; that the note only represented the actual tangible value of the property. After reasoning thus, appellant concludes that the "agreement (of dissolution) operated as a complete and final settlement between the parties." This conclusion does not follow. Respondent is not seeking relief for fraud in representing the value of the business at the time of dissolution, but is seeking relief for the fraud and deceit of appellant in misappropriating past profits of the partnership, already earned, and to which respondent was entitled to a share at the time of the dissolution. In other words, on the date of dissolution appellant, according to the allegations of respondent's pleadings, was indebted to respondent in the sum of \$15,000 by reason of his fraud and deceit. Respondent was ignorant of the fact, believing that at that time appellant owed him nothing. Obviously, if respondent had known of the indebtedness arising out of appellant's fraud, he would have deducted the same from the amount of the note. Under such circumstances, the agreement of dissolution could, under no theory, amount to an accord and satisfaction of this indebtedness; respondent being in ignorance of its very existence. To reach such a result would be to place a premium on successful fraud, and this the law does not permit.

[8] A somewhat analogous and equally fallacious contention is made by appellant in his contention that the alleged fraud is not a defense to an action on the note, and could not be set forth as the proper subject of a cross-complaint. Under the above facts there can be no doubt that the alleged indebtedness caused by appellant's fraud could properly be set forth as a counterclaim under section 438 of the Code of Civil Procedure or as a cross-complaint under section 442 of the Code of Civil Procedure.

[9] Appellant's next assignment of error deals with the question as to the admissibility into evidence of an accountant's summary of the books of account of the partnership. Mr. Dolge, a certified public accountant, was called as a witness by respondent. He testified that he had examined the available books of the concern dealing with the period from January 1, 1923, to September 30, 1923, and had made a summary thereof. This summary or report, he testified, "is for the most part in my own handwriting. I examined the books." Some of the detail work was delegated to assistants who worked under the supervision and control of Dolge. The trial court correctly admitted the report in evidence. Section 1855 of the Code of Civil Procedure provides in part: "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: * * *

5. When the original consists of numerous

accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

Although it is true that Mr. Dolge did not do all of the actual checking required, we do not deem that essential to permit the summary to be introduced. He testified very clearly that his report was made from the original tags, checks, and books of account, and that he had personal knowledge of the same. The tags, checks, and books were all made available to appellant, and could all have been introduced into evidence, but it was to prevent such a time wasting and lengthy procedure that section 1855, subdivision 5, of the Code of Civil Procedure, was passed. See *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 189, 75 P. 787; *Shields v. Rancho Buena Ventura*, 187 Cal. 569, 573, 203 P. 114; *Globe Manufacturing Co. v. Harvey*, 185 Cal. 255, 261, 196 P. 261; *Kinney v. Maryland Casualty Co.*, 15 Cal. App. 571, 574, 115 P. 456; *McPherson v. Great Western Milling Company*, 44 Cal. App. 491, 495, 186 P. 803.

[10, 11] Appellant next contends that the evidence is insufficient to support the verdict in the following respects: The Dolge report covers the period from January 1, 1923, to September 30, 1923, and for that period concludes that the sum of \$19,581.06 was unaccounted for. Appellant admits, in addition, that \$500 was appropriated by Mrs. Johnstone in 1922. The total appropriations amount, therefore, to \$20,081.06, of which one-half, or \$10,040.53, belonged to each partner. Appellant contends that this is the only evidence of misappropriations to be found in the record, and that, assuming the jury believed that the entire sum had been misappropriated and was chargeable to appellant, still there would be a balance due on the note for which judgment should have been rendered in favor of appellant. Respondent admitted that \$12,550 was still unpaid on the note, and, if respondent's share of the misappropriated money be deducted from the amount due on the note, there would still be a balance in appellant's favor of \$2,509.47. Appellant therefore contends, the verdict being unsupported by the evidence, a new trial should be granted. This entire argument is predicated on the fact that the Dolge report and the admissions in the pleadings provided the only evidence from which the jury could determine the amount misappropriated, but such was not the fact. Considerable evidence is to be found in the record in reference to transactions not reflected in the Dolge report, nor in the pleadings. For example, both parties produced considerable evidence in reference to a transaction referred to as the "Mack Truck Transaction," from which respondent claimed appellant made a large profit which he should have but did not credit to the partnership. During this discussion a conditional sales contract was in-

troduced in evidence indicating that \$5,750 had been received for the truck. The Dolge report was never intended as the sole evidence of misappropriations, nor was it ever contended that it was absolutely correct. It was merely offered as an approximation based on the available books. The jury evidently did not believe appellant's explanation, either of the items in the Dolge report or in reference to the Mack truck transaction. It was for the jury to weigh the evidence and judge of the credibility of the witnesses, and this they have done. Under elementary principles, the jury's determination, under such a state of facts, cannot be interfered with on appeal. The rule, amply supported by authority, is thus stated in 24 California Jurisprudence, 886, § 135: "Conclusive proof, however, is never necessary to justify a verdict, and a general verdict will be upheld if it finds support in the evidence, adduced upon the whole case. Obviously, under the system prevailing in California, the jury are the exclusive judges of the weight of the evidence and the credibility of witnesses, and it is, as has often been observed, peculiarly within their province, when considering the evidence, to give to it whatever weight it may, in their deliberate judgment, be entitled to, and to draw all reasonable inferences therefrom or, if it be their judgment that the evidence is entitled to no weight in the determination of the ultimate issue, to disregard it altogether."

[12-14] Appellant next contends that the evidence was insufficient to show a conspiracy to defraud respondent by appellant. Appellant correctly states that there is no direct evidence in the record showing that appellant and his wife acted in concert; all the direct evidence showing that Mrs. Johnstone was in ignorance of the partnership relationship, and was laboring under the impression that her husband owned the business, and took the money under that assumption. Moreover, both Mr. and Mrs. Johnstone testified that Mr. Johnstone had no knowledge of the misappropriations by his wife. But we do not deem it necessary in such an action to show the conspiracy to defraud by direct evidence. The jury was not bound by the direct evidence of the Johnstones. The inherent probability or improbability of that testimony was a matter for them to determine from all the facts and circumstances. The evidence shows that at all times herein involved Mr. and Mrs. Johnstone were husband and wife, living together as such. They both testified that Mrs. Johnstone handled all of the finances of the family. Mr. Johnstone testified that "Mrs. Johnstone and I took charge of the financial end of the business: * * * My wife had a bank account. I never saw it. I never wanted to see it"; and also testified that "Mrs. Johnstone handled all the money including our salaries." The evidence also showed that during this period Mrs. Johnstone purchased a \$1,000 diamond ring, a \$2,800 Packard, and started pay-

ments on a \$9,500 home; that she usually carried large sums on her person, many times over \$1,000 in cash. It is hard to believe that under these circumstances Mr. Johnstone was or could be in ignorance of the fact that his wife was appropriating large sums of the partnership money. In cases of conspiracy to defraud it is not to be expected that direct evidence of the conspiracy can be secured, because such evidence could usually only be secured in the event one of the conspirators confessed. The jury may infer the conspiracy from all the circumstances, and, if the inference is a reasonable one, it will not be disturbed on appeal. These principles have repeatedly been recognized by this court. In *Revert v. Hesse*, 184 Cal. 295, at page 301, 193 P. 943, 946, this court, quoting from a Georgia case (*Woodruff v. Hughes*, 2 Ga. App. 361, 58 S. E. 551), said: "The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which conspiracy may be inferred. * * * The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances." * * *

On the same page (301 of 184 Cal., 193 P. 943, 946) the court continued as follows: "In the present action, while plaintiff was unable to prove any formal agreement between defendants Arthur Hesse and Sidney Beach, nevertheless, there was before the court the entire transaction resulting in the consummation of a flagrant fraud upon the plaintiff, in which transaction defendant Sidney Beach participated as an intermediary. * * * These circumstances, coupled with the further fact that defendants Sidney Beach and Arthur Hesse were not strangers, but were on more or less intimate terms, occupying the same office, were sufficient to warrant the inference drawn by the trial court that defendant Sidney Beach was a party to a conspiracy which had for its object the fraudulent conversion complained of by plaintiff."

In *Beeman v. Richardson*, 185 Cal. 280, at page 282, 196 P. 774, 775, the rule is stated as follows: "The point in connection with the finding as to a conspiracy is that the representations were made by the defendant Richardson alone, and that there is no direct evidence that the other defendants agreed that they should be made, or knew at the time that they were being made. But direct evidence of that character could hardly be had in the very nature of things, unless one of the defendants should confess, and the fact must be determined by the inference naturally and properly to be drawn from those matters which can be and are directly proven."

Under the evidence partially summarized,

supra, the inference of joint fraud was not unreasonable, and will not be disturbed on appeal.

[15, 16] The next assignment of error deals with the failure of the trial court to give an instruction to the effect that a person does not necessarily lose money by faulty bookkeeping. Sufficient it is to say that the record before us does not contain all of the instructions of the trial court. It is well settled that, when all the instructions given by the trial court are not included in the record on appeal, it will be assumed that, were the entire charge of the trial court before us, it would not show error, and that any imperfection in the instructions was harmonized and a correct statement of the law made. *Goldman v. Dahlberg*, 79 Cal. App. 380, 382, 249 P. 536; *Barrington v. Pac. Elec. Ry. Co.*, 83 Cal. App. 100, 103, 256 P. 567; *Heffner v. Gross*, 179 Cal. 738, 178 P. 860. Moreover, the question of the validity of the various items of the Dolge report and the errors in the bookkeeping system were squarely and clearly presented to the jury.

For the foregoing reasons, the judgment appealed from must be, and hereby is, affirmed

109 Cal. App. 328

O'BANION v. CALIFORNIA CANNING PEACH GROWERS et al.

Civ. 4172.

District Court of Appeal, Third District, California.

Nov. 1, 1930.

Rehearing Denied Dec. 1, 1930.

Appeal and error $\Rightarrow$ 607(1).

Order terminating proceedings in preparing transcript held not abuse of discretion, where more than two months elapsed after discovery no transcript had been prepared before it was prepared and filed (Code Civ. Proc. §§ 953a, 954).

The case was tried before the court, and required less than two hours for its trial. Affidavits set forth no facts excusing the long delay or setting forth any reasons why preparation of transcript was not completed many months before date it was actually filed. No stipulations were asked for extending time, and no order was made extending time.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Ernest F. O'Banion against the California Canning Peach Growers, a corporation, and others. From an order terminating proceedings in the preparation of tran-

script on appeal pursuant to statute, plaintiff appeals.

Affirmed.

Lloyd E. Hewitt, of Yuba City, for appellant.

Bradford Webster, of Oakland, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal from an order terminating proceedings in the preparation of a transcript on appeal undertaken to be prepared under the provisions of section 953a, Code of Civil Procedure. The record shows the following: That the notice of entry of judgment appealed from and the proceedings on which said appeal were terminated was filed on the 24th day of May, 1929. Notice of motion for a new trial was filed on the 29th day of July, 1929. On the 10th day of July, 1929, an order was made denying the motion for a new trial. Notice of appeal from the judgment was filed on the 13th day of July, 1929. Notice to prepare transcript was filed on the same day. The order directing the reporter to prepare the transcript on appeal was also filed on the same day. Here the matter rested until a notice was given by the respondents that on the 31st day of January, 1930, respondents would move to terminate proceedings with reference to the preparation of the transcript on appeal, in accordance with the provisions of section 954, Code of Civil Procedure. Upon the hearing of this motion two affidavits were filed by the appellant, one by Duncan McLellan, the reporter, to the effect that on or about the 13th day of July, 1929, A. H. Hewitt, now deceased, had made satisfactory arrangements with him personally to prepare a reporter's transcript, to be used on appeal in this cause; that, due to the press of business in his office, affiant forgot to prepare said transcript, and that the same has since been prepared and was filed in the office of the clerk of the above-entitled court on the 4th day of February, 1930. The second affidavit referred to was made by Lloyd E. Hewitt, one of the attorneys for the appellant. In this affidavit it is set forth that A. H. Hewitt, one of the attorneys of record in said cause, died on or about the 3d day of September, 1929, and that the said A. H. Hewitt was handling said cause, and prepared the papers and pleadings therein. That said cause came on for trial on the 18th day of April, 1929, and judgment was entered therein on the 20th day of May, 1929; that thereafter, on the 29th day of May, 1929, the plaintiff prepared and filed a motion for new trial, which was thereafter denied on the 13th day of July, 1929; that arrangements were made with the reporter to prepare a reporter's transcript; that the first that appellant knew that the reporter's transcript was not prepared was in the latter part of November, 1929, and that at

said time the reporter informed affiant that he would have the same prepared as quickly as possible and would file it with the clerk of the court, and at the same time informed affiant that satisfactory arrangements had been made for his compensation.

Upon this showing the trial court entered its order terminating proceedings relating to the preparation of transcript upon appeal.

It will be seen by an examination of the affidavits that no facts are stated really excusing the long delay, or setting forth any reasons why the preparation of the transcript was not completed many months before the date it was actually filed. The cause was one tried before the court, and as stated in the briefs, and not disputed by counsel, required less than two hours for its trial. The affidavit of the attorney for the plaintiff shows that more than two months elapsed after his discovery that no transcript had been prepared by the reporter before same actually was prepared and filed. No stipulations were asked for extending time and no order of the court was made extending time. Under such circumstances we cannot very well hold that the trial court abused its discretion in making the order appealed from, and, as stated in *Galbraith v. Lowe*, 142 Cal. 295, 75 P. 831, the order of the trial court "will not be disturbed upon appeal where no abuse of discretion appears, and where the proposed engrossed bill failed to show any ground for a new trial." That was a case where the trial court had refused to sign the engrossed bill on account of the negligence of the appellant in having the same prepared. The fact that, under the case of *Smith v. Jaccard*, 20 Cal. App. 280, 128 P. 1023, 1024, the time within which the reporter must prepare a transcript is held to be directory and not mandatory, does not alter the rule relative to diligence. As it is said in that case: "It is doubtless the duty of the appellant, as the moving party, to take the necessary steps to secure the filing of such transcript, and for want of diligence in such matter on his part it is within the power of the trial court to terminate his proceedings for procuring such transcript." It is also there held that, whether due diligence has been exercised is a matter largely within the discretion of the trial court, and will not be disturbed unless such discretion has been abused.

The proceedings now before us appear to have been taken in strict accordance with the decision of this court in the case of *Crocker v. Crocker*, 76 Cal. App. 606, 245 P. 438, in which case it is also held that the termination of proceedings to prepare a transcript for want of diligence is largely within the discretion of the trial court, and will not be reversed unless an abuse thereof is shown.

As stated herein, we find nothing in the record showing such abuse of discretion, and, therefore, the order of the trial court is affirmed.

CLARK v. PATTERSON et al.*

Civ. 6161.

District Court of Appeal, Second District,
Division 2, California.

Oct. 27, 1930.

Rehearing Denied Nov. 26, 1930.

Hearing Granted by Supreme Court
Dec. 22, 1930.**1. Brokers ☞4.**

Customer's acceptance of broker's note with interest covering funds misappropriated held extension of time for payment, releasing surety on broker's bond (Civ. Code, § 2819; St. 1919, p. 1252, as amended).

Broker undertook to sell customer or payee of note a piece of property and secured down payment which broker misappropriated to his own use. Broker gave note covering funds misappropriated and made several payments thereon. Note also provided for payment of 8 per cent. interest, whereas under law only 7 per cent. would have been allowed.

2. Principal and surety ☞104(1).

Where creditor grants principal extension of time of payment, without surety's consent, benefits, if any, to surety are immaterial on question of release (Civ. Code, § 2819).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Joseph F. Clark against J. Le Roy Patterson and another. From a judgment of the superior court, reversing a judgment of the municipal court in favor of plaintiff and against the defendant New York Indemnity Company, plaintiff appeals.

Judgment of the superior court affirmed.

Paul C. Hill, of Los Angeles, for appellant

Culver & Nourse, of Los Angeles, for respondent.

SCHMIDT, Justice pro tem.

The appeal in this case is from the judgment and order of the superior court reversing the judgment of the municipal court in favor of appellant as to the respondent New York Indemnity Company, a corporation.

The case was tried upon a stipulated statement of facts, which in so far as material, are that the respondent New York Indemnity Company issued to one J. Le Roy Patterson its broker's bond in the sum of \$2,000, pursuant to the provisions of the Real Estate Brokers' Act (Stats. 1919, p. 1252, and acts amendatory thereof); that while said bond was in force, to wit, on the 3d day of February, 1926, said Patterson, acting as a real estate broker, through his agent E. F. Gleason,

undertook to sell to appellant a certain parcel of land whereby the said Patterson undertook to endeavor to secure from the Pacific Development Company a contract for the sale and conveyance of said real estate; the said Patterson made and delivered to appellant a purchaser's preliminary sales contract covering the property, at which time appellant paid to Gleason the sum of \$855, which was in turn paid to and received by Patterson, excepting the amount due Gleason on account of his commission; that Patterson deposited the amount received by him in his own account, which was thereafter levied upon under attachment in another action brought against Patterson; Patterson never at any time paid the \$855 or any part thereof to the Pacific Development Company or any one else; that Patterson appropriated the same to his own use and purpose. Appellant, being unable to obtain the repayment of his money, consulted an attorney, which attorney obtained from Patterson a promissory note dated August 10, 1926, without the knowledge of the surety, New York Indemnity Company, which note provided for the repayment of the sum to appellant with interest at the rate of 8 per cent. per annum, in monthly installments of \$100 each, the first payment to be made on the date of the note, the said note also providing in the event of default the whole amount of principal and interest should become immediately due and payable and for the payment of attorney's fees in the event suit or other proceedings were taken to enforce the payment of the note. The note also contained the following provision:

"This note shall not be, and is not a waiver by the said Joseph F. Clark of any rights, nor a release of myself, E. F. Gleason, or the Pacific Development Company from any liability upon or arising out of that certain preliminary sales contract, executed by the said Joseph F. Clark under date of February 3, 1926, until this note has been fully paid and satisfied. J. L. Patterson."

Upon the execution of the note Patterson paid the sum of \$100 and thereafter an additional sum of \$100. This action was commenced for the purpose of collecting the unpaid balance. Subsequent to the filing of the action in the municipal court the further sum of \$100 was paid, leaving at time of trial a balance of principal unpaid to plaintiff in the sum of \$550.

[1] The first question presented is: Assuming that the note of Patterson was in the performance of a duty by him as a real estate broker, has the surety been released by the acceptance by appellant of the note from Patterson?

It must be borne in mind that by the acceptance of the promissory note appellant extended the due date of the indebtedness

and obtained an additional advantage of 8 per cent. interest where the obligation could have carried, under the law, only 7 per cent. Section 2819, Civil Code, provides:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

This section has received frequent interpretation from the Supreme Court. We need only refer to *Daneri v. Gazzola*, 139 Cal. 416, 73 P. 179; *Bridge v. Conn. Mutual Life Ins. Co.*, 167 Cal. 774, 141 P. 375; *Braun v. Crew*, 183 Cal. 728, 192 P. 531, which cases hold under facts similar to the case at bar, that by the acceptance of the note, if there is an extension of time for payment, the surety is released, and also that the acceptance of an additional rate of interest is sufficient consideration for the new obligation so as to release the surety.

[2] Appellant contends, however, that the surety in this case has not been injured, but benefited. As was said in *Braun v. Crew*, 183 Cal. 728, 733, 192 P. 531, 534:

"The rule in this state is that where there is an extension of time by the creditor to the principal, without the consent of the surety, the question of the extent of the injury which the surety sustains therefrom cannot be inquired into."

By reason of the conclusions reached, it is not necessary to discuss any other points raised.

Judgment of the superior court reversing the judgment of the municipal court is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

109 Cal. App. 343

MILONAS v. SARANTITIS et al.
Civ. 7332.

District Court of Appeal, First District,
Division 2, California.

Nov. 5, 1930.

Rehearing Denied Dec. 5, 1930.

Hearing Denied by Supreme Court
Dec. 29, 1930.

1. Principal and agent §132(1).

Disclosed principal is bound by contracts entered into by agent within scope of his authority.

2. Evidence §459(3).

Parol evidence held admissible to show that contract executed by partner individually

was in fact intended by parties to be executed in behalf of partnership.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by John K. Milonas against George I. Sarantitis, Gus Sarantitis, and others, partners doing business as Sarantitis Bros. Judgment for plaintiff, and defendants other than George Sarantitis, appeal.

Affirmed.

Hugo D. Newhouse and Russell P. Tyler, both of San Francisco, for appellants.

L. L. James and James, Brann & Rowe, all of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff recovered judgment for \$1,040 unpaid rent for premises occupied by defendants under a written lease signed by George Sarantitis alone. The defendants other than George Sarantitis appeal on typewritten transcripts.

[1] The trial court found that all the defendants were engaged in business as copartners, and that "by consent and agreement of all parties, said George I. Sarantitis subscribed and executed" the lease in his individual name "for and on behalf of himself and his said brothers and copartners." The appellants attack this finding as not supported by the evidence, but say that it would be too difficult to print the evidence to establish their point. Respondent has printed sufficient evidence to sustain the finding. The liability of the appellants thus rests upon the well-settled rule that, where a person is known to be acting as the agent of a disclosed principal the latter is bound upon the principle that the contract of the agent, within the scope of his authority, is, in legal effect, the contract of the principal. *Geary St., etc., R. R. Co. v. Rolph*, 189 Cal. 59, 65, 66, 207 P. 539; *Marshall v. Bernheim*, 64 Cal. App. 283, 285, 286, 221 P. 401; *Pacific Ready-Cut Homes, Inc., v. Seeber*, 205 Cal. 690, 697, 272 P. 579; *Rubin v. Platt Music Co.*, 92 Cal. App. 203, 210, 268 P. 396.

[2] The further point is made that the trial court erred in receiving parol evidence to show that the contract was in fact a partnership transaction. Recent decisions support the general rule that, when it does not appear that the contracting party, at the time the contract was executed, elected to hold the agent instead of the principal, parol evidence is admissible to show the intention of the parties. 21 R. C. L. pp. 891, 893. In the early case of *Byington v. Simpson*, 134 Mass. 169, the court, speaking through Holmes J., said: "Whatever the original merits of the rule,

that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency." The rule was recognized in *Marshall v. Bernheim*, supra; *Rubin v. Platt Music Co.*, supra, and in *Pacific Ready-Cut Homes, Inc. v. Seeber*, supra, where, at page 697, of 205 Cal., 272 P. 579, 582, the court said that "no good reason appears why it [the rule holding a disclosed principal liable] should not apply as well when the contract is written." The court did not pass directly on the question here presented, but it did hold the disclosed principal liable, and to do so it had to rest its decision on the parol evidence which showed that the contract signed by the agent was in truth and fact signed for and on behalf of the principal whose identity was disclosed at the time the contract was made.

Thus, if a principal, in making the contract, assumes a fictitious or artificial name, parol evidence is admissible to identify the real party in interest, and the situation is nowise changed if the principal should make use of the name of another known person. *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Pleins v. Wachenheimer*, 108 Minn. 342, 122 N. W. 166, 133 Am. St. Rep. 451. The principle is well stated in *Ford v. Williams*, 21 How. 289, 16 L. Ed. 36, as follows: "The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction."

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.

109 Cal. App. 94

BARTY v. COLLINS et al.
Civ. 4039.

District Court of Appeal, Third District,
California.

Oct. 20, 1930.

Rehearing Denied Nov. 19, 1930.

Hearing Denied by Supreme Court
Dec. 18, 1930.

1. Appeal and error 927(7).

In reviewing order directing verdict, appellate court will apply rules analogous to

those governing review of order granting nonsuit.

2. Appeal and error 927(7).

Appellate court, when reviewing order directing verdict for plaintiff, will view evidence and inferences fairly deducible in light most favorable to plaintiff.

3. Appeal and error 837(11), 989.

In reviewing order directing verdict, evidence, though erroneously omitted, if relevant to issues joined, must be given full probative strength, and question arising from variance between witnesses' testimony cannot be considered.

4. Master and servant 302(1).

Liability of master for servant's acts depends upon whether servant was acting within scope of employment.

Terms "course of employment" and "scope of authority" are not susceptible of accurate definition. What acts are within scope of employment cannot be determined by a fixed rule; the authority from the master being gathered from surrounding circumstances.

5. Master and servant 332(2).

Whether servant's act is within scope of employment is question for jury, and not of law for court.

6. Master and servant 302(6).

Servant's mere mingling of some personal purpose with that of master at time of particular act will not relieve master from liability.

7. Automobiles 245(30).

Whether servant, driving his own automobile at time of collision, resulting in injury to plaintiff, was acting within scope of employment, *held* for jury under evidence.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Rizieri Barty against Joseph F. Collins and another. Verdict for plaintiff against defendant named, and, from a judgment upon a directed verdict in favor of defendant Ludlow Typograph Company, plaintiff appeals.

Reversed.

Sinclair M. Dobbins, of Vacaville, and Huston, Huston & Huston, of Woodland, for appellant.

Hadsell, Sweet & Ingalls, of San Francisco, Joseph M. Raines, of Fairfield, and Robert M. Tapscott, of San Francisco, for respondents.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action to recover damages alleged to have been suffered by plaintiff on account of personal injuries received in an automobile collision. The jury returned a verdict against defendant Collins in the sum of \$15,000. Upon motion of defendant corporation, the court directed a verdict in its favor, and from the verdict so rendered plaintiff prosecutes this appeal.

On the evening of July 11, 1928, defendant Collins, while in the general employment of defendant corporation, was driving his own automobile along the state highway, near the city of Fairfield, when a collision occurred between his car and the car driven by plaintiff. The injuries complained of arose out of this collision.

The motion for directed verdict was granted upon the sole ground that there was no proof that Collins was acting within the scope of his employment at the time of the collision, and this is the only question presented upon this appeal.

[1-5] In reviewing an order directing a verdict, the appellate court will apply rules analogous to those which govern in reviewing an order granting a nonsuit. 24 Cal. Jur., p. 913. Accordingly, it is the duty of the court here to view the evidence adduced in support of plaintiff's case, and every presumption and inference that may be fairly deduced therefrom, in the light most favorable to plaintiff. *McKay v. McKay*, 184 Cal. 742, 195 P. 385. Furthermore, evidence, whether admitted erroneously or not, if relevant to the issues joined, must be given by the court the benefit of full probative strength, and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. *Kleist v. Priem*, 51 Cal. App. 32, 196 P. 72. "The question of the liability of the master for the acts of his servant depends altogether upon the fact of whether or not the servant was acting within the scope of his employment. The terms 'course of employment' and 'scope of the authority' are not susceptible of accurate definition. What acts are within the scope of the employment can be determined by no fixed rule; the authority from the master being gatherable from the surrounding circumstances." *Robards v. Bannon Sewer Pipe Co.*, 130 Ky. 380, 113 S. W. 429, 431, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394. Whether the act of the servant complained of is within the scope of his duty, while acting in the furtherance of his master's business, is a matter of fact to be determined by the jury, and not by the court as a matter of law.

The record presents the following evidence upon the question of whether or not Collins was acting within the scope of his duty when the accident occurred: During the trial it was admitted by counsel for Collins "that at the time of his (Collins') vacation and of this

accident he was an employee of the Company on vacation with pay." Collins, called as an adverse witness by plaintiff, testified that at the time of the collision he was on his way from San Francisco to Sacramento, for the sole purpose of calling upon a man named Chambers; that at that time he was regularly employed as a salesman and installment man for defendant corporation, and had been so employed for a number of years; that he sold and installed linotyping machines for the company; that Chambers used machines similar to those sold by defendant corporation, and that he had called upon Chambers a number of times pursuant to his duties and prior to the date of the accident for the purpose of selling a machine for his employer; that some time prior to the accident one of the men (presumably an employee of defendant corporation) had sold a machine to Bird Linotyping Company of Los Angeles; that he had learned from the reports that the Bird Company was dissatisfied with the machine sold them, and that they wanted to dispose of it; that he was on his way to Sacramento to attempt to sell this machine to Chambers, when the collision occurred.

We are only here concerned with evidence favorable to plaintiff. It is true that Collins testified that at the time of the collision he was on his vacation. His testimony upon the matter of the exact time when his vacation commenced is vague and uncertain, and might well have been entirely left out of consideration by the jury. He testified that his wife and child were at Seattle, and that his vacation had started, and he was on his way to meet them. If this is true, the jury might well have inquired why he did not go directly to Seattle, instead of proceeding out of his route to Sacramento. They might reasonably have inferred that he did not intend to start on his vacation until after he had consummated his business call with Chambers. Furthermore, during the trial, no attempt was made by the corporation to show by their records or by the testimony of executive officials that Collins was actually on his vacation or the exact date when it began. At the trial there was testimony to the effect that Collins had admitted to the witness in San Francisco that his vacation did not commence until July 15th, three days after the accident.

[6] It is earnestly contended by respondent that the evidence with reference to the sale of the machine to Chambers is susceptible of one construction only, to wit, that the matter was the private business of Collins, and that the respondent company was in no way interested therein. We believe that this view of the testimony cannot be sustained. According to the evidence, this machine had been sold by respondent company to a customer in Los Angeles, who became dissatisfied. From the "records" Collins found it was to be resold, and he was proceeding to

sell it again. Asked where he got the information, Collins answered in a manner which did not carry conviction, and the jury might well have inferred that the "records" referred to were the records of the corporation. Again, Chambers was an old "prospect" of his company, and the jury could reasonably have found that the business he had with Chambers at Sacramento was respondent's business. The following question and answer put to and made by Collins are indicative of his manner of testifying: "Q. You had planned to stop at Sacramento to see someone there about some business selling typograph machine you told me? A. It was really not business, it was more of a personal call." Conceding that the proposed visit to Chambers was a personal call, it is a matter of common knowledge that salesmen accomplish and carry out their employment through "personal calls." This is particularly true of the instant case, as Collins had made a number of prior calls upon Chambers in an attempt to sell him the machine which his employers had for sale, and which he was employed to dispose of. The jury might well have found that Collins' contemplated visit to Sacramento had two objectives—personal business of his own, and business of the company. Under such facts respondent would still be liable. "The mere mingling by the servant of some purpose of his own with that of the master will not relieve the master of liability." *Shearman & Redfield on Negligence*, vol. 1, § 147a.

[7] We think the jury might have found, not unreasonably, if they believed all the testimony adduced by plaintiff and adopted the inferences properly to be drawn therefrom, that at the time of the collision Collins was engaged in the course of his employment with defendant corporation. We cannot say that a conclusion favorable to a recovery by plaintiff could not have been reached reasonably.

The trial court erred in granting the motion complained of, and, accordingly, it is ordered that that judgment be reversed.

109 Cal. App. 238

RIVERSIDE COUNTY v. LESLIE.
Civ. 253.

District Court of Appeal, Fourth District,
California.

Oct. 27, 1930.

1. Highways ⇨19.

County through board of supervisors not having substantially complied with statutory

provisions in laying out road *held* not to have established road (Pol. Code, §§ 2681-2690).

Owner of land over which road was established was a nonresident, was given no notice of any kind, nor was his consent ever obtained. Record was silent on matter of compliance with Pol. Code, §§ 2688, 2689, and 2690, prescribing jurisdictional steps to be taken before owner of land may be deprived of his property however great the public necessity therefor.

2. Highways ⇨8.

County not having condemned right of way nor paid for it, no right to highway could be acquired by use and maintenance under color of right (Pol. Code, §§ 2681-2690).

3. Dedication ⇨16(1).

Building of fences *held* not implied dedication of thoroughfare, where substantial part of alleged road had no fence on either side and landowner strenuously objected.

Fences were placed along highway 50 feet from center of road without owner's consent by hired man of lessee. The fences were not parallel and remained intact from time of construction. Owner continued to farm strip outside fences, and substantial part of road in center of land had no fence on either side, thereby forming no lane.

4. Highways ⇨14.

Landowner, not having acquiesced in thoroughfare 100 feet wide, *held* not estopped by laches to assert highway was only 20 feet wide.

5. Highways ⇨14.

County's mere assumption of width of roadway will not control, unless proper legal action be taken to acquire land (Pol. Code, §§ 2681-2690; St. 1907, p. 806).

6. Eminent domain ⇨273.

Landowner is entitled to injunction to restrain planting of trees on land claimed as part of public highway, where proceedings to establish highway were absolute nullity (Pol. Code, §§ 2681-2690).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by the County of Riverside against Charles C. L. Leslie, wherein defendant filed a cross-complaint. From the judgment rendered, defendant and cross-complainant appeal.

Reversed.

A. B. Edler, of Los Angeles, for appellant.

Albert Ford, Dist. Atty., of Riverside, for respondent.

OWEN, Justice pro tem.

The county of Riverside instituted this action to recover the sum of \$40,000 from the defendant under the provisions of section 2742 of the Political Code, alleging that the defendant had maliciously destroyed 400 young trees growing upon the highway known as Beaumont avenue; the Code section providing for a forfeiture of \$100 for each tree destroyed. The complaint sets forth that the said highway is 100 feet wide and properly describes its location. It is also alleged that there is a duly organized and existing county board of forestry in Riverside county. The defendant appeared by answer and cross-complaint.

It appears that on September 12, 1888, there was presented to the board of supervisors of the county of San Bernardino a petition from certain freeholders of the county praying that a highway be laid out for a width of 100 feet running through the land of the defendant and cross-complainant; that pursuant to the petition the supervisors took certain steps toward the acquisition of the right of way. The legality of the procedure is attacked by the defendant in his cross-complaint as well as all other actions by the county which seek to establish an actual or implied dedication of the road. Claiming the ownership of the whole strip except a road 20 feet wide, the defendant seeks an injunction against the county of Riverside, its board of supervisors, board of forestry, and other persons, enjoining the placing of fences, the planting of trees, and the opening of the highway beyond the width of 20 feet.

To understand the situation properly, a detailed statement of all actions on the part of the county must be made. In the year 1893 the county of Riverside was created, the premises herein involved were thus transferred from San Bernardino county to the new county, the records of both counties being used in evidence in the trial. The minutes of the board of supervisors of San Bernardino county dated April 2, 1888, read as follows: "Petition for the opening of three new public roads in Beaumont were granted, the accompanying bonds approved and James Kennedy, C. F. Jost and Z. B. Stuart were appointed Road Viewers." Under date of May 7, 1888, were the following minutes: "Report of Road Reviewers on three proposed roads in Beaumont was accepted and two of the roads declared public highways, action on the third road being postponed. For a full description reference is made to the road book of this Board." The record of road surveys of San Bernardino county contains the following:

"At a regular meeting of the Board of Supervisors held on the 2nd day of April, 1888, the following action was taken by unanimous vote of all members present:

"In the matter of a petition of freeholders and residents of the 4th Road District praying

for a county road in Beaumont and to establish some of the streets of Beaumont, a county road, the Road Viewers appointed to consider the same, viz., James Kennedy, C. F. Jost and Z. B. Stuart, having filed a report favorable to the desired action, the report was accepted and the petition granted. The following are the field notes of the proposed new road. Field Notes: Var. 14°30' E.

"Commencing at the intersection of 8th street and Beaumont avenue in Beaumont, thence north on center line of Beaumont avenue one mile to the Twp. line between Twps 2 and 3 south, range 1 west, and extending 50 feet on each side of the center line of said avenue; thence north 1313 feet to R. L. Jenkins north line in section 34 T2N, R1W, and 20 feet on each side; thence north 1.75 miles to the north end of Beaumont avenue and extending 50 feet on each side;" (then follows a page of technical description which has nothing to do with describing the property in question).

"[Signed] Z. B. Stuart,
"County Surveyor."

The foregoing three references constitute the only action taken by the county of San Bernardino to constitute Beaumont avenue a 100-foot county road, so far as the record before us shows. It appears that for a long period before this action was taken, a road zigzagged along the general course of the highway in question, serving Beaumont and other communities to the north. Subsequently, the county of Riverside plowed and graded the road at various times to a width of from 20 to 30 feet. About the year 1916 the county placed stakes and plowed a furrow on each side of the road, 50 feet from the center. The lessee of the defendant informed the road overseer doing the work that the county only had a width of 30 feet; however, the workmen used whatever dirt was needed for fills within the 100 feet. At about this period the lessee of the defendant, or workmen under his direction, placed two fences along the lines of the plowed furrows 50 feet from the center of the road, the fences, however, were not parallel, but the one on the west side of the road began about where the one on the east side stopped, the opposite end of each fence extending to the outer limit of defendant's land. These fences have remained intact from the time of their construction. The fence posts on one side of the road are railroad ties, about 15 or 16 feet apart; the other fence is constructed of willow posts, there being two and three barbed-wire strands.

Pursuant to a resolution of intention dated March 21, 1923, after due posting and publication and the approval of plans, profiles, and specifications, road improvement district No. 11 constructed an 18-foot pavement, 5 inches thick, along the center line of the right of way in question. The work called for 3-foot shoul-

ders to the pavement and the grading of the road to a width of 24 feet. In the month of April, 1927, the Rotary Club of Beaumont purchased about 400 blue and red gum trees (*eucalyptus rostrata*), which trees were planted with the assistance of the Boy Scouts about 50 feet apart, on each side of the road, and within the 100-foot limits thereof, through defendant's property. Plaintiff's witnesses testified that in July of that year most of the trees were living. Defendant testified that nearly all of them were dead. Dead or alive, it is admitted that defendant pulled them up.

The defendant testified that he never knew that the board of supervisors claimed a road through his property until the year 1927; that no notice of such claim was ever served on him, either by the board of supervisors of Riverside or of San Bernardino counties; that he inherited his interest in the land, and the administration of the estate had been pending since 1889, and he was still the administrator; that the taxes on the estate were paid from a trust in Chicago, and he did not know if the taxes were ever paid; that he knew the pavement was being placed on the road about the time it was being finished; that the fences were put up with his knowledge, but not 50 feet from the center of the highway, with his consent; that several years ago he sought legal advice as to the width of the road; and that he visited the premises about once each year and, at times, longer intervals.

Leslie Roberts, lessee of the defendant, testified that the land on both sides of the road had been cultivated outside of the fences, to the graded portion of the road; that the fence on the east side had been standing for 30 years, and that the west fence was placed by a workman at his direction; that he had a controversy with the workman for placing it 50 feet from the center; that he remarked, "We will move it some of these days"; that it had never been removed, but that he had farmed both inside and outside of it; that in 1916 he had ordered the servant of the county off the land when a furrow was being plowed; and that he ordered the workmen off when they were plowing a furrow to plant the trees, but that they did not go. He further stated on cross-examination that he had protested to the workmen at the time of the paving, because of the use of dirt for fills within the 100-foot limit of the claimed highway, but had not protested to the board of supervisors or instituted any action.

It was testified to by witnesses for both parties that it was the general custom in Riverside county for farmers to cultivate to the used portion of highways for the purpose of planting and keeping down weeds.

The trial court found that Riverside county and the board of forestry are legal entities within the law; that Beaumont avenue is 100 feet wide, and that the trees were growing

in and along the highway; that the defendant destroyed the trees, but did not do so maliciously; that the land over which a 100-foot road is claimed is owned jointly by the defendant and the estate of George Leslie; that on April 2, 1888, a petition in due and legal form was received and filed by the board of supervisors of San Bernardino county, asking that a strip of land, which is now Beaumont avenue, be declared and laid out as a public highway; that viewers were appointed, and that on May 7, 1888, the said board declared the strip to be a public highway of the width of 100 feet through defendant's land; that said order was duly entered in the minutes of the board and in the road register, and that thereafter, in the year 1888, the said avenue was laid out and worked by the county and used by the public as a highway, until the creation of Riverside county; that upon the organization of the latter county the said highway was entered in the road register as a highway 100 feet wide through defendant's land, and was mapped and platted in the road book as 100 feet wide by order of the board of supervisors of said county; and that at all times since the creation of said county the said road has been used and maintained as a public highway. The court then finds as facts the statements hereinbefore set forth as to plowing furrows, setting of stakes, and building of fences, and that the fences were maintained with the knowledge and consent of the defendant; that on May 21, 1923, road district improvement No. 21 was created; that defendant's property was contained therein, and the road improved in the manner herein described; that defendant's lands were contained in the assessment district, and that payments have been made by the trustees of the estate of George Leslie, deceased; that notice of the creation of the road district was regularly given as required by law, and the defendant made no objection or protest; that the road has been used as a public highway for more than five years, and such use has been open, notorious, continuous, uninterrupted, and adverse to the claims of the abutting landowners under claim and color of right, and that the defendant had knowledge of the use and the claims of the county. The court found generally against the allegations of the cross-complaint. We have set forth enough of the facts alleged by the parties to the action, and the findings of the court, to gain a clear picture of the controversy. Judgment followed the findings. The injunction was denied.

[1, 2] The first question presented is this: Was Beaumont avenue established as a highway 100 feet wide by the action of the board of supervisors of San Bernardino county? The three excerpts heretofore quoted as the record of the board's transactions fall short of proof of a substantial compliance with the provisions of the Political Code of the year

1888, providing the method of laying out a new road. A "petition was presented," bonds were "approved," and "report of road viewers accepted" as outlined in the minutes of the board, may be probative of the steps taken. There were other procedural acts requisite and necessary, apparently never taken. There seems to have been an attempt to comply with sections 2681 to 2687, inclusive, of the Political Code, but the record is silent as to subdivision 4 of section 2686, providing that the report of the viewers must show the names of nonconsenting landowners, and the amount of damage each claims. That subdivision also provides that nonresident landowners shall be considered nonconsenting landowners, unless their written consent shall be obtained. The defendant herein was a nonresident landowner, as was his predecessor in interest. No notice was ever given him. His consent was never obtained. The proceedings here are silent, as are apparently the records of the two counties, on the following requisite and/or jurisdictional steps to be taken before an owner may be deprived of his property, however great the public necessity; these steps being abridged from sections 2688, 2689, and 2690 of the Political Code, as it existed at the time:

The board of supervisors must fix a day for hearing the report of viewers; give notice to nonconsenting landowners of such hearing by publication; ascertain and declare the amount of damage awarded each nonconsenting landowner; order the amount of damages assessed by them set apart in the treasury; deem rejected any award of damage not accepted within ten days; direct proceedings to procure right of way when damage is rejected by suit instituted by the district attorney; declare the road opened when judgment is obtained.

Not one of the foregoing acts being performed, it cannot be said that the county gained even a shadowy right to a 100-foot strip through the land of a man wholly ignorant and unadvised of the initial proceedings had. It must be held, therefore, that Beaumont avenue was not established 100 feet wide by any legal action of the board of supervisors of San Bernardino county. It must also be held that, said county having failed to institute suit for the right of way, or pay for same, as provided by the code, no 100-foot highway has been created by use and maintenance under color of right created by the ineffective action of the board of supervisors. Nor could the subsequent copying of the San Bernardino records into the records of the newly created Riverside county lend any "color of right" that would justify any action by the board of supervisors of the latter county, based upon the original action which failed wholly to meet even a substantial compliance with the law.

[3] The district attorney urges that the highway has been, by implied dedication, made a thoroughfare 100 feet wide. The fact cited to warrant this claim consists of the building of two fences on the lands of defendant Leslie, each 50 feet from the center of the road. The California authority cited is *Sherwood v. Ahart*, 35 Cal. App. 84, 169 P. 240, 241. Without reviewing that case at length, the two quotations applicable here are as follows:

"Such dedication is implied from the long and continuous use of the said road with *full knowledge* of the landowners interested, without asking or receiving any permission, and *without objection from any one* for a period of time beyond that required by law to bar the right of action. * * *

"We may add that in addition to such use of said road there are other circumstances disclosed by the evidence indicating an intention of the owner to so dedicate said land. One of these circumstances is found in the fact that the road was fenced on *both sides throughout its entire length on the land of the defendant, forming a lane through his land.*" (Italics supplied.)

In the present case it is clearly shown by the defense, with no testimony to the contrary that the defendant did not know through a long period of years that the county claimed a 100-foot road. It is undisputed that the defendant and his agents objected on all occasions to any act on the part of the county asserting its claim to a road wider than the 20-foot strip admitted to have been acquired by user. That the plaintiff acquired no greater width by user is apparent from all the proofs adduced. As to the fences, they were not builded opposite each other. One fence was constructed on the west side of Beaumont avenue, beginning at the south line of defendant's land; the other was on the east side of said road, beginning at the north line of defendant's land. A substantial part of the road in the center of defendant's land had no fence on either side. No lane was thus formed. The rule laid down in *Sherwood v. Ahart*, *supra*, cannot be held to apply here, where a different state of facts exists. There was no contradiction to defendant's proof that the fences had been constructed without his knowledge as to location, and in the absence of his lessee, by a hired man, who, without authority, lined the fences with other existing fences further along the avenue. That the defendant continued to farm the strip outside of the fences up to the 20-foot road does not further the idea of dedication by implication. If the defendant or his lessee had intended to dedicate the road 100 feet wide by the act of fencing it, such fences would have been placed on "both sides throughout its entire length on the land of the defendant, forming a lane through his land," and he would not have

thereafter protested or stopped each encroachment by the county. We cannot hold that there was an implied dedication.

[4, 5] Respondent claims that appellant is estopped and barred by laches from asserting that the highway is but 20 feet wide. The consistent course of opposition and resistance by the defendant throughout the years to the county's claim of more than a road 20 feet in width would hardly bear out a claim that his further resistance is estopped and barred by laches. "The principal factors in determining * * * [the question] of laches are acquiescence and lapse of time." *Chapman v. Bank of Cal.*, 97 Cal. 155, 31 P. 896, 897. Laches not constituting evidence of acquiescence is no bar. *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674. At no time has defendant acquiesced in the 100-foot road, and we cannot continue the discussion of laches further, as he was guilty of none. Respondent's attorney makes no claim and cites no authority in his brief that the improving of the road to the narrower width in 1923 under the Road District Improvement Act of 1907 (St. 1907, p. 806) gave the county a right to the wider road, although in those proceedings Beaumont avenue was shown to be 100 feet wide. The mere assumption of the width to be 100 feet will not control, unless proper action be taken to acquire the land in a manner provided by law.

[6] It is urged by respondent that injunction should not issue in behalf of defendant, restraining the further planting of trees on defendant's land. Plaintiff county admitted in its answer to the cross-complaint that it intended to plant trees within the 100-foot right of way. It is claimed by respondent that an injunction will not lie to prevent the establishment of a public highway over which the commissioners have taken jurisdiction, unless the proceedings are void or so defective as to be an absolute nullity, since an injunction would amount to a collateral attack, citing 29 Cor. Jur. 494.

We believe the mere resolutions adopted by the board of supervisors fall so far short of the intendments of the Political Code as to be void, and that the initial steps taken are so defective as to be an absolute nullity. Injunction should issue against the planting of trees on defendant's premises. The state of California has provided laws whereby the county may acquire the land of an individual for public purposes, after a full hearing and the payment to the individual of his just damages. Let the plaintiff herein pursue that method.

The judgment is reversed.

We concur: MARKS, Acting P. J.; BARNARD, J.

109 Cal. App. 214

CROWL v. BOARD OF TRUSTEES OF CITY OF SOUTHGATE et al.

Civ. No. 6406.

District Court of Appeal, Second District,
Division 2, California.

Oct. 27, 1930.

1. Evidence ⇨83(2).

City clerk is presumed to perform his official duty of filing certified copy of ordinance with secretary of state, as directed by city trustees.

2. Municipal corporations ⇨33(9).

City, taking all steps for annexation, thereafter exercises dominion in at least de facto capacity, precluding certiorari to annul irregularities (St. 1913, p. 587, as amended).

3. Quo warranto ⇨5.

Irregularities in annexation proceedings, after city has exercised de facto dominion over annexed lands, must be tested by quo warranto, not certiorari (Code Civ. Proc. § 803).

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Petition in certiorari by C. A. Crowl, seeking to review the acts and proceedings of the Board of Trustees, known as the City Council of the City of Southgate, in annexing certain territory. Judgment for defendants, and petitioner appeals.

Affirmed.

Thomas V. Cassidy, of Huntington Park, T. P. Hogan, of Los Angeles, and Wallace F. Mills, of Huntington Park, for appellant.

Brewton A. Hayne, of Los Angeles, A. P. Hayne, of Stockton, and Clyde Woodworth, City Attorney, of Inglewood, for respondents.

SCHMIDT, Justice pro tem.

The appeal in this case is from a judgment entered in the lower court following the sustaining of a demurrer, without leave to amend, to a petition in certiorari, seeking to review the acts and proceedings of the board of trustees of the city of Southgate in annexing to said city of Southgate certain territory known as the Fifth addition to the city of Southgate.

[1] The facts alleged in the petition show that all of the steps for annexation required by the Annexation Act of 1913 (Stats. 1913, p. 587, and amendments thereto) have been taken, including the passing of "an ordinance declaring the result of the election and approving the annexation * * * and it is here-

by ordered that a certified copy of this ordinance giving the date of its passage under the seal of said City of Southgate be submitted to and filed with the Secretary of State of California from and after the date of which filing the annexation of said territory to the City of Southgate shall be deemed to be complete and thenceforth said annexed territory shall be to all intents and purposes a part of the City of Southgate." The petition is silent as to whether the certified copy of the ordinance had been filed with the secretary of state. We must presume that the city clerk of Southgate performed his official duty, and that therefore same has been filed with the secretary of state.

The petition was filed after the city of Southgate assumed to exercise dominion over the annexed lands. The demurrer filed in the lower court was both general and special and by the demurrer it was urged, among other matters, that the proceedings for annexation involved could not be reviewed on a writ of certiorari, but that it was necessary to test their validity by a writ of quo warranto.

[2, 3] An examination of the authorities shows that after all the steps for annexation have been taken, even though there may be some irregularity therein, that the municipal corporation exercises dominion over the annexed lands in at least a de facto capacity. The authorities hold that, before such de facto character has attached, certiorari will lie at the instance of a citizen or taxpayer to secure the annulment of irregular proceedings. On the other hand, the decisions likewise hold that after a de facto character has attached certiorari is not the proper remedy; that the proceedings must then be tested by quo warranto.

Section 803, Code of Civil Procedure, provides: "An action may be brought by the attorney-general, in the name of the people of this state, (1) upon his own information, or (2) upon a complaint of a private party, against * * * (b) any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, (1) whenever he has reason to believe that any such * * * franchise has been usurped, intruded into, or unlawfully * * * exercised

by any person, or (2) when he is directed to do so by the governor."

In *Beaumont v. Samson*, 5 Cal. App. 491, at page 492, 90 P. 839, 840, quoting from volume 17, *Encyclopedia of Pleading and Practice*, it is said: "Certiorari to ministerial boards or officers is not the proper remedy to try * * * the right to exercise corporate functions. Quo warranto is the only remedy which affords complete relief." *Jaques v. Board of Supervisors*, 24 Cal. App. 381, held the same way and at the conclusion of the opinion, at page 386, 141 P. 404, 406, stated: "We must assume, of course, that the Attorney General will do his duty and that appellants will have no difficulty in obtaining redress by the method thus pointed out, if there be merit in their contention." In *Keetch v. Joplin*, 157 Cal. 1, 14, 106 P. 222, 228, we read: "The evidence abundantly shows that the district has been organized, and that it has been acting as a district. In other words, that it is a de facto district. It is a public corporation of a similar character to irrigation districts and reclamation districts. The law is well settled that the validity of the organization of such a district cannot be questioned by private individuals, but only in a proceeding in quo warranto at the suit of the state. *Quint v. Hoffman*, 103 Cal. 506, 37 P. 514, 777; *Reclamation District v. Turner*, 104 Cal. 335, 37 P. 1038."

In *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 14, 22 S. Ct. 531, 536, 46 L. Ed. 773, the Supreme Court of the United States says: "Being a de facto corporation, the general rule is that none but the state can call its existence in question. The courts of California agree that such is the rule," citing cases. See, also, *Van Wagener v. McFarland*, 58 Cal. App. 115, 208 P. 345.

We do not feel that anything in the decision in *Miller & Lux v. Board of Supervisors*, 189 Cal. 254, 208 P. 304, cited by appellant, affects the conclusion reached herein. That case arose prior to the completion of all the steps required for the formation of an irrigation district.

In view of the foregoing conclusions, it is not necessary to discuss any of the other points raised by appellant.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

109 Cal. App. 271

**YOSHIE MAEDA v. SIERRA NEVADA LIFE
& CASUALTY CO.**

Civ. 4156.

District Court of Appeal, Third District,
California.

Oct. 30, 1930.

Rehearing Denied Nov. 28, 1930.

Hearing Denied by Supreme Court
Dec. 29, 1930.**1. Insurance** ⇨146(3).

Uncertainty in accident policy should be construed in favor of insured.

2. Insurance ⇨452.

Defective brakes on automobile held "disablement" within accident policy insuring against accidental death caused by wrecking or disablement of automobile.

Disablement, within policy insuring against accidental death caused by disablement of automobile, does not necessarily imply sudden force or catastrophe, but is defined as act of disabling or state of being disabled or deprivation of ability or incapacity.

[Ed. Note.—For other definitions of "Disable," see Words and Phrases.]

3. Insurance ⇨665(5).

Evidence held to justify finding that automobile driven by insured ran off ferry because of defective brakes, disabling automobile within accident policy.

Evidence disclosed that insured drove automobile down incline toward ferry at low speed, but that, when automobile was on ferry, it speeded up and plunged into water. Insurer claimed that accident was not caused by defective brakes, which were found to exist on automobile, but because insured mistakenly stepped on gas throttle instead of brake pedal; but evidence did not preclude finding that automobile failed to stop because of defective brakes.

4. Appeal and error ⇨994(2).

Trial ⇨142.

If two inferences can be reasonably drawn from uncontradicted evidence, question of fact is presented for jury, whose verdict cannot be set aside as not sustained by evidence.

5. Appeal and error ⇨930(1).

In reviewing jury verdict on question of fact, all inferences reasonably possible must be indulged in favor of verdict.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Yoshie Maeda against the Sierra Nevada Life & Casualty Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco, and Lawrence Edwards and Len H. Honey, both of Stockton, for appellant.

J. Francis O'Shea, of Sacramento, for respondent.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action brought to recover upon a policy of accident insurance issued by appellant. Judgment for the full amount of the policy, \$1,000, was entered for plaintiff, and the appeal is taken therefrom.

On August 14, 1928, appellant issued to Toyokichi Maeda a policy of accident insurance wherein plaintiff was designated as beneficiary in the event of loss of life. Thereafter the insured met his death by drowning. He drove his automobile, in the late afternoon, upon a ferryboat which plies between Ryan Island and Grand Island in Sacramento county. This boat was 30 feet long and 12 feet wide. It was moored to the shore, and was reached by an incline upon the Grand Island side which has a 20 per cent grade. It was raining at the time of the accident. The only witness to the whole occurrence was called by plaintiff. He testified that the insured drove his automobile down the incline toward the boat at a speed of 3 or 4 miles per hour, but, when the four wheels of the car were upon the ferry, the automobile speeded up to some 25 miles per hour, and ran off the end of the boat, plunging into the water. The car was recovered the following morning, and the body of the insured, drowned, was found within it. There was evidence that the brakes upon the car were defective and without lining, so that the car could not be stopped quickly going 10 or 20 miles per hour. There was also testimony that when the car was towed from the scene of the accident, the brakes would not hold properly.

The policy limited recovery to accidental death caused "by the wrecking or disablement of a private automobile," and the first point urged by appellant is that the accident does not come within the foregoing provision. It is conceded that there was no "wrecking" of the car; so the inquiry is limited to the meaning of the word "disablement." It is the contention of appellant that this word "necessarily connotes that there must be damage or injury to the structure of the automobile itself," and that impaired or defective brakes do not come within that category. Respondent takes the position that, by virtue of the defective brakes, there was a "disablement" within the terms of the policy.

[1,2] It is at once apparent that, though it be conceded that the language of the policy is susceptible to the construction contended for by appellant, it must also be conceded that it is susceptible to the construction contended for by respondent, and we are thus confronted by an uncertainty which it is our duty to construe in favor of the insured, as against the insurer. *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 213 P. 42, 26 A. L. R. 123. Disablement does not necessarily imply sudden force or catastrophe. It is defined, in Webster's New International Dictionary, as the "act of disabling or state of being disabled; deprivation of ability; incapacity." Adopting, as we are required to do, a liberal construction of the policy, our conclusion is that, at the time of the accident, there was a "disablement" of the automobile due to the defective condition of the brakes, as this term is used in the policy before us.

[3-5] It is next contended by appellant that the evidence shows that the accident was not caused by defective brakes, but by the fact that the insured mistakenly stepped upon the gas throttle instead of the brake pedal. We cannot say, under the evidence adduced, that the trial court was bound to adopt such a theory. Even though it may appear to our minds more probable that the decedent accelerated his speed while upon the boat, by opening the gas throttle, and that the trial court should have found in favor of appellant upon this issue, it was not compelled to so find upon the evidence. Our courts have frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may be fairly and reasonably deducted from those facts, there still remains a question of fact to be determined by the jury, and that the verdict of the jury cannot be set aside by this court on the ground that it is not sustained by the evidence. In reviewing a question of this kind, all inferences reasonably possible from the evidence, favorable to plaintiff, must be indulged by the court. *Mah See v. North American Acc. Ins. Co.*, supra. While it is true the insured may have come down the incline at a very slow speed, it is possible, and the trial court may have found, that he may have come down in "low gear," and when he reached the boat he may have disengaged his gears and attempted to rely upon his brakes, which failed him at the crucial moment. In any event, we are satisfied that there is sufficient evidence to justify a finding by the court that the insured plunged into the water and met his death by reason of the fact that his defective brakes failed to hold.

We are satisfied that the accident came

within the terms of the policy, and that a proper disposition of the case was made in the trial court, and accordingly the judgment is affirmed.

110 Cal. App. 1
In re MEFFERD et al.*
Cr. 2006.

District Court of Appeal, Second District,
Division 2, California.
Oct. 21, 1930.

Rehearing Denied Oct. 31, 1930. Hearing
Granted by Supreme Court Nov. 20, 1930.

1. Constitutional law ⇨81.

Legislature cannot, under guise of police regulations, enact laws not pertaining to public safety, health, or morals, and which impose onerous and unnecessary burdens upon business and property.

2. Evidence ⇨13.

Court takes judicial notice that grapefruit is never yellow.

3. Constitutional law ⇨83(1), 208(9), 296(1). Food ⇨1.

Fruit, Nut and Vegetable Standardization Act, in so far as applying to grapefruit, excluding grower on sales he makes and providing penalties for any one making sales other than grower, held unconstitutional as discriminatory and unreasonable and as taking property without due process of law (St. 1927, p. 1845, § 13, as amended by St. 1929, p. 102, § 7, and § 20, as amended by St. 1929, p. 1585; Const. art. 1, § 11).

On Petition for Rehearing.

4. Habeas corpus ⇨90.

Rehearing is unauthorized in proceedings for habeas corpus.

In the matter of the application of George Mefferd and another, for a writ of habeas corpus.

Petitioners discharged.

William P. Redmond, of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Erwin P. Werner, City Atty., and George A. Dockweiler, Deputy City Atty., both of Los Angeles, for respondent.

SCHMIDT, Justice pro tem.

In the municipal court of the city of Los Angeles petitioners were jointly charged and

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 6 P.2d 71.

convicted under count 1 of complaint No. 11775 of unlawfully labeling grapefruit in violation of section 9 of the California Fruit, Nut and Vegetable Standardization Act, as amended in 1929 (Stats. 1929, p. 104); under count 2, of unlawfully selling and offering for sale grapefruit containers, subcontainers, and wrappers upon which were alleged false statements in violation of section 10 of the same act, as amended in 1929 (Stats. 1929, p. 105); under count 3, of labeling for sale and offering for sale deceptive pack of fresh grapefruit by mislabeling said grapefruit "Imperial" as "Imperial Valley Grapefruit"; and under another complaint of unlawfully picking, causing to be picked, sold, and offered to be sold and/or transported grapefruit, the juice of which said grapefruit did not at the time same was sold and offered for sale contain soluble solids equal to or in excess of $5\frac{1}{2}$ parts to every part of acid contained in said juice, the said grapefruit not having remained on the trees after June 1st of the season in which it was picked, in violation of section 20 of the aforementioned act as amended in 1929 (Stats. 1929, p. 1585).

From the conviction in the municipal court, petitioners appealed from the judgment of conviction to the appellate division of the superior court, which court affirmed the convictions. Whereupon petitioners obtained a writ of habeas corpus from this court.

Appellants contend that the California Fruit, Nut and Vegetable Standardization Act of 1927 (Stats. 1927, p. 1845), and amendments thereto in 1929 (Stats. 1929, pp. 102, 177 and 1585), in so far as it applies to grapefruit, and each provision thereof, is invalid, illegal, unjust, unreasonable, discriminatory, oppressive, in restraint of trade, taking property, destroying the same, confiscating same without due process of law and without compensation therefor, granting privileges to some and not to all, an arbitrary law without a lawful purpose and without legislative police power or right, and therefore unconstitutional.

The single question calling for determination is whether or not the act, in so far as its provisions refer to grapefruit, is constitutional.

A perusal of the preamble of the act shows the intent of the Legislature in enacting the statute to be (1) to promote the development of the California fruit, nut, and vegetable industry in state, interstate, and foreign markets; (2) to protect the state's reputation; (3) to establish standards and standard containers; (4) to prevent deception in packing, marketing, and sale of fruits, etc.

Section 20 of said act, as amended (St. 1929, p. 1585), provides:

"For the purpose of this section of this act the state shall be divided into districts as follows:

"District 1. That part of the state south of the San Geronio pass in Riverside county and east of the Sierra Nevada range, comprising parts of the counties of Riverside and San Diego and all of Imperial county.

"District 2. All of the state excepting the part included in district 1.

"Citrus fruits, when being packed, or after packing, or when delivered for shipment, loaded, shipped, or being transported, offered for sale or sold, in any container or subcontainer, or in bulk, shall conform to the following standard:

"Citrus fruits shall be mature, virtually free from marked evidence of freezing injury, free from decay and from serious damage caused by splits, cuts, bruises, stem or thorn punctures, or by drying at the stem or blossom end; and in the case of packed citrus fruits shall be virtually uniform in size; provided, that, with the exception of freezing injury, not more than ten per cent. by count, of the citrus fruits in any one container, or in any lot in bulk, may be below these requirements, but not to exceed one-half of this tolerance, or five per cent., shall be allowed for any one cause; provided, further, that any packed, wrapped citrus fruit which has been in storage or shipped by rail and which fails to meet the requirements of this standard only by reason of brown rot, blue mold or green mold which has occurred after packing, shall not be held for violation of the provisions of this act on account of such deterioration. * * *

"Grapefruit shall not be deemed mature under the provisions of this act unless the juice contains soluble solids equal to or in excess of six parts to every part of acid contained in the juices, the acidity of the juice to be calculated as citric acid without water of crystallization; provided, that the grapefruit have attained at least twenty-five per cent. of yellow color before picking; provided, further, that grapefruit produced in district two shall be deemed mature under the provisions of this act if the juice contains soluble solids equal to or in excess of five and one-half parts to every part of acid contained in the juice; provided, that the grapefruit have attained at least twenty-five per cent. of yellow color before picking; provided, however, that grapefruit remaining on the trees after June 1 of each season shall be deemed mature irrespective of analysis of the juice."

[1] There can be no question that an act such as the one here under consideration, if it restricts personal liberty of a citizen, is invalid unless such restriction is necessary for the protection of the public safety, public health, or public morals. As was said in *Ex parte Dickey*, 144 Cal. 234, 236, 77 P. 924, 925, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428: "That the due exercise of the police power is limited to the preservation of the

public health, safety, and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation." Nor can such restrictions be upheld unless in their application they actually effect the object sought to be obtained. Nor can the Legislature under the guise of police regulations enact laws which do not pertain to one or the other of these objects and which impose onerous and unnecessary burdens upon business and property. As was said in *Ex parte Whitwell*, 98 Cal. 73, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152: "But it is not true that when this power is exerted for the purpose of regulating a business or occupation, which in itself is recognized as innocent and useful to the community, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As the right of the citizen to engage in such a business or follow such a profession is protected by the constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power."

Respondent contends that the validity of legislation of the character here presented has been determined by our Supreme Court, and cites *Ex parte Kohler*, 74 Cal. 38, 15 P. 436, and *Ex parte Hayden*, 147 Cal. 649, 82 P. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183, to the proposition "that legislation having for its object the protection of the purchasing public by requiring the proper labeling of articles of food for human consumption is indeed constitutional and a proper exercise of the police power of the state." This proposition was enunciated in each of these cases, and yet each case was decided upon other grounds. *Ex parte Kohler* is of no help on the question involved in this proceeding. *Ex parte Hayden*, however, in our opinion, is determinative of this case. That case is very similar to the one at bar; it was one in which the statute required that all fruit shipped or offered for shipment in this state shall have stamped on the container "a statement truly and correctly designating the county and immediate locality in which such fruit was grown." Stats. 1903, p. 338, § 1. The defendant in that case was charged with shipping apples in violation of the act. At page 652 of 147 Cal., 82 P. 315, 317, of the *Hayden* Case it was said: "It requires merely that every shipment of every package of fruit, whether it be from the small farmers with few trees or vines, or whether it be from the large producer, must in every instance bear a label naming the county and immediate locality in which the fruit was grown. It is a matter of common knowledge that this requirement would work the absolute destruction of certain important branches of indus-

try. * * * It seems quite apparent that the true purpose of the act was to obtain for the fruit raisers of some well advertised and favored localities an advantage in the disposition of their own fruit. But this, for reasons well and elaborately set forth in *People v. Hawkins*, 157 N. Y. 1 [51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736] * * * forms no part of the police power, and is wholly beyond the prerogative of the Legislature."

An examination of the aforementioned section 20 of the California Fruit, Nut and Vegetable Standardization Act shows that the state is divided into two districts, and describes grapefruit maturity as follows: "Grapefruit shall not be deemed mature under the provisions of this act unless the juice contains soluble solids equal to or in excess of six parts to every part of acid contained in the juices, the acidity of the juice to be calculated as citric acid without water of crystallization; provided, that the grapefruit have attained at least twenty-five per cent. of yellow color before picking; provided, further, that grapefruit produced in district two shall be deemed mature under the provisions of this act if the juice contains soluble solids equal to or in excess of five and one-half parts to every part of acid contained in the juice; provided, that the grapefruit have attained at least twenty-five per cent. of yellow color before picking; provided, however, that grapefruit remaining on the trees after June 1 of each season shall be deemed mature irrespective of analysis of the juice." The standard of maturity for grapefruit in district one is that the juice shall contain "*soluble solids equal to or in excess of six parts to every part of acid contained in the juices*," while in district number two the juice shall contain "*soluble solids equal to or in excess of five and one-half parts to every part of acid contained in the juice*." (Italics ours.) Under this provision, whatever grapefruit may be grown in district No. 2, if properly labeled, may be sold and consumed in district No. 1, and such sale is not unlawful. How can the public welfare or the public health possibly be affected or benefited by having these two standards when it is not unlawful to sell grapefruit of the lesser standard? This brings it clearly within the terms quoted from *Ex parte Hayden*, supra. Such classification is neither natural nor reasonable.

[2] A portion of section 20 further provides that the grapefruit shall "have attained at least twenty-five per cent. of yellow color before picking." This provision is uncertain and indefinite. Who shall say what constitutes "at least twenty-five per cent. of yellow color"? Does it import that the fruit shall have progressed, all over its surface, 25 per cent. toward a yellow color, or that 25 per cent. of its surface shall be yellow, the re-

maining 75 per cent. being some other color? No one can tell. Moreover, we take judicial notice of the fact that grapefruit is never yellow. For that reason, especially no standard is fixed by the act.

Section 20 closes with these words: "Provided, however, that grapefruit remaining on the trees after June 1 of each season shall be deemed mature irrespective of analysis of the juice." If it is lawful to sell the grapefruit that has remained on the trees after June 1 of each season irrespective of the analysis of the juice, then why any standard of test of the juice?

Section 13 of the act (St. 1929, p. 102, § 7) provides as follows: "No provision of this act, except as hereinafter provided in section 21, shall be construed to prevent a grower of fruits, nuts or vegetables in the State of California from selling or delivering the same unpacked and unmarked, as a part of his crop in bulk to a packer for grading, packing or storage; or to prevent a grower or packer from manufacturing the same into any by-product, or from selling the same unpacked and unmarked to any person, firm, company, organization or corporation actually engaged in the operation of a commercial by-products factory for the sole and express purpose of being used in the State of California in the manufacture of a by-product for resale."

This section readily shows that it is class legislation, for it excludes the grower on any sales that he may make, but provides penalties for any one making sales other than the grower. The provisions of a similar section under the same act was held unconstitutional in *Mattel v. Hecke*, 99 Cal. App. 747, 279 P. 470.

[3] It follows, therefore, that those provisions of the California Fruit, Nut and Vegetable Standardization Act which petitioners were charged with violating and convicted in the municipal court, and in so far as such provisions apply to grapefruit, are discriminatory and unreasonable, and therefore violative of section 11, article 1, of the Constitution of this state. It amounts to the taking of property without due process of law.

No other questions raised need be discussed.

Petitioners are, and each of them is, dismissed.

We concur: WORKS, P. J.; CRAIG, J.

On Petition for Rehearing.

IRA F. THOMPSON, Acting P. J.

[4] Petition denied for the reason that there is no provision of law warranting a rehearing in a matter such as the instant case.

DUNLAP et al. v. DEAN et al.
Civ. 3734.

109 Cal. App. 300

District Court of Appeal, Third District,
California.

Nov. 1, 1930.

Rehearing Denied Dec. 1, 1930.

1. Principal and agent ⇨23(1).

Evidence held to establish direct agency as respected principal's liability for merchandise purchased by agent for operation of sheep camp (Civ. Code, § 2307).

It appeared that originally a direct obligation had been assumed by principal for merchandise to be purchased by agents for use in operation of sheep camp, in which principal had an interest, and that sellers of merchandise were conversant with agency and knew that during year supplies were sent from store to sheep camp and bills made in name of agent and thereafter paid by principal, the same procedure appearing in following year, the first bill being sent to principal, and being paid without comment, thereby showing a direct precedent, authorization, and a subsequent ratification and authorization of right of agents to purchase goods and direct obligation of principal to pay for supplies so furnished.

2. Principal and agent ⇨169(2).

Payment by principal of bills for merchandise furnished agent without comment and directly in accordance with authority theretofore given constituted ratification of agent's authority (Civ. Code, § 2307).

3. Principal and agent ⇨103(2).

Principal's payment of bills for merchandise purchased by agents rendered signified authority on part of agents to make purchases (Civ. Code, § 2317).

4. Principal and agent ⇨116(1).

Any secret limitation on authority of agents to purchase supplies at particular store would not affect ostensible agency existing to purchase supplies elsewhere.

5. Principal and agent ⇨21.

Testimony of alleged agent was admissible to establish agency.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by A. M. Dunlap and another against A. J. Dean and others. Judgment for defendants, and plaintiffs appeal.

Reversed.

Carter & Smith, of Redding, and Annette Abbott Adams, of San Francisco, for appellants.

Carr & Kennedy, of Redding, for respondents.

PLUMMER, J.

In this action for the value of goods, wares, and merchandise furnished to F. E. Brown, now deceased, judgment was entered in favor of the respondent, and plaintiffs appeal.

The record shows that during the years 1923, 1924, and 1925, F. E. Brown owned a band of sheep which was kept and cared for at a camp about 12 miles from a place called Glenburn. Prior to 1925 it appears that the sheep were cared for by Dean, upon shares, and that in the latter part of the year 1924, A. J. Dean and Brown Brothers entered into a lease relative to the management and control of the sheep, whereby it was provided that Dean should take care of the sheep, defray the expenses thereof, etc. The lease also provided that all moneys paid out or advanced by Brown Brothers should be repaid out of the moneys realized from sale of the sheep or from sale of wool, etc. The lease also provided for a division of the sheep at the expiration of the term of the lease. The record also shows that during the year 1923 and 1924 a general merchandise store was conducted at Glenburn by one J. H. Creighton. This store was conducted by Creighton until the first of the year 1925, upon which date it was sold to the plaintiffs in this action. The record further shows that A. N. Dunlap, one of the plaintiffs in this action, was, during the years 1923 and 1924, an employee and clerk in the Creighton store, and that early in the year 1924, F. E. Brown called at the Creighton store in Glenburn, and in the presence of A. M. Dunlap, told Creighton to let A. J. Dean and the boys (referring to the sons of A. J. Dean) have stuff, merchandise, and to send the bill to him or to Mr. Martin, and he would settle it. In this conversation, F. E. Brown also stated that if the bills were sent to Dean, he (F. E. Brown) would settle the bills. The record further shows that Brown stated he would pay the bills for the merchandise. In pursuance of this arrangement the Creighton store furnished the goods, wares, and merchandise which went to the Dean sheep camp, the bills for which were sent to F. E. Brown at his residence in Chico, and paid by him from time to time as the bills were received. The record likewise shows that during all of the time the account was carried in the name of A. J. Dean, and it appears from the record that the sheep camp was spoken of as the "Dean Sheep Camp."

After the plaintiffs, on the 1st of January, 1925, had become the owners of the Creighton Merchandise Store, at Glenburn, F. E. Brown ordered a ton of salt to be sent to the Dean Sheep Camp, and thereafter paid for the same.

Following the transactions which we have here stated, it appears that there was ordered

by the Deans during the month of July, 1925, merchandise to the value of \$77.14. Included in this order were raisins, peaches, flour, coffee, shoes, pineapples, potatoes, butter, macaroni, soap, inner tube for automobile tire, knives and spoons, cheese, eggs, frying pan, etc. This bill, as stated, was sent to F. E. Brown, at his residence in Chico, who thereafter sent his check to the plaintiffs in payment therefor. Following this, the Deans, including the boys, and a man by the name of Brown, who was working at the sheep camp, called at the store and purchased supplies during the months of August, September, and October; the three bills aggregating the total sum of \$349.26. No reply was made by Brown to the receipt of the bills for August, September, and October, until some time during the month of November, at which time Brown wrote to the Glenburn Mercantile Company (being the plaintiffs herein), the following letter:

"A few days ago I got up out of a sick bed and my mail was turned over to me and I find some bills charged to A. J. Dean, and on those bills I find \$288.94 charged to him that does not belong to him, or to the sheep. Some time early in the summer a bill came to me of \$77.14 that showed on its face that it had been purchased by A. J. Dean. I sent you check for same and when I saw Mr. Dean on October 26 I mentioned it to him and he knew nothing about it, said he had not got anything at Glenburn, and had not authorized anyone to get anything. I knew I had not for I had made arrangements with Summers & Company at Fall City to fill sheep camp orders and send me bills the first of the month, the same as I had made in 1924 with Mr. Creighton. I have sent those bills to S. E. Martin at Klamath Falls and told him to get in touch with A. J. Dean and have them straightened out. You can help straighten them out by sending S. E. Martin or A. J. Dean names of the party or parties that got the various bills and dates of same, for I find that one bill of stuff with name attached, and that is Cook and no initial. When I hear from you as to what they are doing about it I will write you. Looks to me like a bunch of crooks are trying to get in their work. Whoever they are they are laying themselves liable for buying goods under false pretenses. I don't see how Martin can do anything about straightening this out until you send them the names of the purchasers.

"Yours truly,

F. E. Brown."

The record shows that the bills referred to herein were made out just exactly in the same form as the bill for \$77.14 paid by the respondent F. E. Brown. The bills likewise show that the goods purchased were similar in kind, and were such as would properly be used at a sheep camp in furnishing food to those engaged in looking after the sheep.

Without quoting the bills, it is sufficient to say that an examination of the bills exhibits just what we have stated as to the character and kind of goods purchased. We may further state that so far as the record discloses the destination of the goods purchased, it shows that it went to the Dean sheep camp. The record further shows that the merchandise ordered from the Glenburn Mercantile Store in 1925 was ordered by the same people as ordered and obtained merchandise from the Glenburn store in 1924.

The testimony of the witness Creighton, relative to the directions given him by F. E. Brown to furnish supplies for the sheep camp, was substantially the same as the testimony of the witness A. M. Dunlap. In reply to the question if he had ever had any conversation with Mr. Brown in regard to payment of bills for supplies to the sheep camp, the witness Creighton replied as follows: "Well, I remember in particular the spring of 1924. Brown said for us to supply the sheep camp and let Dean have what supplies he wanted, and at the end of each month send the statement to him at Chico and he would send a check." No testimony was introduced contradicting this authorization on the part of Brown and the assuming of a direct obligation to pay the bills. It will be noticed that Brown did not say if Dean did not pay the bills when the statements were rendered, that he (Brown) would, but the statement was to let Dean have the supplies and he (Brown) would pay the bill.

While the record shows that in 1925 the sheep were leased to Dean, it also shows that prior to that year the sheep were being managed on shares. Just what the shares were or what the arrangement was the testimony does not disclose, but it does show that during all the time involved in this action the respondent was interested in the welfare of the sheep and furnished a basis for his direct obligation to pay for supplies. The defense of the respondent to this action is based upon the statute of fraud, on the theory that the circumstances disclose a promise to become responsible for the debt or obligation of another, and being oral, was therefore not binding. On the part of the appellants it is contended that the agency was established both directly and ostensibly. We think the record shows both. There was a direct agency during the year 1924, and if not a direct agency during 1925, then an ostensible agency so far as the proprietors of the Glenburn store were concerned. It will be observed that the letter written by the respondent Brown on November 6, 1925, admits the agency of Dean for that year. The letter which we have quoted contains, among other things, the following: "I knew that I had not, for I made arrangements with Sumners & Company at Fall City to fill sheep camp orders and send me bills the first of the month, the same as I had made in 1924 with

Mr. Creighton." In other words, the agency of Dean had never been revoked, the only contention of the letter being that the writer had made arrangements with some other merchants to supply provisions.

It will also be noticed that the chief complaint of the respondent was that some of the goods did not go to the sheep camp. As we have said, the record sufficiently shows that this contention is untenable.

After the cause had been submitted for decision, the plaintiffs moved the court for an order to reopen the case and permit the introduction of additional testimony of A. J. Dean, whose whereabouts had been discovered after the close of the trial and whose testimony would be to the effect that Dean was acting as the agent of Brown during the year 1925, and as such, purchased supplies from the plaintiffs in this action, which the respondent F. E. Brown was to pay for. The court denied this motion and thereafter entered judgment in favor of the respondent. This was followed by a motion for a new trial, in which an affidavit was made by the plaintiff A. M. Dunlap relative to the testimony of A. J. Dean, showing that his testimony could not have been obtained prior to the trial, by reason of not being able to discover his whereabouts, and also that the testimony would show that the supplies purchased from the plaintiffs in 1925 were purchased for the use of the sheep camp under the agreement that F. E. Brown was to pay for the same. Plaintiffs' motion for a new trial was also denied.

That the trial court, at the conclusion of the taking of testimony, had a correct view of the law which should be applied in the decision of this cause appears from the following excerpt of the court's statement set forth in the transcript: "The Court: I view it this way: Mr. Brown having made that arrangement with Mr. Creighton allowing the credit to be given and then paying the bills afterwards that were charged in the name of Dean, then when the season came after Mr. Dunlap had taken up the property and taken over the mercantile business, then Dean comes there and secures goods and the first of the month the bill sent to them is paid, no objection is made to the bill, and it is paid; it was charged to Dean. Now, the rule of ostensible authority there would hold that he had the right to come and secure the goods as his agent; and then he allowed the next month and the third month bill sent in. I believe that the facts presented to the court in this case are sufficient for the court to hold that there is a direct liability on the part of the defendant Brown for the goods. Although they were charged to Dean, it was an account carried on by his predecessors."

[1] A direct agency had been established during the year 1924. A direct obligation had

been assumed by F. E. Brown for merchandise to be purchased by the Deans for the sheep camp. The plaintiffs in this action were entirely conversant with this agency, and knew that during the year 1924, supplies were sent from the Glenburn store to the sheep camp, bills made in the name of A. J. Dean, sent to F. E. Brown, and thereafter paid by F. E. Brown. The same procedure appears in the first bill sent by the plaintiffs to F. E. Brown. In the course of time after the sending of a statement made out in the name of A. J. Dean for supplies, a check in payment of the value of the goods was sent by Brown to the plaintiffs without any comment whatsoever. Thereafter, three statements were sent to him, and no comment was made upon any of them, nor was anything written by Brown to the plaintiffs, or any word or intimation given by Brown to the plaintiffs that the obtaining of the merchandise, or any part thereof, was unauthorized, until the season had ended, when three bills were disputed on the theory that all the goods did not go to the sheep camp, and, as we have shown, the letter containing this statement contains likewise an express statement of Dean being authorized to purchase supplies, though at a different place.

[2] The testimony of the witness Creighton, the former owner of the mercantile establishment at Glenburn, shows that the merchandise purchased for the sheep camp in 1923 and in 1924 was carried on the books in the name of A. J. Dean, and the same method of entering the account was adopted by the plaintiffs in this action. The authorization and direction being to let Dean have the goods and send the bill to the respondent takes away, we think, all the effect of the argument that as the account was carried in the name of A. J. Dean, it cannot be held as a direct obligation of the respondent, and therefore, the cases holding that where credit is given to the one who purchases the goods, or to the one to whom the goods are delivered, a third person promising to pay for the same stands only in the position of a surety and are not controlling. In this case it is not the collateral promise to answer for the debt or default of another; it is an instance of an owner of personal property directing supplies, or authorizing supplies to be furnished to the person in care of that personal property, upon the direct obligation of the owner giving such direction. From this it follows that the cases cited by respondent, where such circumstances were presented, are inapplicable, and need not be reviewed at length herein. Attention need only be given to the principal case of *McClenahan v. Keyes*, 188 Cal. 574, 206 P. 454, 457. In that case it appears that a mother whose daughter needed medical attention went to the plaintiff, asked him to give the necessary medical attention, stating that he would be well compensated for his services. There does not

appear to be any express or direct promise on the part of the mother to pay for the rendering of the services as a direct and individual obligation on her part. The plaintiff in that case testified as follows: "I was assured to go ahead by all concerned, and I was to be adequately remunerated; no definite statement as to who should do that or as to how or what it should be." We have nothing of that kind in the case at bar. In the instant case we have a direct promise to start with, and a continuation of the dealing of the parties in pursuance of that promise, and then when the ownership of the store changed the same method of dealing. In other words, the dealing started upon a direct and not a collateral promise. Section 2307, Civil Code, reads: "An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification." The record shows here a direct precedent authorization and a subsequent ratification of the authorization of the right of Dean to purchase goods for the sheep camp, and the direct obligation of the owner of the sheep to pay for the supplies so furnished. The July bill of 1925, to which we have referred, being paid without any word of protest or any inquiry of the plaintiffs, but directly in accordance with the authority theretofore given to the merchandise establishment to furnish such supplies, of which the plaintiffs were aware, constituted, as well, a ratification of the authority of Dean to purchase supplies, and also a holding out that Dean was still the agent of the owner of the sheep for such purpose. In fact, the letter to which we have heretofore referred, written by the respondent, shows that such agency still existed, the change being only an unknown change to the plaintiffs, as to the place of making purchase.

[3] Again, the acts of respondent we think come directly under the provisions of section 2317 of the Civil Code, which reads: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Whether intentionally or otherwise, it is evident that the payment of the July bill, rendered just as previous statements had been rendered, signified to the plaintiffs that the Deans had authority to make purchases during the year 1925, just as they had during the year 1924.

In 1 California Jurisprudence, p. 742, § 42, we find the rule thus stated: "Where the third person relies upon an ostensible agency, he must give evidence of similar transactions in which the act of the agent was authorized or recognized; or, more accurately, since an ostensible authority may be conferred by the recognition of a single act of the agent if sufficiently unequivocal, the third person must show at least one specific instance in which a similar act of the alleged agent was author-

ized or recognized." The text-writer then goes on to show that different acts do not indicate authority. Here, however, the acts are all similar. Exactly the same kind of supplies, to all intents and purposes, were purchased in 1924 that were purchased in 1925; the account was carried in the same manner; statements were rendered each month to the respondent; checks forwarded by him in payment thereof; and nothing appeared to the contrary, or disputing the agency or questioning the bills in any particular, until after all the supplies had been furnished. When the respondent, upon receipt of the bill for merchandise for the month of July, 1925, forwarded his check in payment thereof, without any intimation that the right of Dean to make further purchases for the sheep camp had been rescinded, he held out to the plaintiffs, in view of the former dealings with the merchandise store, all that the law requires to establish ostensible agency.

[4] Both appellant and respondent refer to 21 Ruling Case Law, p. 222, § 7, where it is said: "An agency, when shown to have existed, will be presumed to have continued in the absence of anything to show its revocation. Necessarily, however, the agency is terminated with the completion of the transaction for the accomplishment of which it was created, the appellant relying upon the first sentence, the respondents upon the last." The establishment of the agency in this case is apparently conceded. In this behalf it is contended by the respondent that the agency ended with the termination of the year 1924. However, the sheep camp remained in the same place. No notice was given of the termination of the agency. In fact, the duration of the agency was not limited in the original authorization to the year 1924. The act of the respondent was in direct line with the original authorization, and his own letter shows that the agency was not limited to the year 1924, as he had only made arrangements for the purchase of supplies elsewhere. Again, the agency was to purchase supplies for the sheep camp. The people in charge of the sheep camp required supplies just as necessarily in 1925 as they did in 1924; the sheep were at the same camp; the supplies were ordered for the same camp; and the first bill for supplies to the same camp was paid by the respondent without question. Any secret limitation of the authority of the Deans to purchase supplies at some other store would not affect the ostensible agency thus shown to exist.

Without quoting from the text of 2 C. J. p. 460, we think the circumstances set forth herein estop the respondent from denying his liability for the merchandise furnished by the plaintiffs to the Dean Sheep Camp.

The respondent in this case, upon receipt of the July statement, was under the necessity of acting promptly. The law as stated in the

case of *Quinn v. Dresbach*, 75 Cal. 159, 16 P. 762, 7 Am. St. Rep. 138, is controlling in this case. We quote from the syllabus: "Where a person is the agent of another in the commencement of a transaction, and such other is chargeable with knowledge that the first is continuing to act in the matter in some way, the inference which he ought to draw is that the person assuming to act as agent is continuing to act in the same capacity in which he commenced, and it is negligence not to repudiate the agency." Here, it was simply a continuation of the former action, and the respondent is estopped by reason of his negligence in not immediately notifying the plaintiffs upon receipt of the July statement that the authorization theretofore given to purchase supplies and render him directly liable had been withdrawn.

The instant case is very similar to the circumstances involved in *Ford v. Lou Kum Shu*, 26 Cal. App. 203, 146 P. 199, where it was held that quiescence amounted to acquiescence. That was also a case where the principal had made arrangements with a merchandise firm to furnish supplies to another person, upon the direct obligation to pay therefor; not a collateral promise in the event that the person receiving the goods failed to pay for the same.

In *Meyers v. McKillop*, 37 Cal. App. 144, 173 P. 773, this court again held as follows: "Where services were performed for the benefit of a third party in reliance that defendant would pay therefor, and defendant directly promised to pay, an original contract was thereby constituted with a sufficient consideration for its support."

A case where the same rule is involved is that of *Klamath Lumber Co. v. Co-Operative Land & Trust Co.*, 25 Cal. App. 678, 145 P. 159, where this court held, under circumstances just as we are considering here, that a direct promise was made, from which it would necessarily follow that a continuation of the business, under like circumstances, would establish an ostensible agency and estop the party making the promise to deny its existence.

In the case of *Jan Wai v. Smith-Riddell Co.*, 55 Cal. App. 59, 202 P. 952, this court, in considering a somewhat similar question, held as follows (quoting from the syllabus): "Actual authority of the president of a corporation to make a particular contract may be proven by its silence after knowledge of facts connected therewith."

[5] What we have said renders it unnecessary to consider whether the court abused its discretion in denying the motion of the appellants to reopen the trial before decision, and admit the testimony of A. J. Dean to establish his agency, which testimony, under the case of *Raleigh v. Lee*, 26 Cal. App. 229, 146 P. 696, was admissible. Likewise, we do not need to consider whether the court erred in denying

the appellants' motion for a new trial in order to introduce such testimony.

Without further review of the authorities cited, we think the circumstances of this case clearly establish ostensible agency, if not actual agency, and that the respondent is estopped by reason of his negligence in not notifying the plaintiffs that the agency had been revoked, immediately upon the receipt of the bill for supplies furnished the sheep camp for the month of July, 1925, and permitting the plaintiffs to continue in the same line of action.

Necessarily the judgment of the trial court should be reversed, and it is so ordered.

All concur.

109 Cal. App. 194

**FIRST NAT. BANK OF PETERSBURG, ILL.,
v. SHIPLEY et al.**
Civ. 4138.

District Court of Appeal, Third District,
California.

Oct. 25, 1930.

1. Appeal and error ⇨1010(1).

Findings of trial court must be accepted by appellate court, if supported by any substantial evidence.

2. Fraudulent conveyances ⇨300(1).

Evidence *held* to support finding that assignment of husband's interest in estate to wife was without consideration and fraudulent as to husband's judgment creditors.

Husband assigned interest in estate to wife shortly after plaintiff commenced action on foreign judgment against husband. Husband claimed that consideration for assignment was debt due wife, accruing forty years prior thereto, and that wife executed deed of trust to property in her name as security for husband's debts, thereby becoming husband's creditor. Assignment was not recorded for more than year after its execution and left husband insolvent.

3. Fraudulent conveyances ⇨104(1).

In determining whether assignment by judgment debtor to wife was fraudulent, court must scrutinize entire transaction with view of detecting fraud.

4. Fraudulent conveyances ⇨308(1, 4).

Questions of fraudulent intent and adequacy of consideration for transfer of property by judgment debtor to wife are questions

of fact, requiring exercise of judicial discretion.

5. Appeal and error ⇨931(1).

On appeal every reasonable presumption must be indulged in favor of trial court's findings on questions of fraudulent intent and adequacy of consideration.

6. Evidence ⇨589.

Trial court *held* not required to believe defendant's testimony sustaining assignment claimed to be fraudulent, though uncontradicted.

7. Evidence ⇨591.

Plaintiff calling defendant as witness under statute did not vouch for defendant's credibility (Code Civ. Proc. § 2055).

8. Fraudulent conveyances ⇨241(4).

Judgment creditor *held* not required to resort to trust deed on foreign property given as security before seeking to set aside assignment of debtor's property to wife in fraud of creditors (Civ. Code, §§ 2899, 3433).

9. Fraudulent conveyances ⇨312(3).

Where assignment by husband to wife of interest in estate was in fraud of creditors, wife was liable for amount of estate actually distributed to her.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the First National Bank of Petersburg, Ill., against Clement W. Shipley and others. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

Laughlin & Laughlin, of Los Angeles, for appellants.

Muhleman, Anderson & Palmer and Frank L. Muhleman, all of Los Angeles, for defendant Davis.

Hughes & Miller, of Los Angeles, for respondent.

LUTTRELL, Justice pro tem.

Plaintiff and respondent, as the name implies, is a national banking corporation engaged in the banking business in the state of Illinois. Defendants and appellants Clement W. Shipley and Evelyn Shipley are husband and wife. Plaintiff, as a judgment creditor of defendant Clement W. Shipley, instituted the present action against defendants to have a certain assignment which said Clement W. Shipley had made to his wife of his interest in the estate of Faithful W. Ebey, deceased, annulled upon the ground that same was made without consideration and with in-

tent to hinder, delay, and defraud creditors, and particularly the plaintiff. By its complaint plaintiff also sought to have the administratrix of said estate enjoined from paying out or distributing any portion of said estate to said Evelyn Shipley. There was also a prayer for general relief. All of the defendants answered plaintiff's complaint, denying any fraudulent intent in making said assignment and affirmatively alleging that same was made for a valuable consideration. A trial was had upon the issues thus joined, resulting in a judgment in plaintiff's favor setting aside and annulling such assignment and enjoining said administratrix from paying or distributing any portion of said Ebey estate to said Evelyn Shipley. The trial court found that said administratrix had already paid to said Evelyn Shipley out of the funds of said estate, under such assignment, the sum of \$12,000, and that said sum belonged to said Clement W. Shipley, and decreed that plaintiff have judgment against said Evelyn Shipley for said amount, and that said sum be applied to the satisfaction of the judgment which plaintiff had theretofore recovered against the defendant Clement W. Shipley.

Defendants Shipley appeal from the judgment upon the grounds of insufficiency of the evidence to support the findings and the judgment and also that the court erred in awarding judgment against defendant Evelyn Shipley in any amount.

[1] The trial court found that the assignment in question was made without any consideration and with intent to hinder, delay, and defraud plaintiff as a creditor of said defendant Clement W. Shipley and, as above stated, that Evelyn Shipley had already received \$12,000 under such assignment. Findings having thus been made upon the issues presented, it is incumbent upon this court, upon principles of law too well settled to need citation of authority, to accept such findings if they find any substantial support in the evidence.

To determine this fact it will be necessary to briefly review the evidence adduced at the trial. It appears that defendant Clement W. Shipley was indebted to plaintiff to the extent of something like \$12,300 as far back as January 25, 1924, and plaintiff desiring some security on the debt, defendants Shipley, on March 5, 1924, executed a certain trust deed to one Edwin S. Waldmire of Petersburg, Ill., covering 976 acres of land situated in the state of Missouri, the record title to which stood in the name of Evelyn Shipley, which land said Clement W. Shipley testified was worth \$25 per acre. Waldmire agreed to sell the land and apply the proceeds to the payment of Shipley's debt to plaintiff, paying the surplus, if any, after deducting commission and expenses, to Evelyn Shipley, her heirs or assigns. It was also agreed that in

the event Clement W. Shipley paid his debt to plaintiff before such land was sold, the trustee should reconvey the land to said Evelyn Shipley, her heirs or assigns. The evidence shows that this land was acquired by the Shipleys in the year 1923; the husband, Clement W. Shipley, having traded some property which he owned in Mississippi for same, taking the title to the Missouri land in his wife's name. On July 1, 1925, Shipley gave his two promissory notes to plaintiff in renewal of notes covering the debt he owed, the two renewal notes aggregating \$12,300, payable six months after date with 6 per cent. interest. On November 4, 1925, plaintiff secured a confessed judgment against Shipley on the two notes in the circuit court of Menard county, Ill., in the sum of \$14,018.75 and costs, and on the 21st of the same month filed suit on this judgment against Shipley in the superior court of Los Angeles county, Cal. Six days after the filing of this last-mentioned suit, or on November 27, 1925, the assignment which is the subject of controversy in this action was made by Shipley to his wife. The assignment was accepted by the wife on that same day and by the administratrix of the Ebey estate three days later, but for some unexplained reason was not filed as a record in the estate papers until some thirteen months after its execution, or on December 17, 1926. Plaintiff's action on the Illinois judgment was contested in the Los Angeles court by defendant Shipley, he having filed his answer therein on December 17, 1925, but the plaintiff prevailed in the suit and on September 27, 1927, recovered a judgment for the sum of \$15,879.55 and costs. The value of Clement W. Shipley's interest in the Ebey Estate at the time he made the assignment thereof to his wife was about \$20,000. At that time he owed, in addition to the judgment which plaintiff had secured against him, about \$700 to various other creditors. The assignment of his interest in the Ebey estate left him wholly insolvent, as he had no other funds or property.

In justification of the assignment in question the appellants contend that at the date thereof Evelyn Shipley was a creditor of her husband, and that in making the assignment he simply exercised a right which the law gave him of making a preference among his creditors. The basis of their claim that she was her husband's creditor is twofold: First, that some forty years before she had let him have some money, the amount not being mentioned in the testimony, and that he had promised to pay it back with interest; and, secondly, that in executing the trust deed covering the Missouri property to Waldmire, as security for the husband's debt to plaintiff, she became his creditor. In connection with the making of this trust deed, appellants contend that the property thus conveyed in trust became the wife's separate property, when

the title was taken in her name, and that to induce her to sign the trust deed he promised to convey to her his interest in the Ebey estate. It is an admitted fact that at the time of this alleged promise Faithful W. Ebey was still living.

The two appellants were the only witnesses who gave oral testimony at the trial, aside from brief testimony given by the attorney for the Ebey estate as to its value and the portion thereof already distributed. Because of such fact that the appellants gave practically all of the evidence in the case, other than the documentary evidence, they insist that the trial court was bound to take their uncontradicted testimony on the questions of fraudulent intent and lack of consideration for the transfer, as true, and that therefore the findings to the effect that their claims in these respects were false are contrary to and unsupported by the evidence. They further contend that when plaintiff called Clement W. Shipley as a witness, it thereby vouched for his credibility and was bound by his testimony. In support of this latter contention they cite the case of *Hopkins v. White*, 20 Cal. App. 234, 128 P. 780.

[2] We have carefully considered these contentions of appellants and fail to find therein any reason for overturning the judgment of the court below. There is no question but what, had the wife been a bona fide creditor of her husband, he would have been within his legal rights in preferring her as a creditor and that an honest transfer of property for such purpose would stand. However, in the case before us, as heretofore stated, the trial judge, after hearing all of the evidence adduced, and after observing the witnesses upon the stand, noticing their demeanor while testifying, their manifestations of interest, or lack of interest in the result of the trial, and having before him all of the surrounding circumstances, decided that these appellants were untruthful in giving their testimony. He doubtless considered, as he had a right to do, the confidential relationship of the parties to the transfer; the age of the debt claimed to be owing by the husband to the wife; the fact, as the evidence showed, that no book accounts or other writings had ever existed between the appellants with reference to such forty year old debt; the insolvency of the assignor as a result of the assignment; the short interval of time elapsing between the recovery of the Illinois judgment against appellant Clement W. Shipley and the filing of suit thereon in California and the assignment; the great length of time between the contracting of the claimed debt of the husband to the wife and its attempted payment; the claim that this so-called debt was being paid by this transfer of \$20,000 worth of property, in the face of the claim of appellants that about two years before the husband had given the wife property in Missouri

worth \$24,400 by taking the title thereto in her name; the claim that such Missouri property was her property, although acquired with property of the husband; the delay in making any public record of the assignment for more than a year after its execution; and other suspicious circumstances surrounding the transaction. In the face of such a record, the trial judge could well conclude that the transfer in question was fraudulent and without consideration, and that, as from the findings made, he evidently did conclude, there was no debt owing by the husband to the wife, and that the property in Missouri, though standing in the wife's name, was in fact his property.

[3-5] In cases of this kind the court is called upon to carefully scrutinize the whole transaction with a view of detecting any fraud which may have prompted it. Questions of fraudulent intent and of adequacy of consideration are questions of fact, calling for the exercise of judicial discretion, and upon appeal, every reasonable presumption must be indulged in favor of the action of the trial court. *Commercial National Bank, etc., v. Roberts*, 49 Cal. App. 764, 194 P. 751.

[6] The trial court was not obligated to believe the testimony of the appellants, even though uncontradicted by other evidence. As was said in the case of *Caldwell v. Weiner*, 203 Cal. 543, 264 P. 1100, 1101:

"While it is a general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions, and the most positive testimony may be contradicted by the circumstances in evidence in connection with the matter which satisfy the court of its falsity and the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact."

To the same effect are the cases of *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480; *Quock Ting v. United States*, 140 U. S. 417, 11 S. Ct. 733, 851, 35 L. Ed. 501.

[7] Plaintiff did not vouch for the credibility of the defendant Shipley by calling him as a witness, as the record shows that he was called under the provisions of section 2055 of the Code of Civil Procedure. The case of *Hopkins v. White*, supra, relied upon by appellants in this regard, is not in point, as same was decided before the enactment of the salutary provisions found in section 2055 of the Code.

[8] Appellants, under their claim that the relationship of debtor and creditor exists between them, as hereinbefore mentioned, further contend that it was incumbent upon respondent to resort to the security given it by

the execution of the trust deed herein mentioned before looking to the interest of Clement W. Shipley in the Ebey estate for satisfaction of its judgment. In this connection they rely upon sections 2899 and 3433 of the Civil Code of this state. There is, in our opinion, nothing to this point. The first of the sections of the Code mentioned deals exclusively with liens on property of a debtor, and in no sense of the word can we see that Evelyn Shipley had a lien upon any of her husband's property. The second section mentioned deals with the relative rights of different creditors. The court having found that the purported assignment was null and void, certainly Evelyn Shipley acquired no interest under it in or to any portion of the Ebey estate, and, too, under the claims as made by the appellants, and particularly in view of the findings as made by the trial court, we do not believe that she placed herself in any position to lay any claim to her husband's interest in such estate on any account, or to complain of respondent's efforts to satisfy its judgment therefrom. From the findings made it would seem that the trial judge took little stock in the claim of appellants that forty years ago the wife had let the husband have some money which was to be paid back some time, or in the claim that the Missouri property belonged to the wife and that to induce her to sign the trust deed to Waldmire the husband promised to assign his interest in the Ebey estate to her, or in the claim that the wife was her husband's creditor on any account. We think the facts and circumstances of the case would fully justify this inference.

In 27 C. J. 564 it is stated:

"Where funds of the wife are received and used by the husband with her knowledge and consent, and no evidence of indebtedness is taken by her, or no claim that he is her debtor is made by her during the lapse of many years, a conveyance in consideration of such funds will not be sustained, especially where it is made after the husband has become insolvent or greatly financially embarrassed."

As to the ownership of the Missouri property and the alleged promise of the husband to assign his interest in the Ebey estate to his wife, provided she would execute the trust deed, the evidence is undisputed that, as hereinbefore stated, this Missouri property was acquired by the husband trading his own Mississippi property for same. His title was merely taken in his wife's name.

[9] One other point requires consideration. The evidence shows that a decree of partial distribution was made in the Ebey estate and that by this decree \$12,000 was ordered distributed to Evelyn Shipley, as assignee of her husband. Owing to lack of funds in the hands of the administratrix at the time, however, such administratrix only paid to said Evelyn Shipley the sum of \$11,000. As heretofore

shown, the trial court found that \$12,000 had actually been paid to her and awarded judgment against her for said latter sum. This was an apparent oversight on the court's part, as the evidence is clear and explicit upon the matter. We think that the facts warranted a judgment against her in the sum of \$11,000 and that the judgment as rendered should be modified to conform to the proof. The contention of appellants that the court erred in awarding any judgment at all against Mrs. Shipley is untenable. The assignment in controversy being void, the title and ownership of the \$11,000 paid over to her remained in the fraudulent grantor as fully as though no assignment had been attempted. *First National Bank v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64; *Ohio Electric Car Co. v. Duffet*, 48 Cal. App. 674, 192 P. 298. In this last-mentioned case it was held that a creditor has the right to follow the trust property, regardless of the form in which it is found. It was also held in such case that under the prayer for general relief, and under the well-known equitable rule, a court of equity will do full justice in the premises and render such relief as will fully settle the controversy between the parties wherever possible. In the case of *Jenner v. Murphy*, 6 Cal. App. 434, 92 P. 405, 407, a decree of distribution had been made after the fraudulent deed was executed and the court held that the decree only affected the deed and did not affect the right of a judgment creditor to show who was the real owner of the property. Speaking of such decree of distribution, the court said:

"It cannot bind a court of equity, nor prevent it from investigating the facts, and brushing aside all illegal and fraudulent transfers for the purpose of seizing the assets of the debtor, and applying them to the satisfaction of the judgment creditors' claim. In such a case a court of equity will not be turned aside by shadows, but will grasp the substance—the assets of the fraudulent debtor—no matter where they may be found, and apply them to the payment of the honest creditor."

See, also, *Martinovich v. Marsicano*, 137 Cal. 355, 70 P. 459.

Applying these principles to the instant case, appellant Evelyn Shipley, having legally acquired nothing under the void assignment, but having actually received \$11,000 in cash as a result thereof, is not injured in any sense by reason of a judgment against her for the amount received.

The judgment of the trial court is therefore modified, in so far as same affects appellant Evelyn Shipley, by reducing the amount thereof in the sum of \$1,000, and as thus modified, such judgment is, as to both appellants, affirmed.

All concur.

109 Cal. App. 226

REYNOLDS et al. v. HOOK et al.

Civ. 245.

District Court of Appeal, Fourth District,
California.

Oct. 27, 1930.

1. Appeal and error ⇨676.

Record *held* sufficient to show that court allowed substitution of party plaintiff.

Plaintiff offered in evidence assignment to him of original plaintiff's interest, and after objection thereto, ruling was reversed. Record disclosed no action by court on reserved ruling, but assignment appeared as plaintiff's exhibit, and court gave judgment in favor of defendants and against plaintiffs for costs.

2. Appeal and error ⇨931(1).

All evidence, with reasonable inferences, tending to sustain findings, must be accepted as true on appeal.

3. Mortgages ⇨32(2).

Deed absolute on face, if intended to secure debt, is mortgage (Civ. Code, §§ 2924, 2925).

Civ. Code, § 2924, provides that every transfer of interest in property, other than in trust, made only as security, is to be deemed mortgage, and section 2925 provides that fact that transfer was made subject to defeasance on condition may, for purpose of showing such transfer to be mortgage, be proved, except as against subsequent purchaser or incumbrancer without notice, although such fact does not appear in instrument.

4. Mortgages ⇨38(2).

To justify finding that deed purporting to convey land in fee simple was intended as mortgage, evidence must be clear and convincing (Civ. Code, §§ 2924, 2925).

5. Mortgages ⇨39.

Whether deed, absolute in form, is mortgage, is mixed question of law and fact, to be determined from all evidence, written and oral, and all facts and circumstances (Civ. Code, §§ 2924, 2925).

6. Mortgages ⇨25(3).

Debt, as security for which absolute deed, intended as mortgage, is given, may be antecedent debt, or one created at the time (Civ. Code, §§ 2924, 2925).

7. Mortgages ⇨32(6).

Great inequality between value of property and price allegedly paid is one of cir-

cumstances indicating that deed, absolute in form, is mortgage (Civ. Code, §§ 2924, 2925).

8. Mortgages ⇨27.

Facts alleged in complaint *held* not to show equitable mortgage.

Complaint alleged in part that owner of property, being unable to pay note secured by trust deed, directed trustee, with creditor's consent, to reconvey property, and as part of same transaction, creditor executed grant deed of property to B., owner's son-in-law, and placed it in escrow, to be delivered to B. upon his paying stipulated amount, and also as part of same transaction B. executed grant deed to owner, conveying undivided one-half, which was likewise placed in escrow.

9. Trial ⇨388(3).

Where complaint did not state cause of action for declaration of equitable mortgage, no finding was necessary.

10. Appeal and error ⇨193(1).

In absence of demurrer to complaint, mere defects in manner of stating facts cannot be considered on appeal.

11. Appeal and error ⇨193(6).

If cause of action be stated, although defectively, complaint not attacked by demurrer must be sustained, notwithstanding ambiguity and uncertainty.

12. Pleading ⇨34(6).

In aid of judgment, complaint must receive as favorable interpretation as its general scope warrants.

13. Account ⇨17(1).

Complaint *held* to state cause of action for accounting, rather than facts constituting equitable mortgage.

Evidence showed that owner of property gave deed, absolute in form, intended as mortgage; that receiver was subsequently appointed and negotiations entered into for payment; that creditor executed deed of grant to receiver and placed it in escrow to be delivered when certain payments were made; that by receiver's direction, crops from premises were delivered to creditor, who became agent of receiver to sell crops and account for proceeds.

14. Mortgages ⇨197.

Beneficiary under trust deed, authorized by receiver to sell hay from premises, being agent, was charged with utmost good faith and with duty of accounting for proceeds.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by A. W. Reynolds, sometimes known as Arzeno W. Reynolds, and another, against A. W. Hook and J. F. Hook, doing business as Hook Brothers, and another. Judgment for defendants, and plaintiffs appeal.

Reversed.

C. W. Benshoof, of Riverside, and Daniel W. Brown, of Perris, for appellants.

French & Moore and Joseph Seymour, all of Riverside, for respondents.

WARMER, Justice pro tem.

The transaction out of which this action arose might be stated as follows: In the year 1917 A. W. Reynolds was indebted to Hook Brothers in the sum of \$27,000, for which he gave them a note secured by a trust deed on the premises described in the complaint. In March, 1922, the principal and interest on the trust deed was due. Reynolds was unable to pay the same. One of the Hook Brothers notified him, Reynolds, that they would have to foreclose the trust deed. Peter Beatty was a son-in-law of A. W. Reynolds. Beatty, Reynolds, and J. F. Hook, one of the Hook Brothers, began negotiations concerning said indebtedness. There was some friction between the Hook Brothers and Reynolds. W. W. Stewart was the trustee named in the Reynolds trust deed. Reynolds informed Stewart, the trustee, that he was to reconvey the real property, stating that they had made a new deal, and asked Stewart to sign a paper that Mr. Hook would bring to him. Mr. Hook, an hour or two later, brought a paper to Mr. Stewart, which Stewart signed; the same being a reconveyance of the property in the trust deed to Reynolds. However, it was the understanding by Hook, Beatty, Stewart, and Reynolds that the conveyance that was to be executed by Stewart was to have transferred the property to the Hook Brothers, and Reynolds agreed, according to the pleading, to execute a grant deed to said property to the Hook Brothers. This was never done. Prior to these negotiations of March, 1922, the Midvale Farms Company had been operating the real property here involved under a lease, Reynolds had instituted an action against the ranch company, and Beatty was appointed receiver in that action and took charge of this particular property under said receivership. The Midvale Farms Company owed Reynolds about \$3,000 rent. About, if not at, the same time when the direction was given to Mr. Stewart to reconvey the said real property, and as a part of the same transaction, Hook Brothers executed a grant deed of said real property to Beatty, and placed the same, together with instructions, in escrow with the First National

Bank of Riverside. The said instructions provided that the deed was to be delivered to Peter Beatty upon his paying into escrow \$30,000, interest and taxes. The price of \$30,000 had been arrived at in the negotiations between Hook Brothers, Beatty, and Reynolds, by adding the sum of \$27,000 principal indebtedness under the Reynolds' trust deed and the \$3,000 indebtedness of the insolvent Midvale Farms Company. At or about the same time, and as a part of the same transaction, Peter Beatty and his wife executed a grant deed to Reynolds to an undivided one-half interest in the real property. This deed, together with instructions, was placed in escrow in the same bank. The instructions provided for a delivery of the deed upon the payment of \$12,500, together with interest thereon. Subsequent to the consummation of this deal, Peter Beatty continued in possession of the property. About two years thereafter it was discovered by Hook Brothers that the real property had been conveyed to Reynolds instead of to the Hook Brothers. Beatty and J. H. Hook took the matter up with Reynolds and secured a quitclaim deed from Reynolds to the Hook Brothers. It is not contended that any adverse interests in said premises arose during said two years. At the same time Hook Brothers extended the term of Beatty's payment to October, 1928, and Beatty extended the term of payment for Reynolds to the same time. About the same time it became necessary to do some work on the well on said property, and the Hook Brothers agreed with Beatty to advance him enough money to pay for this pump and the installation thereof, and they agreed then that the interest on the \$30,000 and \$12,500 to Hook Brothers and Beatty, respectively, would not become due until the pump was installed. The pump was actually installed August 27, 1924.

Peter Beatty assigned his interest in the cause of action in this particular case to one M. L. Mapes, after the commencement of this action.

Beatty transferred all his right, title, and interest in and to an action entitled A. W. Reynolds, sometimes known as Arzeno W. Reynolds, and Peter Beatty, Plaintiffs, v. J. F. Hook and A. W. Hook, etc., et al., Defendants, by assignment to M. L. Mapes.

Peter Beatty and Flora Beatty, his wife, conveyed by quitclaim deed the premises here in question to Maynard L. Mapes. Under the assignment and conveyance Maynard L. Mapes became the owner of all of the interest and title of Beatty that the court might allow him to be substituted in the action. Code Civ. Proc. § 385; Walker v. Felt, 54 Cal. 386; Douglas v. Moncur, 19 Cal. App. 177, 124 P. 1053; Merced Bank v. Price, 9 Cal. App. 177, 98 P. 383; 123 Am. St. Rep. 299; 20 R. C. L. 686.

[1] It does not appear affirmatively that the court allowed the substitution of M. L. Mapes for Peter Beatty as party plaintiff. However, the amended complaint was filed and answered. The condition of the record was called to the attention of the trial court by plaintiff offering in evidence the said assignment and said quitclaim deed. To such offer objection was duly made and ruling was reserved. Counsel have not called to our attention any action of the trial court on the reserved ruling and we have found none. However, both of the said instruments appear in the record as plaintiff's exhibits and the court must have considered the substitution allowed, for in its judgment it ordered judgment in favor of the defendants and against the plaintiffs for costs. While the record is not clear or satisfactory, we think it sufficient to hold that the court allowed the substitution of M. L. Mapes for Peter Beatty as party plaintiff.

[2] Appellants urge a number of claims that the evidence is insufficient to support the findings; that the deed from Reynolds to Hook Brothers was given as security for the payment of the \$27,000 theretofore secured by the trust deed to the property which had been reconveyed. Were the premises conveyed to Hook Brothers as security for a debt, and therefore did the deed constitute an equitable mortgage, or was the instrument what it purported to be on its face, a conveyance of title in fee? On appeal all evidence tending to sustain the findings must be accepted as true, together with all the reasonable inferences that may be drawn therefrom. *Bancroft-Whitney v. McHugh*, 166 Cal. 140, 134 P. 1157; *Hind v. Oriental Products Co.*, 195 Cal. 655, 235 P. 438; *Delannoy v. Quetu*, 73 Cal. App. 627, 239 P. 71.

The complaint alleges in part that the plaintiff A. W. Reynolds, in consideration of said note being canceled, the title to said land being reconveyed, and other considerations therein mentioned, was to execute and deliver to Hook Brothers a grant deed to said land, in the place and stead of said trust deed, as security for said indebtedness. The answer alleges in part a mistake on the part of the trustee named in said trust deed, in reconveying the property to Reynolds, the trustor in said trust deed, and then alleges as follows: "That in order to rectify said mistake, said A. W. Reynolds agreed to execute and deliver to said J. F. Hook and A. W. Hook a grant deed to the said premises inadvertently reconveyed to said A. W. Reynolds by said Trustee W. W. Stewart as aforesaid."

The court finds that the said A. W. Reynolds agreed to execute and deliver to said J. F. Hook and J. W. Hook a grant deed to said premises inadvertently conveyed to said Reynolds by said trustee W. W. Stewart as aforesaid. There is evidence that Hook

Brothers knew nothing of the fact that the reconveyance was made to A. W. Reynolds for approximately two years thereafter, at which time negotiations were begun that resulted in the execution and delivery of a quitclaim deed from Reynolds to Hook Brothers of the said premises. Whether or not Reynolds and Hook Brothers agreed that the trustee, W. W. Stewart, should convey the premises to Hook Brothers, and by proper instrument authorized him so to do, or whether the trustee, W. W. Stewart, was to reconvey the property in usual form to Reynolds, the trustor, and Reynolds was to convey the premises to Hook Brothers, is immaterial, being only the plan or method for accomplishing the result—when no intervening rights are claimed.

If the original contract had been fulfilled by Reynolds, as well as by the others who were parties thereto, would it have created an equitable mortgage instead of a conveyance absolute? If so, then an equitable mortgage was created by the agreement in the manner in which it was carried out as between the parties thereto, and no one gained any right or lost any right by the failure of Reynolds to immediately deliver a deed as agreed.

"Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage," etc. Civ. Code, § 2924.

"The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice) though the fact does not appear by the terms of the instrument." Civ. Code, § 2925.

[3, 4] That a deed absolute on its face is in fact intended to be a mortgage and is a mortgage, if intended as security for a debt, is a rule recognized in California, and finds support in numerous decisions. 17 Cal. Jur. 737, and cases there cited; *Boal v. Gassen*, 178 Cal. 132, 172 P. 588; *Lamberson v. Bashore*, 167 Cal. 387, 139 P. 817; *Shirey v. All Night and Day Bank*, 166 Cal. 50, 134 P. 1001. The evidence is required to be clear and convincing to justify a court in finding that a deed which purports to convey land in fee simple was intended to be a mortgage. *Beckman v. Waters*, 161 Cal. 581, 119 P. 922; *Lynch, as Executrix, v. Lynch*, 22 Cal. App. 653, 135 P. 1101.

In *Couts v. Winston*, 153 Cal. 686, 96 P. 357, 358, the court uses the following language: "If therefore the evidence offered by plaintiffs, taken by itself, was sufficiently 'clear, satisfactory and convincing' to satisfy the trial court that the deed was in fact a mortgage, the finding made cannot be overthrown merely because numerous witnesses, whose character is not impeached, gave positive testimony to the contrary effect."

In *Wadleigh v. Phelps*, 149 Cal. 627, 637, 87 P. 93, 98, the court said: "The appellate court * * * will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court."

In *Keese v. Beardsley*, 190 Cal. 465, 213 P. 500, 501, 26 A. L. R. 1538, we find the following: "In dealing with a deed absolute given as security, we are not bound by the rule that writings cannot be contradicted by parol, and it is therefore permissible to establish the agreement of the grantor by his acquiescence in a statement made by or on behalf of the persons for whose security the obligation is given."

In *Boal v. Gassen*, 178 Cal. 132, 172 P. 588, 589, the court said that "the continued existence of a debt is, no doubt, a circumstance tending to show that a conveyance is a mortgage."

[5-7] Whether a deed, absolute in form, be a mortgage or not, is a mixed question of law and fact, to be determined from all the evidence, written and oral, and in determining it, all the facts and circumstances attending the transaction should be considered. *Husheon v. Husheon*, 71 Cal. 407, 12 P. 410. The debt to secure which a deed is given, may be an antecedent debt, or one created at the time. One of the circumstances tending to show that a deed, absolute in form, is only a mortgage, is the fact when it appears that there is a great inequality between the value of the property conveyed and the price alleged to have been paid for it. *Husheon v. Husheon*, supra. In order to hold the conveyance to Hook Brothers to be an equitable mortgage, Beatty must in some way have the right of a redemptioner under the mortgage. Being a stranger to the trust deed and to the transaction, he could not be in the position of a redemptioner. No debt was subsisting as between Beatty and Hook Brothers that was in any way, even remotely, connected with the trust deed or later transaction with Beatty. There was no question of adequacy or inadequacy of the price paid. He (Beatty) was coming into a new obligation as between Beatty and Hook Brothers. He had given no title to Hook Brothers and Hook Brothers got no title, equitable or legal, from him. None of his debts to Hook Brothers, if any, were purported to be paid or affected by this transaction, either as to the past or the future. Reynolds agreed to convey (and later did convey) these premises to Hook Brothers, knowing that they had or were to enter into an agreement with Beatty, and under such agreement with Beatty, if the same was finally completed by Beatty, Hook Brothers would be bound to convey the title to said premises to Beatty. Further, Reynolds entered into an

agreement with Beatty, whereby he was to get one-half of the same premises from Beatty, who, in turn, must get his title to be delivered to Reynolds from Hook Brothers. Reynolds agreed to convey to Hook Brothers, knowing that Hook Brothers intended to agree to sell to Beatty, and Reynolds bought from Beatty, knowing that Beatty was depending on the reconveyance from Hook Brothers for the title he agreed to convey to him, Reynolds.

If, under such circumstances, an equitable mortgage was created, as to Beatty, he could, by the payment of the \$27,000 for the equitable mortgage thus created, secure the property which he agreed to pay \$30,000 for, in the escrow. If an equitable mortgage was created as to Reynolds, he could rightfully demand a satisfaction of the mortgage by the Hook Brothers, by the payment of the \$27,000 and interest. Beatty could not get any title from Hook Brothers through his performance of his agreement with them, and hence could not deliver the deed to Reynolds which he had agreed to do. Under such circumstances Reynolds could bring an action against Beatty for the breach of a contract and failure to deliver title to the land that he himself had title to. All of these conditions are made possible because of the act of Reynolds himself in conveying said premises in fee absolute in form, that is, Reynolds conveyed to Hook Brothers by deed absolute in form, knowing Hook Brothers were to agree to sell to Beatty and Beatty relying upon the conveyance from Hook Brothers under the Reynolds deed, was to agree to, and did convey, a one-half interest in said premises to Reynolds himself.

In *Chapman v. Hicks*, 41 Cal. App. 158, 182 P. 336, 338, the court says: "The test of a mortgage is whether the relation of debtor and creditor continues so that there is a subsisting debt after the conveyance (citing cases); and where a deed, absolute on its face, is given to secure a debt, it will be held to be a mortgage even though the parties stipulate it shall be an absolute conveyance (*Hodgkins v. Wright*, 127 Cal. 688, 60 P. 431. * * *). The intention of the parties must govern, and it matters not what particular form the transaction may take. If the deed is made for the purpose of securing the payment of a debt, it is a mortgage 'no matter how strong the language of the deed, or any instrument accompanying it may be.'" Citing *Woods v. Jensen*, 130 Cal. 200, 62 P. 473. See, also, *Locke v. Moulton*, 96 Cal. 21, 30 P. 957.

[8, 9] The facts above discussed were all alleged in the complaint, and it is claimed they constitute a pleading of an equitable mortgage, but with this contention we cannot agree for the reasons hereinbefore stated. The pleading not stating a cause of action for the declaration of an equitable mortgage, no finding is necessary.

[10-14] We are aware that much criticism has been directed to the use of the demurrer. This cause certainly aptly illustrates the necessity for the use of such a pleading. If such a pleading had been used in this case, undoubtedly the cause could and would have been tried in less time and upon a theory that both parties would have at least known. Where no demurrer has been interposed to a complaint, mere defects in the manner of stating the facts relied on cannot be considered on appeal. The complaint must be sustained if a cause of action be stated, though defectively, notwithstanding the ambiguity and uncertainty that may exist there, and in aid of the judgment the complaint must receive as favorable an interpretation as its general scope will warrant. *Fudickar v. East Riverside Irrigation Dist.*, 109 Cal. 29, 41 P. 1024. Taking the complaint by its four corners, we are of the opinion that it states a cause of action for an accounting. The record discloses that Hook Brothers executed a deed to Beatty and placed it in escrow, with instructions to deliver the same to him when certain payments were made, and in the event said payments were not made the said deed was to be returned to Hook Brothers; that certain crops from the ranch premises described in said deed were delivered to Hook Brothers by Beatty during the time Beatty farmed the premises himself. Also during that time Beatty sold some of the hay grown on the premises and gave Hook Brothers orders on the purchasers for the payment thereof. Further, Beatty leased the said premises with the consent of Hook Brothers. By the terms of said leases Beatty was to receive a portion of the crops and the tenants a portion; that Beatty directed the tenant to deliver his portion of the crops to Hook Brothers. The tenant did deliver the crops to Hook Brothers, as directed. Beatty kept no account of the quantity of hay or number or amount of orders for the payment for hay that he delivered to Hook Brothers, and relied on the Hook Brothers to keep the account. The Hook Brothers admit receipt of some of said hay and of some of said orders, claiming the money received therefor was applied as payment on other indebtedness that Beatty owed them. In such circumstances Hook Brothers were the agents of Beatty for the sale of the hay and collection of the orders. They took the money so received by them and applied it on Beatty's indebtedness, if any, other than the indebtedness of this transaction. As agents for Beatty they were charged with utmost good faith and with the duty of accounting to him for the money received for the hay, and the money received for the orders given them. *Allsopp v. Joshua Hendy Machine Works*, 5 Cal. App. 228, 90 P. 39; *Calmon v. Sarraile*, 142 Cal. 638, 76 P. 436.

There is no evidence in the record to show how much Beatty owed Hook Brothers other

than the sum arising in this transaction, or what was the value of the hay delivered to Hook Brothers or the value of the orders on the purchasers for the payments for hay that had been delivered to Hook Brothers. Yet Beatty was entitled to know what was received for said hay and on said orders delivered to Hook Brothers. What his other indebtedness consisted of, and whether or not there was any balance that should have been applied on the indebtedness arising out of this transaction, is not shown. Assuming, without deciding, that Hook Brothers had the right to apply the total sum received by them on some other indebtedness, if any, the record being silent on the amount received by them and the condition of Beatty's accounts, except the indebtedness shown in this transaction, there is no way to determine whether or not the payments called for in the escrow instructions had been made and an accounting by the Hook Brothers is necessary to determine that fact. In order to hold that the payment had not been made on the indebtedness arising out of this transaction, we would have to assume that the said hay and said orders that were delivered to Hook Brothers were in an amount less than enough to pay the account and the payments called for in this transaction, without evidence as to how much money Hook Brothers got from the said hay and said orders and without evidence to show how much or what they were to pay. In other words, to balance an account without knowledge of any of the charges or credits is impossible. An accounting was therefore necessary to determine the rights of the parties, and a finding should have been made to that effect. The evidence was insufficient to support the finding: "That by reason of the failure of said Peter Beatty to comply with the terms of said escrow agreement and of the said extension thereof, as aforesaid, said Peter Beatty, his successors and assigns forfeited all right, title and interest in, and under said escrow agreement and said extension agreement and all right, title and interest in and to the premises covered thereby, and that said J. F. Hook and A. W. Hook, or their successor in interest, are now the owners of said premises free and clear of any interest of said plaintiffs, or either of them."

There are numerous other objections raised as to the sufficiency of certain findings, and certain other errors are claimed by the appellants; but inasmuch as we have found that an accounting is necessary and that an accounting must be taken and had to determine the rights of the parties, it is unnecessary to determine any of the other specifications of error.

Judgment reversed.

We concur: MARKS, Acting P. J.; BARNARD, J.

MERTENS v. BERENDSEN.*

Civ. 7476.

District Court of Appeal, First District, Division 2. California.

Oct. 27, 1930.

Rehearing Denied Nov. 26, 1930.

Hearing Granted by Supreme Court
Dec. 22, 1930.

1. Vendor and purchaser ⇨130(2).

"Marketable title" within contract for sale of realty is one that is free from reasonable doubt.

[Ed. Note.—For other definitions of "Marketable Title," see Words and Phrases.]

2. Vendor and purchaser ⇨130(9), 334(5).

Encroachment of building on street along frontage of 35 feet, tapering from 2 inches to seven-eighths of an inch, held to render title unmarketable, entitling purchaser to recover deposit.

Appeal from Superior Court, City and County of San Francisco; J. A. Allen, Judge.

Action by M. J. Mertens against John C. Berendsen. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Walter H. Robinson, of San Francisco, for appellant.

Thos. R. White, of San Francisco, and Chas. W. White, of Hayward, for respondent.

PRESTON, Justice pro tem.

This is an appeal by plaintiff, M. J. Mertens, from a judgment entered against him in an action for rescission of a real estate contract and the recovery of the money paid by him thereunder.

The facts are briefly these: On January 11, 1929, the plaintiff, M. J. Mertens, agreed in writing to buy from defendant, John C. Berendsen, for the sum of \$150,000, a lot at the northeast corner of Kearny and California streets in the city of San Francisco, together with a three-story concrete building situated thereon. Plaintiff paid \$1,000 on account of the purchase price when the contract was signed. The contract provided that plaintiff "has only seven days in which to report any defects in either title or survey, after the expiration of which seven days he waives the right to make any claim for return of deposit because of any alleged defects in title or survey."

Within the seven days plaintiff served a written notice of rescission and a demand for the return of the deposit of \$1,000, specifying in said notice the fact that both the title and survey were defective by reason of the fact that the building overlapped onto California

street. The defendant refused to return the deposit. The overlap of the building on the street was admitted by defendant; the only conflict being as to the extent thereof.

The court found, among other things, as follows:

Finding No 4: "That on said January 11, 1929, the building on said premises encroached on property belonging to the city and county of San Francisco for a length along the California street frontage of at least 35 feet and to the extent of two inches on the westerly end, tapering to an encroachment of seven-eighths of an inch at the easterly end, and that such encroachment still continues. That said encroachment consists only of the marble veneer at base of building and a slight overlap of the concrete behind the marble."

This finding is supported by the evidence.

The sole question presented here is whether or not the admitted encroachment renders the title to the property in question unmarketable.

[1, 2] A marketable title is one that is free from reasonable doubt. *Cummings v. Dolan*, 52 Wash. 496, 100 P. 989, 132 Am. St. Rep. 986; *Todd v. Union Dime Sav. Inst.*, 128 N. Y. 636, 23 N. E. 504; *Walters v. Mitchell*, 6 Cal. App. 410, 92 P. 315; *Muller v. Palmer*, 144 Cal. 313, 77 P. 954, and cases there cited; *Vought v. Williams*, 120 N. Y. 253-257, 24 N. E. 195, 196, 8 L. R. A. 591, 17 Am. St. Rep. 634, and cases there cited.

In this last case the court said: "A marketable title is one that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some fact appearing in the course of its deduction, and the doubt must be such as affects the value of the land, or will interfere with its sale. A purchaser is not to be compelled to take property the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and, if he wishes to sell it, be reasonably sure that no flaw or doubt will arise to disturb its market value."

Again, in *Empire Realty Corporation v. Sayre*, 107 App. Div. 415, 95 N. Y. S. 371, 373, the court said: "It is undoubtedly the rule of law that a purchaser will not be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be free from any reasonable doubt that would interfere with its market value."

In *Walters v. Mitchell*, supra, speaking of marketable titles, the court said: "One who contracts to purchase land from a vendor who agrees to give a good title has the right to a title free from reasonable doubt or litigation.

Where the eaves of an adjoining house overhang the property, the purchaser is not required to accept a parol promise to remove the same."

Many other cases from our own and other jurisdictions could be cited to the same effect.

Under the authorities and the findings of the court, we see no escape from the conclusion that the admitted encroachment of the building on California street renders the title to the property in question unmarketable—that is, with this encroachment of the building on the street, the title is not free from reasonable doubt or litigation. The purchaser might be called upon at any time to remove the building from the street, and, in case of a sale, the prospective purchaser would, as a reasonable man, do just as plaintiff is doing here—object to taking the title. The defendant has offered nothing in the way of correcting the encroachment, but merely says it does not amount to anything. We do not believe that plaintiff should be compelled to take all the chances and to expend a large sum of money for property, the title to which might at any time be questioned.

We conclude, therefore, under the findings of the court, that judgment should have been for plaintiff for the return of the deposit of \$1,000.

The judgment is reversed, with directions to the trial court to enter a judgment in favor of the plaintiff as prayed for in his complaint.

We concur: NOURSE, P. J.; SPENCE, J.

109 Cal. App. 205

MANGINO et al. v. BONSLLETT.

Civ. 7494.

District Court of Appeal, First District, Division 2, California.

Oct. 27, 1930.

Rehearing Denied Nov. 26, 1930.

Hearing Denied by Supreme Court

Dec. 22, 1930.

1. Appeal and error ⇨301.

Insufficiency of evidence could not be urged in support of order granting new trial, where not specified in order as one of grounds (Code Civ. Proc. § 657).

2. New trial ⇨29.

In automobile accident case, defendant's counsel's remarks conveying idea insurance company was real party in interest behind plaintiffs' case held prejudicial misconduct, warranting new trial.

3. Trial ⇨133(6).

Court's admonition did not cure prejudicial effect of defendant's counsel's remarks

conveying idea that insurance company was real party in interest behind plaintiffs' case.

4. New trial ⇨29.

Granting new trial for misconduct is largely in trial court's discretion.

5. Trial ⇨129.

In automobile accident case, plaintiffs' question to witness whether he was plaintiffs' insurance broker did not warrant defendant's counsel's remarks relating to plaintiffs' insurance.

6. Trial ⇨129.

Question to jurors on voir dire examination whether they were interested in insurance company furnished no excuse for defendant's counsel's remarks regarding plaintiffs' automobile insurance.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Filomena Mangino and husband against Jake Bonslett for damages for personal injuries sustained in an automobile accident. From an order granting a new trial after a verdict in favor of defendant, defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

James M. Wallace and Lovell & Lovell & Wallace, all of San Francisco, and Wade W. Moore, of Pittsburg, for respondents.

PRESTON, Justice pro tem.

This is an appeal from an order granting a new trial, after a verdict of a jury in favor of the defendant. The action is one for damages for personal injuries resulting from an automobile accident.

The order granting the new trial reads in part as follows: "The motion for a new trial in behalf of plaintiffs in the above-entitled case, coming on regularly to be heard, and said motion having been submitted to the court for decision, and the court having very carefully considered the points urged by counsel, and having a clear recollection of the conduct of the trial, now orders that said motion be, and the same is, hereby granted. On the question of the sufficiency of the evidence, the court finds that the evidence was sufficient to warrant a verdict in favor of either party."

[1] The insufficiency of the evidence cannot be urged in support of the order because it is not specified in the order as one of the grounds therefor. Section 657, Code Civ. Proc.; *Murphy v. Zwieg*, 100 Cal. App. 266.

279 P. 1062. The sole question is whether the trial court abused its discretion in granting plaintiffs' motion for a new trial.

[2] Plaintiffs predicated their motion for a new trial upon practically all of the grounds enumerated in section 657 of the Code of Civil Procedure, but urged as the main specification of error the alleged prejudicial misconduct upon the part of counsel for defendant.

The plaintiffs were riding in an automobile borrowed from one H. H. Summers, who was not a party to this action, but he had already sued the defendant, Bonslett, in another action for damages to his automobile. A Mr. Boysen, an insurance broker representing Summers, interviewed the defendant, Bonslett, the day after the accident. A Mr. Schmitt assisted the plaintiffs' counsel in preparing this case for trial, but was not called as a witness, but was mentioned by the witness Anderson as the man who obtained his signature to an affidavit. Anderson was asked upon cross-examination as to what Schmitt's business was, and replied, "One of them is insurance and the other is law, I believe."

It is readily apparent, from an examination of the record, that counsel for defendant, throughout the entire trial and during his closing argument attempted to convey to the jury the idea that an insurance company was the real party in interest behind the plaintiffs' case. The record in this case is replete with improper statements and prejudicial remarks on the part of counsel for defendant in his closing argument. The following excerpts from the record will be sufficient to illustrate the nature of the remarks and objections of counsel, and admonitions of the court with reference thereto, to wit:

"Mr. Hoey (Counsel for Defendant): Now if the Glenn Falls Insurance Company was obliged to pay Mr. Summers for damage to his car, why didn't they go and pay it? Why should they have their agent going around and trying to collect their damages from somebody else? But he says he remembered when they had the suit for the property damage. Of course he did. He was an interested party as an agent there. He wanted his insurance company to get the money that they had to pay to Summers as a result of this accident. * * * Now the insurance man from San Francisco (meaning Schmitt), he is the man that is handling the case. He is the man that is going to make old Jake Bonslett pay. He is the man who talks it over with these people and he is the man who talked it over with the family and he is the one who is handling this situation. We have also as part of this case to say that perhaps people were influenced by him. * * * This case was submitted to a jury one time before and

the jury brought in a verdict in favor of the defendant.

"Mr. Wallace (Counsel for Plaintiffs): If the Court please, we will object to that statement of counsel.

"The Court: Now, Mr. Hoey, that is misconduct on your part and the jury will disregard any remarks made by counsel as to the former trial of this case.

"Mr. Wallace: We would like, for the sake of the record, to assign it as prejudicial error, Your Honor, and ask Miss Raffetto (the reporter) to note that.

"The Court: The court will admonish the jury to entirely disregard that remark.

"Mr. Hoey: Do I understand that I can't comment on any of the papers in the case?

"The Court: You can't comment upon what the action of the jury did in this case before. If you were to be allowed to do that then the other side would be allowed to say that the Judge granted a new trial.

"Mr. Hoey: Well, I expected to say that and—

"The Court: Well, there should be no reference at all to the disposition of the case at the former trial. * * *

"Mr. Hoey: I always understood that the papers were evidence in the case.

"The Court: Well, what papers?

"Mr. Hoey: Well, the papers were—the affidavits that were filed by the people to have the court grant a new trial.

"The Court: Well, they have nothing to do with the case. They were not introduced in evidence.

"Mr. Hoey: Well, one of them was referred to.

"The Court: All cases should be disposed of on the basis of the evidence before the court and arguments should be confined to that. * * *

"Mr. Hoey (continuing with his argument): There is evidence before the court that in the matter of granting a new trial one of the grounds is newly discovered evidence. * * * It seems to me that Mr. Schmitt, the insurance man from San Francisco, with all his ability and all of his years of experience would have gone up to that garage the first time and had a conversation with this boy, or somebody else. * * * That dent, in my judgment, was put in there with a sledge hammer and not with a bumper of an automobile. * * * Now, ladies and gentlemen of the jury, why was this jury asked—why were you asked, ladies and gentlemen of the jury, if you were a policy holder and a stockholder in some—I don't remember the name of the Company—Zurich Insurance Company? Why were you asked that question if it wasn't intended that that company or some other company was to be injected in this case.

Why were you asked if you were a member of the California Automobile Association? I will tell you why: The California Automobile Association writes insurance. Mr. Sturm, I think, is the only man on this jury that belongs to that organization. They want to leave the impression with you that Jake Bonslett has an insurance company behind him and that if you render a verdict that the insurance company will pay it and not Jake Bonslett. The insurance man behind this case is Mr. Schmitt, the man who is peddling around, and Mr. Boysen, the man who never appeared before you. He is the insurance man, Mr. Schmitt is the insurance man involved in this case. This case occurred on December 21, 1928. There was no damage suit until June 3, 1929, a long time after it occurred and sufficient time elapsed to permit these plaintiffs, with their insurance director there, and not one but two people who were not new at the game, who have been sued themselves, who knew how to collect evidence, who had the evidence concealed in their own brain, so they tell you now—they didn't tell you before. Know just what to do, but they didn't file a complaint until June 23, 1929, and you decide just what is behind this case: Whether or not it is Mr. Bonslett or another insurance company, and you determine in your own mind how much Mrs. Mangino is going to get out of it. Why these people are particularly interested in it. The question was asked you and you make that charge now and if it isn't true. * * * The question was asked you if you were interested in an insurance company. Mr. Bonslett is well able to pay whatever judgment perhaps would be rendered against him in a fair case. He doesn't want to deny any liability. I don't know how about his financial condition and I don't believe the neighbors are bringing in coal and potatoes to keep him in comfort, and I don't believe it is fair for counsel to try to leave an impression with this jury that Jake Bonslett or somebody else is insured and the insurance company will pay the bill. The insurance company on the other side of the case are the ones that are trying to gouge Jake Bonslett in this case. * * * Just how would you feel if you were brought in as a defendant in a personal injury suit and thereafter for reasons that perhaps you will not be informed of the matter was retried and then during the interim when these witnesses—when there was plenty of time, ample time to get them and bring them in here, come in here and testify to things which are material in this case. * * * Mr. Bonslett's automobile did not even touch the automobile of Mr. Mangino and that dent that you hear so much about did not appear in the left fender immediately after the accident, but it appeared perhaps at some later date. * * * Now just what is the damage? She

(one of the plaintiffs) was a county patient for which the county ought to pay the bill if she hasn't the financial situation. * * * Ladies and gentlemen of the jury, I want you to consider that Mr. Schmitt is the representative of the insurance company on the other side of the case and it is your duty to find out just how much Mr. Schmitt is going to get out of this case. * * *

"Mr. Wallace: At this time, if Your Honor please, I would like the record to show that we assign as misconduct Mr. Hoey's statement to the jury referring to the insurance company on the other side of the case. There is no evidence in the record of any insurance company except what Mr. Boysen testified and that referred to Mr. Summers' insurance on Mr. Summers' automobile and we wish the record to show that that is assigned as misconduct.

"Mr. Hoey: Mr. Anderson testified he had a conversation with Mr. Schmitt and I asked him what Mr. Schmitt's business was and he said 'insurance and a lawyer.' * * *

"Mr. Wallace: The fact that he said Mr. Schmitt was in the insurance business would in no way justify a reference to the insurance company on the other side of the case.

"Mr. Hoey: And Mr. Mangino testified that he was handling the case.

"The Court: Well now, gentlemen, that is the misfortune of bringing things into a case that have no business there, and I would like to instruct the jury that you are to disregard this question of insurance and that any question that is asked by counsel when it is not permitted by the court is not evidence. Furthermore, you are to decide this case on the evidence. There is no evidence before the court in this case that Dr. Merrithew and the county are not to be paid that hospital bill. As I understand it, the hospital is open to two classes of people. First, those who are dependent and claim to be indigents and ask for aid. To them it is free. To other citizens of the county who do not claim to be indigent and do not ask for public aid, they pay their bills the same as they would at any other hospital. Now proceed, Mr. Moore.

"Mr. Moore (one of plaintiffs' counsel): I believe there is no question of insurance on either side here.

"The Court: Now you have asked that the court admonish the jury that insurance is not a question in this case. Now after that admonition you have no right to go into that.

"Mr. Moore: I was going to reply to Mr. Hoey.

"The Court: Mr. Hoey threw the field wide open but you didn't care to take advantage of that.

"Mr. Moore: Very well, I will abide by it, if Your Honor please. Now Mr. Schmitt is not a lawyer. He is just a law clerk.

"Mr. Hoey: Just a second, we object to counsel misquoting the testimony. The testimony was he was a lawyer and an insurance man.

"Mr. Moore: Well, that was Mr. Anderson—

"Mr. Hoey: That is the only testimony in this action.

"The Court: Well now gentlemen, it has been a remarkable case; the extraneous matters that have entered into this case surpasses anything I ever heard or heard of. Now there is no evidence that I can recall of before this court that Mr. Schmitt is a lawyer.

"Mr. Hoey: Yes, there is, may it please the court, young Anderson testified—I asked him who Mr. Schmitt was. He said 'a lawyer and an insurance man.'

"Mr. Moore: He said he thought he was. He didn't know.

"The Court: He thought he was wouldn't make him a lawyer.

"Mr. Wallace: Perhaps he thinks I am an insurance man.

"The Court: Well, proceed, but really try and confine ourselves to the evidence.
* * *

These remarks were not warranted by any phase of the testimony and could have had but one purpose; that is, to prejudice the minds of the jury against the plaintiffs' case and in favor of the defendant. There is no evidence in the record that plaintiffs were insured or that an insurance company was the real party in interest behind plaintiffs' case.

[3] Appellant insists that the repeated admonition of the court to the jury to disregard the remarks of counsel cured whatever prejudicial effect the remarks had upon the jury. We cannot agree with this contention. We are satisfied that the remarks were of such a character, and the purpose of their injection into the case so apparent, that they could not have been completely obliterated from the minds of the jury by any admonition the court gave or could have given.

[4] The granting or denial of a new trial on the ground of misconduct is largely in the discretion of the trial court. "The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong." *Lafargue v. United Railroads*, 183 Cal. 720-724, 192 P. 538, 540. "The trial court, having

heard and seen the witnesses on the trial, and having knowledge as to those circumstances of a case which cannot be reproduced in the printed record, is in a better position than is the appellate court to determine as to the effect of the shown irregularity upon the result of the trial. It is certainly enough to justify the affirmance of an order granting a new trial upon such ground that the irregularity found, upon sufficient evidence, by the trial court, to have existed, was of such a nature, that it may, under the circumstances of the case, as shown by the record, have affected the substantial rights of the aggrieved party and prevented a fair trial." *Piercy v. Piercy*, 149 Cal. 163-166, 86 P. 507, 509; *Merralls v. Southern Pacific Co.*, 182 Cal. 19, 186 P. 778; *Loggie v. Interstate Transit Co.* (Cal. App.) 291 P. 618.

[5, 6] Appellant also contends that the matter of insurance was injected into the case by plaintiffs' attorneys. This contention is based upon these two facts: The witness Boysen was asked by counsel for plaintiffs this question: "Q. Now you are Mr. Summers' insurance broker? A. Yes." This would certainly be no basis for the remarks of counsel for defendant; (2) Each juror was asked on his voir dire examination whether he or she was interested in any insurance company. This question was entirely proper, and furnished no excuse for counsel's remarks. *Arnold v. California Portland Cement Co.*, 41 Cal. App. 420, 421, 183 P. 171; *Williamson v. Hardy*, 47 Cal. App. 377, 190 P. 646; *Baldarachi v. Leach*, 44 Cal. App. 603, 186 P. 1060; *Potter v. Driver*, 97 Cal. App. 311, 275 P. 526; *People v. Simon*, 80 Cal. App. 675-685, 252 P. 758. The purpose of this question was to obtain a jury that was free from bias, prejudice, or interest that would affect their verdict, and thereby prevent the very prejudice in the minds of the jury that the remarks complained of were calculated to instil.

A further discussion seems entirely unnecessary. We are of the opinion that the trial court exercised its discretion wisely in granting plaintiffs a new trial, and that its action in so doing should not be disturbed by this court.

As further authority for the conclusion that we have reached, see *Citti v. Bava*, 204 Cal. 136, 266 P. 954; *Gee v. Fong Poy*, 88 Cal. App. 627-641, 264 P. 564; *Dameron v. Ansbros*, 39 Cal. App. 298, 178 P. 874; *Keena v. United Railroads*, 197 Cal. 148, 239 P. 1061; *Baroni (Continental Casualty Co., Intervener) v. Rosenberg* (Cal. Sup.) 294 P. 1111.

The order granting a new trial is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

102 Cal. App. 798

George BOWERS, as Administrator, etc., Appellant, v. O. O. PUTNAM et al., Respondents.
Civ. 3947.

District Court of Appeal, Third District,
California.

Dec. 30, 1929.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Denying application for additional evidence.

See, also, 284 P. 470.

Frank A. Duryea, of Marysville, for appellant.

A. A. King, of Colusa, and Theodore W. Chester and Downey & Chester, all of Sacramento, for respondents.

PER CURIAM.

Application to take additional evidence herein is denied on authority of *Tupman et al. v. Haberkern et al.*, 208 Cal. 256, 280 P. 970.

109 Cal. App. 341

PEOPLE v. KATO.

Cr. 1127.

District Court of Appeal, Third District,
California.

Nov. 3, 1930.

Criminal law §1130(4).

Where appellant filed no brief and failed to appear when case was called for hearing, judgment of conviction will be affirmed (Pen. Code § 1253).

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Frank T. Kato was convicted of assault with intent to commit murder, and he appeals. Affirmed.

R. B. Maxey, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Stanislaus county of a felony, to wit, assault with a deadly weapon with intent to commit murder.

The transcript on appeal was filed in this court May 27, 1930. No brief has been filed in behalf of appellant. The cause was regu-

larly placed on the calendar for oral argument on November 3, 1930. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

109 Cal. App. 257

GOLISH v. VAN PELT.

Civ. 191.

District Court of Appeal, Fourth District,
California.

Oct. 28, 1930.

1. Appeal and error §554(3).

Order vacating default judgment must be affirmed, where appeal was on judgment roll alone (Code Civ. Proc. §§ 953a-953c).

2. Appeal and error §900.

All intendments are in favor of action of trial court.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by R. H. Golish against Peter R. Van Pelt. From an order vacating a default judgment, plaintiff appeals.

Affirmed.

Perry F. Backus, of Los Angeles, for appellant.

R. J. Welch, Jr., of Riverside, for respondent.

WARMER, Justice pro tem.

Plaintiff appealed from an order vacating a default judgment. This cause has been before the District Court of Appeal, Second Appellate District, Division 2 (287 P. 537), on a motion to have the record returned for preparation, examination, and approval in the superior court, in accordance with sections 953a, 953b, and 953c of the Code of Civil Procedure. In denying said motion the court said: "There is but one transcript before us, which contains the judgment roll and notice of appeal, certified by the clerk. Other matters are discussed in the briefs as properly constituting an additional transcript for authentication, had one been filed. But it is the duty of the appellant in such a case to prepare and present in the trial court, upon notice, a proposed transcript, and to afford the respondent an opportunity to participate in its final settlement for examination and approval. Since none of these steps requisite to a valid appeal have been taken, and no transcript is available for

return or approval, appellant's motion is without foundation." *Golish v. Van Pelt* (Cal. App.) 287 P. 537.

[1] No other or further record as to the proceedings in the trial court is now presented. Hence we have an appeal on the judgment roll alone. On such a record the order appealed from must be affirmed. *Waymire v. California Trona Co.*, 176 Cal. 395, 168 P. 563, *Brown v. Canty*, 31 Cal. App. 183, 159 P. 1056.

[2] All the intendments are in favor of the action of the trial court. *Waymire v. California Trona Co.*, supra. Nothing appearing in the record to show an abuse of discretion the order appealed from must be affirmed.

The order appealed from is affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

denied. The pleadings, the motion, and the affidavits upon which that motion was heard in the trial court are included in the transcript. The bill of exceptions proposed by appellant and settled by the trial court recites: "That said motion was heard upon the papers included above and the pleadings contained in said cause. * * *"—On the present motion in this court it is not made to appear that the matters referred to in the "Proposed Certification of County Clerk" were before the trial court upon the hearing of said motion nor that said matters are material upon the hearing of this appeal on the merits. The motion is therefore denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

109 Cal. App. 294

STERN et al. v. HILLMAN.

Civ. 7564.

District Court of Appeal, First District,
Division 2, California.

Nov. 1, 1930.

Appeal and error ⇐659(4).

Matters in proposed certification of county clerk could not be incorporated in record on appeal, where not before trial court on motion for jury trial, nor material on hearing of appeal from denial of jury trial.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by L. Stern and another against A. M. Hillman. Judgment for plaintiff, and defendant appeals. On motion by appellant on suggestion of diminution of record to incorporate certain matters in record on appeal.

Motion denied.

Arthur W. Jonas and Otto G. Kuklinski, both of San Francisco, for appellant.

Livingston & Livingston, of San Francisco, for respondents.

SPENCE, J.

This is a motion by appellant, upon suggestion of diminution of the record, to incorporate in the record on appeal certain matters contained in a "Proposed Certification of County Clerk."

From the bill of exceptions it appears that appellant seeks a reversal solely upon the ground that his motion for a jury trial was

111 Cal. App. (Supp.) 769

**CROOKS v. PEOPLE'S FINANCE & THRIFT
CO. OF POMONA VALLEY.**

C. A. 212.

Appellate Department, Superior Court, Los
Angeles County, California.

Nov. 3, 1930.

1. Justices of the peace ⇨141(1).

Appellate Department of Superior Court held to have jurisdiction over appeal from justice court in action to recover treble amount of usurious interest (St. 1919, p. lxxxiii, §§ 2, 3).

2. Statutes ⇨162.

In absence of manifest legislative intention to contrary, or irreconcilable inconsistency, special statute is not repealed by general statute.

3. Pawnbrokers and money lenders ⇨2.

Statute regulating personal property brokers, and authorizing 24 per cent. interest, held repealed pro tanto by Usury Law, allowing only 12 per cent. interest (St. 1909, p. 969, § 2 as amended by St. 1911, p. 978; St. 1919, p. lxxxiii, § 2).

4. Statutes ⇨205.

Unconstitutional part of statute may be examined to ascertain scope and effect of valid parts.

5. Statutes ⇨217.

If construction of statute be uncertain, it is proper to resort to arguments submitted to voters at time it was adopted as initiative measure.

Appeal from Justice Court, San Jose Township; U. E. White, Justice.

Action by W. H. Crooks against the People's Finance & Thrift Company of Pomona Valley. Judgment for plaintiff, and defendant appeals.

Affirmed.

Fickeisen & Richardson, of Los Angeles, for appellant.

Allard & Stead, of Pomona, for respondent.

SHAW, Acting P. J.

This action was brought by plaintiff under the usury law to recover \$154.74, being treble the amount of usurious interest alleged to have been paid by plaintiff to defendant. The court gave judgment for plaintiff for the sum of \$94.05, from which defendant appeals.

[1] A question has been raised as to the jurisdiction of this department over this appeal. We have concluded that we have such

jurisdiction, but do not deem it necessary to discuss the reasons for that conclusion at this time.

Coming to the merits of the appeal, it appears from the record without dispute that the plaintiff borrowed a sum of money from defendant and agreed to pay and did pay to the defendant for the loan interest at the rate of 2 per cent. per month, amounting to \$31.35, which interest was paid less than one year before this suit was brought; that the defendant was at the time doing business as a personal property broker as that term is defined in the act of 1909 (St. 1909, p. 969) regulating personal property brokers; and that the transaction satisfied the requirements of that act. Upon these facts, but one question of law is presented; that is, whether the Usury Law, adopted as an initiative measure in 1918 (St. 1919, p. lxxxiii), repealed the act of 1909 regulating personal property brokers, as to the rate of interest that may be charged by such brokers on loans. The act of 1909 was amended in 1911 (St. 1911, p. 978), and has since stood unchanged. The Usury Law is the later in point of time, but it contains no provision expressly repealing the other act, and hence the question is whether it accomplished such repeal by implication. The act regulating personal property brokers has been upheld (Eaker v. Bryant, 24 Cal. App. 87, 140 P. 310; Matter of Stephan, 170 Cal. 48, 148 P. 196, Ann. Cas. 1916E, 617), but these cases were decided before the Usury Law was adopted and have no bearing upon the question before us.

[2] Appellant contends that the act of 1909 was not affected by the usury law, relying on the rule which is stated in Riley v. Forbes, 193 Cal. 740, 745, 227 P. 768, 770, as follows: "Where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter, so far as coming within its particular provisions."

It is perhaps impossible to reconcile the many decisions on this point, but the decision of each case must depend largely on the provisions of the particular statutes involved. In Riley v. Forbes, supra, it was held that a statute authorizing the state board of accountancy to collect and keep certain fees and to use them in payment of its expenses was not repealed by a later statute requiring all "moneys belonging to the state" collected by any board to be paid into the state treasury; the court saying that "we find no irreconcilable inconsistency between the two acts," and that the fees collected by the board were not money belonging to the state within the meaning of the later act. The language first

quoted from *Riley v. Forbes* was there quoted from *Bateman v. Colgan*, 111 Cal. 580, 586, 44 P. 238, 240. In *Bateman v. Colgan*, the court said there was no inconsistency between the acts under consideration, and further said, quoting with approval from a New York decision (*Van Denburgh v. Greenbush*, 66 N. Y. 3): "It is a rule of construction that a special statute providing for a particular case, or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would be taken strictly, and, but for the special law, include the case or cases provided by it."

In *Home for Care of Inebriates v. Reis*, 95 Cal. 142, 148, 30 P. 205, 207, the court held that a statute directing fines imposed by the San Francisco police court on charges of drunkenness to be paid to the plaintiff was not repealed by a later statute providing that all fines imposed by said court should be paid into the city treasury. The court here called attention to the fact that the later statute was but a re-enactment of an older one which antedated the special statute, and quoted with approval from *Endlich on Interpretation of Statutes*, the following: "A general act is to be construed as not repealing a particular one,—that is, one directed towards a special object or a special class of objects. * * * Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature has been turned to the special act, and that the general one was intended to embrace the special cases within the previous one."

On the other hand, there are many California cases where a later general statute has been held to repeal a prior special statute. Among these cases are: *People v. Grippen*, 20 Cal. 677; *People v. Burt*, 43 Cal. 560; *People v. Sargent*, 44 Cal. 430; *Pennie v. Reis*, 80 Cal. 266, 22 P. 176, 177; *People v. Henshaw*, 76 Cal. 436, 440, 18 P. 413, 415; *Kennedy v. Board of Education*, 82 Cal. 483, 492, 22 P. 1042; *Ex parte Ah You*, 82 Cal. 339, 22 P. 929; *Miller v. Curry*, 113 Cal. 644, 647, 45 P. 877, 878.

In *People v. Henshaw*, supra, the court held that a special act providing a police court for the city of Oakland was repealed by a later act providing for police courts in all cities of a certain size, which included Oakland. The court said: "Where, as in the present case, the latter statute is repugnant to the former, and both cannot stand together, the latter will repeal the former."

In *Pennie v. Reis*, supra, the court said that a repeal by implication "takes place whenever by subsequent legislation it becomes apparent that the legislature did not intend the former act to remain in force."

In *Miller v. Curry*, supra, the court said that the rule referred to by appellant "has its limits, and means no more than that in arriving at the intent of the legislature, which is always to govern, and endeavoring to deduce that intent from the acts themselves, unless there be plain and explicit terms of repeal in the later act, or unless the provisions of the two acts be so inconsistent as that both may not stand, it will be assumed that the legislature, in making general provision for all cases, did not mean to destroy the effect of a rule laid down with explicit care and directness, and applicable to a particular class of cases. But this, after all, is but a method of arriving at the legislative intent when other and better means are not available. * * * The rules that we have been considering apply only in a case where a repugnancy between the two acts is not manifest. If such a repugnancy exists, then it is well settled that the earlier act must fall. *End. Interp. St. § 206*. Only so far as the two acts are not in their terms incompatible with each other is the earlier act allowed to stand."

In the *Washer Case*, 200 Cal. 598, 254 P. 951, the Supreme Court applied the rule mentioned by appellant to the Usury Act so far as to hold that it does not affect or repeal statutes respecting the control of corporate securities, public or private, but said in that connection: "We are not here deciding what may be the effect of the act upon existing statutes regulating the business of pawnbrokers and other personal property brokers." Page 607 of 200 Cal., 254 P. 951, 955.

[3] Comparing now the two statutes here involved, we find that the act regulating personal property brokers (St. 1909, p. 969), as amended in 1911 (St. 1911, p. 978), defines the term "personal property broker" to include "every person or corporation engaged in the business of loaning or advancing money or other thing" on the security of any chattel mortgage or other contract hypothecating personal property, the use or possession of which is not to be in the lender, or on the security of a lien upon, assignment of, or power of attorney relating to "wages, salary, earnings, income or commissions." Section 1. It further provides that "such personal property broker may charge, receive and collect a benefit or percentage upon money or other thing advanced, or for the use and forbearance thereof, of two per centum per month where such loan or advance is made upon security properly falling within the scope of business as set forth in section 1 hereof" (section 2); that such brokers shall not make or receive

any further charges for any services or on any pretext in connection with the loan if such charges plus the interest would amount to more than 2 per cent. per month, except certain fees necessary to give legal effect to a mortgage (section 4); that no contract made by a personal property broker in his business shall be valid "if there is therein or thereon directly or indirectly charged, accepted or contracted to be received" a greater benefit, discount or interest than at the rate of two per cent. per month, and if interest at any greater rate is "directly or indirectly advanced or paid" upon such a contract, the excess above 2 per cent. per month may be recovered by the person who paid it (section 4).

The Usury Law provides: "No person, company, association or corporation shall directly or indirectly take or receive in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than at the rate of twelve dollars upon one hundred dollars for one year. * * * Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest" (section 2); that every person who pays interest at a rate exceeding 12 per cent. per annum may recover treble the interest paid; and that a violation of section 2 of the act is a misdemeanor (section 3). Also in section 3 there is a provision regarding secured loans to which we shall refer later.

Reducing these statutes to their lowest terms, the act of 1909 provides that personal property brokers may take interest on a loan at the rate of 24 per cent. per annum, and the Usury Law provides that no lender may take interest at a rate greater than 12 per cent. per annum. It appears to us that there is a plain and irreconcilable repugnancy between these two provisions; and, although the Supreme Court in the Washer Case, *supra*, declined to decide the question now before us, we think the conclusion we have just stated is foreshadowed by that part of the opinion in that case wherein the court said: "The inevitable conclusion from these views is that sections 1 and 2 of the act known as the Usury Law are, in all respects, valid and cover both *secured* and *unsecured* obligations" (page 608 of 200 Cal., 254 P. 951, 955), and by the following statement made by the court while holding unconstitutional the provision of section 3, which we will quote in our next paragraph: "It would appear, therefore, that the draftsman of the Usury Law statute in California undertook to broaden the provision respecting personal property loans so as to include secured obligations of all kinds on real and personal property ex-

cept corporate bonds, municipal and other public bonds, without realizing that the *preceding sections of the act fully covered secured loans.*" (Italics added by us.)

[4] Applying the rule concerning the implied repeal of a special statute by a general statute, as declared in the authorities previously cited, we find a clear indication that the attention of the lawmaking power when enacting the usury law was turned to the act regulating personal property brokers, and that the repeal of the last-mentioned act was intended, in the following part of section 3 of the Usury Law, which describes in detail the business of a personal property broker and denounces as a misdemeanor acts which he is permitted to do by the act of 1909: "Any person, company, association or corporation, who shall ask, demand, receive, take, accept or charge more than twelve per centum per annum upon the sum of money actually loaned for the forbearance, use or loan thereof, when the repayment of the money loaned shall be secured by a mortgage, trust deed, bill of sale, assignment, pledge, receipt or other evidence of debt, except corporation bonds, and municipal and other public bonds, upon property, real or personal or by assignment of wages * * * shall be guilty of a misdemeanor."

This provision was, it is true, held unconstitutional in the Washer Case, *supra*, because it excepted certain classes of securities from its ban, but this holding was coupled with the declarations already quoted that other parts of the act had the same effect; and even an unconstitutional part of a statute may be examined for the purpose of ascertaining the scope and effect of the valid parts thereof. *Ex parte Fedderwitz*, 6 Cal. Unrep. Cas. 562, 572, 62 P. 935, 940; 36 Cyc. 1131, 1132.

[5] If there were any uncertainty as to the construction of the Usury Law on this point, which we do not concede, it would be proper to resort, in aid of its interpretation, to the arguments submitted to the voters at the time it was voted upon and adopted as an initiative measure. *Story v. Richardson*, 186 Cal. 162, 165, 198 P. 1057, 18 A. L. R. 750; *Yosemite L. Co. v. Industrial Acc. Comm.*, 187 Cal. 774, 781, 204 P. 226, 20 A. L. R. 994. On examining the pamphlet containing these arguments, we find there officially listed, among the provisions which will be repealed by the proposed Usury Law, that part of the act of 1909 which permits personal property brokers to charge interest at the rate of 2 per centum per month; and the respective arguments, while not mentioning the act of 1909, proceed on the assumption that it will be affected by the proposed Usury Law. In view of these facts, it is clear that the voters who read these pamphlets understood that the proposed law would limit the rate of in-

terest to be charged by personal property brokers.

Our conclusion is that the Usury Law has repealed pro tanto the act regulating personal property brokers, and such brokers may not charge or receive interest at a rate exceeding 12 per cent. per annum.

The judgment of the trial court is therefore right, and it is affirmed, with costs of appeal to the respondent.

We concur: BISHOP, J.; TAPPAAN, Judge pro tem.

111 Cal. App. (Supp.) 776

PEOPLE v. SKLAR et al.
Cr. 425.

Appellate Department, Superior Court, Los Angeles County, California.

Nov. 3, 1930.

1. Riot ☞1.

Unlawful assembly ☞1.

Offense of "remaining at place of riot or unlawful assembly" cannot occur until statutory command to disperse has been given (Pen. Code, §§ 409, 726).

Pen. Code, § 409, makes it unlawful to remain present at the place of a riot, rout, or unlawful assembly "after the same has been lawfully warned to disperse." Section 726 provides that where a number of persons are unlawfully or riotously assembled, the peace officers named in the section must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the state, immediately to disperse.

2. Riot ☞1.

Unlawful assembly ☞1.

Statute requiring certain peace officers to command riotous or unlawful assembly to disperse held to include police officers (Pen. Code, § 726).

Pen. Code, § 726, provides that where there is an unlawful or riotous assembly, "the sheriff of the county, and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them," must command the assembly to disperse.

3. Riot ☞6.

Unlawful assembly ☞3.

Facts held to show required command to disperse was not given, and hence offense

of "remaining at place of riot or unlawful assembly" after warning to disperse was not shown (Pen. Code, §§ 409, 726).

Defendants were individually and separately told by different police officers scattered among the crowd to "move on," or "get out of the crowd," but it did not appear that any general proclamation was made to the crowd, calling on them to disperse, or that such commands as were given purported to be "in the name of the people of the state," nor were any of the defendants, except perhaps one, told to disperse or to leave the place of the riotous and unlawful assembly.

4. Riot ☞1.

Unlawful assembly ☞1.

Offense of "remaining at place of riot or unlawful assembly" does not necessarily involve participation in riot or unlawful assembly (Pen. Code, § 409).

Appeal from Municipal Court of Los Angeles; Charles L. Bogue, Judge.

Carl Sklar and others were convicted of a violation of Pen. Code, § 409, and they appeal.

Reversed and remanded.

Leo Gallagher, of Los Angeles, for appellants.

Lloyd S. Nix, City Pros., and J. W. Matherly, Deputy City Pros., both of Los Angeles, for the People.

SHAW, Acting P. J.

[1, 2] By the complaint in case numbered 13363 in the municipal court, the appellants were charged with a violation of Pen. Code, § 409, which makes it unlawful to remain present at the place of a riot, rout, or unlawful assembly "after the same has been lawfully warned to disperse." The words quoted no doubt refer to Pen. Code, § 726, which is in pari materia, and provides that where any number of persons are unlawfully or riotously assembled, "the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the state, immediately to disperse." On comparison of the two sections, it is clear that a violation of section 409 cannot occur until the command mentioned in section 726 has been given. The list of officers who are authorized by section 726 to give this command does not expressly include police officers, but we think the terms therein used may be held by construction to include the police.

[3] The evidence shows that at the time charged there was at least an unlawful assembly, as defined in Pen. Code, § 407, and probably even a riot, as defined by Pen. Code, § 404; that appellants and a large crowd of other persons were present at the scene of this unlawful assembly or riot while it was in progress; that the appellants were individually and separately told by different police officers who were scattered among the crowd to "move on," or, in the case of appellant Bulgian, to "get out of the crowd." It does not appear that any general proclamation was made to the crowd calling on them to disperse, or that such commands as were given purported to be "in the name of the people of the state." Neither were any of the defendants, except perhaps Bulgian, told to disperse, or to leave the place of the riotous and unlawful assembly.

We think the facts above stated do not show a compliance with Pen. Code, § 726. That section is evidently derived from the English statute of 1 Geo. I, st. 2, c. 5 (1714), which provided in effect that when a riot occurred and continued for one hour after proclamation made in the king's name to disperse, the participants should be guilty of a felony, and directed that such proclamation should be made by a justice of the peace, or sheriff of the county or his undersheriff, or by the mayor, bailiff, or other head officer, or justice of the peace of any city or town, who should go among the rioters, "or as near to them as he can safely come" and with a loud voice command them to keep silent, and then make proclamation to them in a certain form of words prescribed by the statute, commanding them, in the king's name, to disperse (3 Ward's Justice, 826, 827). This mode of proceeding is commonly referred to as "reading the riot act." This English statute has been the model for laws adopted by various states of this country. Section 726 of our Penal Code was obviously based upon it, and its intent is to provide a similar procedure. Under our Code section no particular form of proclamation is required, but the section does require that something in the nature of a general command to disperse be given and that it purport to be in the name of the people of the state. Since there was nothing of this kind in the present case, the offense charged was not established.

[4] We are not to be understood as holding that the police may not disperse a riot, rout, or unlawful assembly, or arrest those actually participating therein without any such formal command as is required by Pen. Code, § 726. We have no doubt that they may do so under their general powers for the preservation of the public peace and the arrest of offenders who commit misdemeanors in their presence. But the special offense denounced

by Pen. Code, § 409 and charged against these defendants does not necessarily involve participation in the riot, rout, or unlawful assembly, and cannot be committed until the requirements of section 726 have been met.

The judgments in case 13363 in the municipal court are reversed as to all the appellants therein, and the cause is remanded for a new trial.

We concur: BISHOP, J.; TAPPAAN, Judge pro tem.

COMMUNITY LUMBER CO. OF BALDWIN
PARK et al. v. CHUTE et al., and four
other cases.*
L. A. 10156.

Supreme Court of California.
Oct. 31, 1930.

Rehearing Granted Nov. 29, 1930.

1. Bills and notes ☞376.

Defense of usury in connection with note is personal between immediate parties and cannot be raised against purchaser in due course, for value.

2. Usury ☞111(2).

Party seeking to take advantage of usury against transferees of obligation, not usurious on face, must affirmatively plead usury.

3. Corporations ☞92.

Note held not vitiated in hands of purchasing corporation, where transfer was for value and not connected with subsequent sale of corporation's stock allegedly not for cash.

4. Mortgages ☞151(3).

Trust deed for purchase money, made by agreement subsequent to trust deed to debtor's agent for procuring fund for paying for erection of structure, and recorded before commencement of work or furnishing of materials, held superior to mechanics' lien claims.

By agreement between purchaser of property and vendor, trust deed, given for whole or greater part of purchase money, was made second in lien to a trust deed executed to secure certain promissory notes, which notes or the proceeds thereof were to be used or negotiated by grantee under first trust deed for purpose of procuring and paying for necessary materials and labor for erection of structure which grantee under first trust deed

was to undertake and carry forward to completion on behalf of and as agent of such purchaser.

PRESTON, J., dissenting in part.

In Bank.

Appeals from Superior Court, Los Angeles County; John L. Fleming, Judge.

Actions by the Community Lumber Company of Baldwin Park and others, by George H. Whyte, Jr., by the Truscon Steel Company, and by C. W. Grizzelle and others, against W. H. Chute and others, and by the Weaver Roof Company against the West Coast Trimmings Company and others. From judgments establishing priorities respecting plaintiffs' mechanics' liens, plaintiffs appeal.

Affirmed.

Superseding opinion in 284 P. 466.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, James B. Ogg, of Alhambra, and Musick, Burr & Pinney and Mitchell, Silberberg & Davis, all of Los Angeles, for appellants.

Hulme, Hastings & Bartlett, of Los Angeles, for appellants Grizzelle and others.

Fleming & Robbins, of Los Angeles, for respondents.

Harry W. Hanson, J. H. Van Law, and A. G. MacRobbie, all of Los Angeles, for respondent J. A. Keeney.

M. W. Conkling, of San Diego, for respondent Western Discount Corporation.

Woodruff, Musick & Hartke, of Los Angeles, amici curiæ for respondents.

RICHARDS, J.

These appeals are from a judgment of the trial court in favor of the defendants and respondents in each of the actions brought by the several plaintiffs named herein, which had for their purpose the establishment and determination of the priority of these several plaintiffs as lien claimants as against certain incumbrances in the form of mortgages or deeds of trust affecting the property with respect to which these several plaintiffs seek to foreclose their respective mechanics' or materialmen's liens. These several cases were consolidated for the purpose of the trial in the lower court, and are also consolidated and presented in a single record upon appeal. The facts as set forth in the pleadings of the respective parties and as shown by the evidence and as found by the trial court are briefly these:

On or about June 1, 1925, and for some time prior thereto, one James A. Keeney was the owner of those certain premises which are sought to be affected by these several actions, and on or about said date sold the same to one W. H. Chute, who, with his wife, on June 1,

1925, made, executed, and delivered to said James A. Keeney their promissory note for the sum of \$5,000, which represented the whole or a considerable portion of the purchase price of the premises, and coincidentally therewith, and to secure said note, also executed a deed of trust covering the premises in question. At the time of the purchase of the premises and of the execution of the promissory note and trust deed, W. H. Chute contemplated the erection upon the premises of one or more buildings, for which it was necessary that he should borrow other and larger sums of money which were to be applied to the construction of said buildings. It was therefore agreed between himself and James A. Keeney that the latter was to permit his aforesaid deed of trust upon the premises to be and to be accepted by him as a second lien thereon and to be subject to a prior incumbrance in the form of a trust deed to the extent of \$15,000, which was to be or had been executed by W. H. Chute and wife and delivered to the Union Engineering Company, and which trust deed was to secure certain promissory notes to the extent of said \$15,000, and which promissory notes or the proceeds thereof were to be used or negotiated by the Union Engineering Company for the purpose of procuring and paying for the necessary materials and labor for the erection of said structure, which the Union Engineering Company was to undertake and carry forward to completion on behalf of and as the agent of said Chute. The foregoing incumbrances were duly executed and recorded on or about June 12, 1925. Thereafter the work of the erection of said structure went forward with the result that there were supplied by the several plaintiffs herein, and upon the order of the Union Engineering Company, the labor and materials for which these plaintiffs eventually filed the several liens which are sought to be foreclosed in these actions. In pursuance of the foregoing arrangement, and on or about June 12, 1925, the Union Engineering Company caused to be executed and delivered to one Leonard L. Jones a promissory note for the sum of \$6,500, which was to be secured by an assignment of the aforesaid note and deed of trust of W. H. Chute and wife for the sum of \$15,000, and which note for the sum of \$6,500 Jones presently sold and transferred to the Western Discount Corporation, receiving therefor the sum of \$6,000 in money, which was to be applied to the construction of said building, and which sum was for said purpose delivered to and so used by the Union Engineering Company. Thereafter and on or about August 4, 1925, the Union Engineering Company caused to be executed its certain promissory note in the sum of \$1,000 due thirty days after date, with interest thereon at the rate of 8 per cent. per annum, in favor of the Western Discount Corporation, and for which it received from the latter the

sum of \$950, and which promissory note was also to be secured by whatever equity the Union Engineering Company had in the promissory notes and deed of trust for the sum of \$15,000 theretofore executed by W. H. Chute and wife to it and by it assigned to Leonard L. Jones, and by him transferred to the Western Discount Corporation as security for the prior note of \$6,500. At the time of the institution of these several actions for the establishment and foreclosure of the plaintiffs' aforesaid mechanics' and materialmen's liens, there were outstanding and unpaid the foregoing obligations, to wit: The sum of \$5,000, with interest thereon, due to the defendant James A. Keeney and secured by the deed of trust to him and which had expressly been made the second incumbrance; the further sum of \$6,500 which was represented in the promissory note for the said sum, executed by the Union Engineering Company to Leonard L. Jones and by him transferred to the Western Discount Corporation and which note was secured by an assignment of the aforesaid promissory note and deed of trust of W. H. Chute and wife for the sum of \$15,000, and upon which said note for the sum of \$6,500 the Union Engineering Company had received from the Western Discount Corporation the sum of \$6,000, and which constituted a first incumbrance upon the premises; and the further sum of \$950 represented in the promissory note for \$1,000 executed directly by the Union Engineering Company to the Western Discount Corporation, and also secured by the aforesaid obligations of W. H. Chute and wife.

Upon the trial and submission of the cause the trial court made its findings of fact and conclusions of law, wherein it found that the aforesaid indebtedness to James A. Keeney, with the trust deed securing the same, constituted a second incumbrance upon the premises and as such was superior to the liens of the several lien claimants who are the plaintiffs herein. The court further found that the promissory note made and executed by the Union Engineering Company to Leonard L. Jones and by him transferred to the Western Discount Corporation and which was secured by the assignment of the \$15,000 note and trust deed of W. H. Chute and wife, was, to the extent of \$6,000, actually received thereon by the Union Engineering Company, a first lien upon the premises, and that the sum of \$950 actually received by the Union Engineering Company through its second loan from the Western Discount Corporation and covered by the same security, constituted also a first lien upon the premises, and as such was superior to both the lien of the defendant James A. Keeney and to the claims of lien of each of the respective plaintiffs herein. Upon the judgment based on said findings of fact the trial court directed the sale of the said premises under and by virtue of the terms of

the deed of trust of W. H. Chute and wife for the sum of \$15,000, and the application of the proceeds of such sale, after paying the expenses thereof, to the payment of the aforesaid amounts in the order of their precedence, that is to say, to pay to the Western Discount Corporation the sum of \$6,000, with interest thereon at the rate of 8 per cent. per annum from June 25, 1925; also the sum of \$950, with interest thereon at the rate of 8 per cent. per annum from August 4, 1925; to pay certain further sums aggregating \$609, being the amount expended by the Western Discount Corporation in preserving the property, for insurance, taxes, etc.; to pay from whatever sum remained in the hands of the trustee after making the foregoing payments, to the defendant James A. Keeney the sum of \$5,000, with interest thereon at the rate of 8 per cent. per annum from June 12, 1925; and finally, from whatever sum remained in the hands of the trustee, to pay to the plaintiffs herein, in the order to their respective lien claims, the several amounts found to be due thereon; and thereafter, in the event that any further sum remained in the hands of the trustee, to pay the same to the administrator of the estate of W. H. Chute and wife, deceased. From such judgment the respective plaintiffs herein have prosecuted their appeals.

[1, 2] The first contention which the appellants urge upon these appeals is to the effect that as to the promissory note for the sum of \$6,500 executed by the Union Engineering Company to Leonard L. Jones, and by him transferred to the Western Discount Corporation, the transaction was a usurious one for the reason that the sum of but \$6,000 was received thereon from the Western Discount Corporation, \$500 of the gross amount of the note having been retained by the Western Discount Corporation as a bonus for making the loan. The difficulty with this contention chiefly consists in the fact as found by the trial court, that the original transaction out of which this indebtedness arose was one between the Union Engineering Company and Leonard L. Jones, to whom for a valuable consideration the note was given, and that Leonard L. Jones thereafter and for a valuable consideration transferred the same to the Western Discount Corporation, who was a purchaser thereof in good faith and for value in the ordinary course of business before maturity, and without any notice or knowledge of any equity existing either between the Union Engineering Company and W. H. Chute, or between the Union Engineering Company and Leonard L. Jones. It is well settled by our recent decisions and those of the Appellate Court that the defense of usury is a personal defense between the parties to a transaction of this character and cannot be availed of against the purchaser of a promissory note in due course and for value. *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 254 P.

956, 255 P. 805, 53 A. L. R. 725, and cases cited; *Baker et al. v. Butcher et al.* (Cal. App.) 289 P. 236. A further answer to the foregoing contention is to be found in the fact that the appellants did not affirmatively or otherwise plead in any of their complaints herein that the transaction involved in the issuance and transfer of said promissory note mediately to the Western Discount Corporation was a usurious one, and it appears to have been settled by our recent decisions that where the obligation does not upon the face thereof disclose that it was usurious, those who seek to take advantage of the latent fact of usury, assuming that the same exists, as against transferees of the obligation, must affirmatively plead that the transaction was usurious. *Ames v. Occidental Life Ins. Co.* (Cal. Sup.) 291 P. 182, and cases cited; *Zimmerman v. Boyd*, 97 Cal. App. 406, 275 P. 509. The appellants, however, contend that these decisions are contrary to the ruling of this court in the case of *Wallace v. Zinman*, 200 Cal. 585, 254 P. 946, 62 A. L. R. 1341. But an examination of that case discloses no discord between it and the above more recent decisions, since in the latter case cited the alleged usury appeared upon the face of the obligation, and for that reason it was held that it was not necessary to specially plead the fact of usury.

The foregoing reasoning also applies to the appellants' contention with respect to the note for the sum of \$1,000 which was immediately executed by the Union Engineering Company to the Western Discount Corporation, and upon which a discount of \$50 was retained by the latter, but in respect to which there was no claim of usury set forth in the appellants' pleadings.

[3] The next contention of the appellant has also reference to the transaction in which the note of the Union Engineering Company for \$6,500 was executed to Leonard L. Jones and by him transferred to the Western Discount Corporation, the claim of the appellants being that at the time of the transfer of the note from Jones to the Western Discount Corporation a portion of the consideration therefor received by Jones consisted in the issuance to him by the Western Discount Corporation of certain shares of its capital stock to the extent of \$1,000 in face value, which transaction, according to the appellants' contention, was one in violation of the permit issued by the corporation commissioner, prescribing the terms upon which it could dispose of its capital stock and forbidding it to do so otherwise than by a practically cash transaction. The difficulty with this contention on the part of the appellants consists in the fact that the trial court found upon what appears to have been sufficient evidence that the stock transaction between Leonard L. Jones and the Western Discount Corporation was an independent transaction, occurring some time later than the transaction for the sale and transfer to the

Western Discount Corporation of the aforesaid note. We are unable to say that this finding on the part of the trial court is not in accord with and supported by the evidence in the case, and this being so, the stock transaction between these parties cannot be held to have affected the validity of the former transaction by which Jones received the sum of \$6,000 for and in consideration of his assignment of the aforesaid note of the Union Engineering Company to the Western Discount Corporation.

[4] The next contention of the appellants has relation to the priority of the promissory note and deed of trust held by the respondent Keeney over the lien claims of the several appellants herein. In support of their contention the appellants urge that the fact that the respondent Keeney was willing to agree and did agree that the lien of his trust deed given to secure the purchase price of the property which had been purchased by the Chutes should be postponed in favor of the subjection of the property to a prior lien in the form of the trust deed for the sum of \$15,000 given by the Chutes to the Union Engineering Company, and which sum, or so much thereof as might be realized thereon, was to be used by the latter in the course of the erection of a building upon the premises, must be given the effect of having subordinated his said lien to the claims of the plaintiffs herein, who had thereafter contributed labor and materials for the erection of the building and who should have been paid for the same out of the moneys to be derived by the Union Engineering Company through its negotiation of the note or notes secured by said trust deed. It would seem, however, that the respondent Keeney, while aware of such prior transaction and while willing that his lien in the form of a trust deed for practically the whole of the purchase price of said premises should be subordinated thereto, was not a party to said transaction and was in no wise in control of any act or thing which the Union Engineering Company might do in carrying out its engagement with the Chutes. It further appears that Mr. Keeney in due course recorded his aforesaid trust deed and that this was done by him prior to the doing of any work or the furnishing of any material on the part of these appellants in the course of the construction of any building or buildings upon the premises covered by the trust deed. We are thus unable to perceive how any equities could have arisen, either by estoppel or otherwise, in favor of these appellants who furnished whatever labor and materials they or any of them may have supplied in the erection of said structure with full knowledge of the existence of the prior recordation of the trust deed of the respondent Keeney, which in the ordinary course of things would constitute a prior lien to that of these lien claimants. We discover nothing in the case of *Fuller v. McClure*, 48

Cal. App. 185, 191 P. 1027, which can be held to furnish comfort to these appellants upon this point. On the contrary, we are satisfied that rightly read it supports the respondents' contention herein.

It follows from the foregoing that the conclusions of the trial court with respect to the proper allocation of the several claims of liens upon the premises affected by the foregoing transactions are correct, and that its judgment for the sale of the premises affected and for the disposition of the proceeds thereof in accord with its foregoing conclusions should be and the same is hereby affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

PRESTON, J. (dissenting).

I find myself unable to agree in toto with the views announced by the learned justice in the above-entitled cause. I agree with all that is said down to the question of priority between the lien claimants and Keeney. Keeney allowed a prior first lien of \$15,000 to be created, to take precedence over his mortgage. He commissioned the Union Engineering Company to procure the necessary building material and labor to construct a building on the property in question. The engineering company procured the labor and material here in controversy which actually went into the construction of the building. The court now decrees a sale under the prior mortgage and so marshals the funds as to place the Keeney mortgage ahead of the lien claimants.

I think Keeney should be estopped to assert the priority of his mortgage as long as any portion of the \$15,000 remains unconsumed inasmuch as he approved the transaction for the furnishing of labor and materials. I think this would be true even though these claimants had filed no statutory lien claims. I think it is a matter of equity as between the parties and the former owner must be estopped to assert the priority of his claim. For these reasons, I think the judgment of the court below should be modified in this respect.

211 Cal. 45

OSWALD v. CITY OF EL CENTRO.
L. A. 10353.

Supreme Court of California.
Nov. 3, 1930.

Rehearing Denied Nov. 28, 1930.

1. Municipal corporations ⇨362(2).

Power of board of trustees to grant extension of time for completing street improvement contract could not be arbitrarily exercised (St. 1911, p. 730).

2. Municipal corporations ⇨362(2).

Board of trustees was required to act upon application for extension of time to complete street improvement contract, and in so doing could not consider matters not germane to subject-matter (St. 1911, p. 730).

3. Municipal corporations ⇨374(1).

City could not justify its exaction of lease of property from contractor at nominal rental as method of recoupment of loss for alleged inefficient work performed under prior contract.

4. Contracts ⇨95(1).

Freedom of will is essential to valid contract.

5. Municipal corporations ⇨362(2).

Where city officials compelled contractor to lease property to city for nominal rental before officials would extend time for completing contract, lease was void.

6. Cancellation of instruments ⇨58.

In action to cancel void lease, damage was rental value for term that owner had been deprived of possession.

In Bank.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by George H. Oswald against the City of El Centro. From the judgment, plaintiff appeals.

Reversed.

George D. Blair, of Los Angeles, and Hickcox & Trude, of El Centro, for appellant.

Dorsey G. Whitelaw and S. P. Williams, both of El Centro, for respondent.

SEAWELL, J.

This appeal is taken by plaintiff from a judgment refusing the cancellation of a certain lease entered into by plaintiff and defendant. The grounds upon which the validity of said lease is assailed by plaintiff and appellant are that it was executed without consideration to appellant; that it was obtained by means of intimidation, oppression, menace, and coercion practiced by defendant upon plaintiff; that the entire transaction is violative of and contrary to public policy and good morals. No serious disagreement exists between counsel to this appeal as to the facts of the case as hereafter related. Those not expressly admitted are not controverted.

The controversy arises out of a street improvement contract, which had its inception on June 4, 1924. Some two years prior to that date, George H. Oswald, the plaintiff and appellant, was awarded a contract by the city

of El Centro to perform certain construction and improvement work ordered by said city. The work, in due time, was completed and accepted by said city. It is the contention of said city that said improvements contained latent defects which rendered them, within a short time after the acceptance thereof, unserviceable, and the city was required to expend large sums of money thereafter in repairing said defective construction.

On November 30, 1923, by resolutions of intention Nos. 261 and 262, respectively, said city awarded contracts to the Los Angeles Paving Company for the paving and improvement of two other certain streets within said city, which contracts were, on April 10, 1924, assigned to appellant, Oswald, who thereupon entered upon the performance of said contracts, and after prosecuting the same with diligence it became evident that the work could not be completed within the time fixed by the superintendent of streets and that it would require an extension of two weeks beyond the time limit fixed by said superintendent of streets for the completion of said work. Oswald filed his application in writing for an extension of time, which matter came regularly before the city trustees on June 4, 1924, for action thereon. No fault was found in any respect with the work as performed or the materials as furnished by the appellant in the construction of said improvements, nor with the diligence with which the improvements had been prosecuted. In fact, the construction work was performed under the close scrutiny of the city engineer and superintendent of streets and strictly conformed with the plans and specifications.

The extension requested by appellant was the first and only request made by him and the findings of the court and admissions of counsel for respondent are to the effect that said work could not have been completed within the time provided in said contracts. The work, which was a district bonded improvement, was inaugurated pursuant to the Improvement Bond Act of 1911 (St. 1911, p. 730), together with the amendments thereto. By said statute the superintendent of streets is authorized to make all written contracts that pertain to the street department. He is directed to fix the time for the commencement and for the completion of the work, which must be prosecuted with diligence thereafter to completion, and he may extend the time so fixed from *time to time* under the direction of the city council. All applications for such extensions of time, if in writing, must be filed in the office of the clerk before the expiration of the original time fixed in the contract, or in the time granted by the extension, as the case may be. Any extension of time shall not release the surety upon any bond required under the act. The work must in all cases be under the direction and to the satisfaction of

the superintendent of streets, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent of streets. If the contractor fails to complete the work within the time limited in the contract, or within the further time as the city council may give him, the superintendent of streets shall report such delinquency to the city council, which may relet the unfinished portion of said work after pursuing the formalities prescribed in said act for the letting of the whole in the first instance. It also contains the provision that it is to be liberally construed to the end that its purposes may be effective.

[1] The period in which the improvements shall be completed is but the result of an estimate made by the superintendent of streets as to time that will be required to complete the work, and it is clear from sections authorizing extensions of time for the completion of such work that the power of the board of trustees to grant said extensions is not a power to be arbitrarily exercised, but it is to be exercised when the exigencies of the particular case reasonably justify the granting of extensions of time. No claim is made that the request was not reasonable or that the failure of the completion of the improvement was attributable to the unreasonable delay or the fault of appellant. That the extension requested, and which was granted upon appellant yielding to the pressure brought to bear upon him, was a reasonable request and one which would have been granted, as in ordinary cases, but for the opportunity presented by fortuitous circumstances to apply coercive methods to compel the execution of the lease which appellant seeks to have canceled, there is not, within the case presented, room for doubt. The extension applied for was the first and only extension requested by appellant, and it conformed with the requirements of the statute in every particular.

Appellant was at all the times herein mentioned the owner of real estate situate in the city of El Centro upon which he operated a street-paving plant consisting of tracks, roller, and such equipment as is necessary for the construction and repair of general street improvements. The value of the real estate and of the plant, considered separately, took a wide range in the evidence. The court found, upon widely conflicting testimony, that the value of the real property and plant at the time said lease was executed was approximately \$26,000. No finding was made as to the plant's rental value.

Appellant was personally present, and presented his case when the matter came regularly before the board of trustees for action on said evening of June 4, 1924. The application for an extension of time met with the positive refusal of the board unless the appellant would consent to enter into the lease of

said plant for a nominal money consideration. The proceedings had at said meeting, as told by the plaintiff and which are not questioned or disputed, but, on the contrary, are corroborated by members of the board, were substantially as follows:

"I was present at the meeting of the Board of Trustees at 7:30 p. m., on June 4, for the purpose of asking for an extension of time on this contract and had a conversation with the members of the Board of Trustees at that time.

"I was sitting back there in a seat and they were doing their regular business and Lavayea asked me what I wanted and I told him I wanted an extension of time. Mr. Lavayea was chairman of the Board and Mr. Fawcett [councilman] then spoke up and told me that—started in to talking and told me, he said, 'Mr. Oswald you can't get an extension of time, and furthermore if we do give you an extension of time you will have to do certain things, first put a two-inch asphalt wearing surface over several streets, Main Street, Fourth, Len Rey, Sandalwood and a few others. [The repair work mentioned was to be done on streets constructed by appellant some two or three years prior to June 4, 1924.] Furthermore, you will have to lease this land to the City for ten years at a dollar a year. * * * We have you where we want you * * * you will have to be a good dog, we got you where we want you.' And I plead with him and told him I couldn't do it, but he said, 'Nevertheless George, that is what you got to do.' I told him, I said, 'Mr. Fawcett, don't you realize that this is a lot of money that I have got tied up here?' He said, 'I don't care, George, whether you lose the whole thing or not.' Then I told him, I said, 'Mr. Fawcett, I can't do that,' and he said, 'George, you've got to do this, we've got you where we want you,' and then he said, 'Well we might give you an extension of time by leasing the plant to us for ten years and not putting down the two-inch surface,' like he spoke before and I plead with him and plead with him and it didn't seem to affect the Board at all, he kept on saying he had me where he wanted me and I would have to be a good dog. I said, 'If that is the Board's attitude,' I said, 'gentlemen I will do just exactly what you want me to do, if that is what I've got to do. It is not right. It is not fair, and it has never been done in the history before to my knowledge.' I told him in regard to an extension of time that it was a custom all over in all these little cities and there was never a question of giving an extension of time where the work was carried out in half ways decent manner. And he said, 'Now George if that—if you want to do that; why I will have the city attorney draw up a lease and we will adjourn and have a special meeting tomorrow,' and that meant the fifth of June, 'and you can sign

this lease and we will then give you an extension of time.' So that was done."

The board met the next day, when the city attorney presented said lease, which was executed by appellant, wherein it is recited that the lessor, appellant, "in consideration of the sum of \$10 and other valuable and sufficient considerations" paid to him by the lessee, city of El Centro, leased for a term of ten years from the date thereof, lots 21, 22, and 23, situate in block 49 of said city, together with the paving plant and all machinery and equipment on said premises used in connection with said paving plant, also one twelve-ton roller, giving and granting unto the lessee the full and unconditional right to the occupation of said premises and the use thereof at all times during said term of ten years, guaranteeing and warranting the use thereof. It was further provided therein that appellant was to keep said paving plant and all machinery and equipment of every kind and nature used in connection therewith in good repair for operation at all times during said ten-year term at his own expense. It also provided that in the operation of said plant and equipment appellant should have the right at his option to furnish a man approved by the board of trustees to direct the operation of said plant and roller, at his own expense, if he should elect to do so, upon fifteen days' notice from the city of its intention to operate said plant and roller. No consideration was given to appellant for the execution, unless it can be said that the extension granted constituted a good or sufficient or valuable consideration. At the time the lease was executed, appellant said to the board that it was a crime to take advantage of him in such a manner and that they held a club over his head and they might as well hang him.

[2, 3] No consideration in fact passed to appellant as a consideration for executing the lease, unless it can be said that the performance of official duty is the subject of barter. Respondent admits in its answer that it refused any extension of time to appellant unless he should execute said lease, and that appellant executed the same in order to save himself many thousands of dollars. The board was required by law to act upon the application, and in so doing it had no authority to consider matters which were not cognate or germane to the subject-matter of the contracts, which was the improvement of the streets described therein and none other. Respondent undertakes to justify its exaction as a legitimate method of recoupment of a loss which it claims to have sustained by reason of inefficient work performed under other contracts made with appellant some two years prior to the execution of said lease. Appellant denies that respondent suffered any loss through his fault. We have no means of determining the merits of those controversies.

It is sufficient to say that said former street work was duly accepted, and any controversy concerning it has long since been foreclosed. No contractual relation existed between the two transactions. As to this proceeding, the prior transactions are *ultra vires*.

[4, 5] It is evident from a statement of the case that the lease is void for lack of consideration of any kind known to the law and, further, that it violates the public policy rule of the state. Clearly it was the product of compulsion and the employment of coercive methods by which the exercise of freedom of will, which is always essential to a valid contract, was unquestionably overcome by officers of the city acting under color of official authority. It is not necessary to discuss the question of public policy. The principles of law which condemn the transaction as being in violation of public policy are elemental.

The action was brought within the statutory period prescribed by law, and no question of laches is involved.

[6] The criterion of damage in such cases as this is the rental value for the term that the owner has been deprived of possession.

Judgment reversed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

211 Cal. 16

CITY OF OAKLAND v. E. K. WOOD LUMBER CO.

SAME v. PACIFIC FUEL & BUILDING MATERIAL CO. et al.

S. F. 13375-13378.

Supreme Court of California.

Nov. 1, 1930.

1. Wharves ⇨16.

Right to collect tolls for wharfage and dockage is "franchise" which must have its origin in legislative grant (Pol. Code, § 2906).

[Ed. Note.—For other definitions of "Franchise," see Words and Phrases.]

2. Municipal corporations ⇨719(4).

Provision in lease of wharf prohibiting discrimination in rates, charges, or facilities *held* not effective to add anything to operative portion of lease not expressly granted (Civ. Code, § 1069; St. 1911, pp. 1254, 1258).

City by lease granted to private corporation, pursuant to St. 1911, pp. 1254,

1258, the right to use a certain wharf, and provided that no discrimination in rates, tolls, or charges, or in facilities for any use or service in connection therewith, shall ever be made, authorized, or permitted by lessee in management, conduct, or operation of any of the utilities, structures, or appliances mentioned in lease.

3. Wharves ⇨7.

Property rights of operator of wharf, in absence of franchise, exist only until there is lawful interference by state or municipality.

4. Navigable waters ⇨36(3).

Riparian owner on navigable water has no rights below high-tide line as against state, such lands having been reserved to states.

5. Navigable waters ⇨36(3).

Land below high-tide line on navigable water is held by state in trust for people.

6. Wharves ⇨1.

Erection of wharf, dock, or other construction over tidelands without license constitutes encroachment upon sovereignty of state.

7. Navigable waters ⇨39(3).

Littoral owner's right of access to navigable water may not prevail as against rights of state or its grantee (Const. art. 15, § 2).

8. Navigable waters ⇨43(2).

Right to erect wharves on tidelands may be vested subject to same trust by which title is held by state (Const. art. 15, § 3).

9. Navigable waters ⇨37(8).

State may grant tidelands to municipalities with power to maintain wharves and grant leases, privileges, and franchises to private persons (St. 1911, pp. 1254, 1258; Const. art. 15, § 3).

10. Municipal corporations ⇨719(3).

Municipality vested with tidelands for maintenance of wharves, piers, docks, etc., for public use may make reasonable wharfage and dockage charges (St. 1911, pp. 1254, 1258).

11. Commerce ⇨78.

Reasonable wharfage and dockage charges exacted by municipality to whom tidelands were granted for maintenance of wharves and docks *held* not "duty on tonnage," prohibited by Constitution (St. 1911, pp. 1254, 1258; Const. U. S. art. 1, § 10).

[Ed. Note.—For other definitions of "Duties," see Words and Phrases.]

12. Commerce ⇨78.

Tax upon tonnage may not be imposed under cover of laws or ordinances ostensibly to collect wharfage, and therefore they will be carefully scrutinized (Const. U. S. art. 1, § 10).

13. Evidence ⇨20(2).

Court judicially knows that vessels are not accustomed to stop in harbor, except at wharf or similar accommodation.

14. Municipal corporations ⇨719(3).

Though city may exact fee from vessels stopping at its wharves, charge may be imposed only in municipality's proprietary, as distinguished from sovereign capacity (St. 1911, pp. 1254, 1258; Const. U. S. art. 1, § 10).

15. Commerce ⇨78.

Imposition of wharfage or dockage fee by municipality by virtue of sovereignty alone, as distinguished from proprietary capacity, would constitute "duty on tonnage," prohibited by Constitution (Const. U. S. art. 1, § 10).

16. Commerce ⇨78.

Imposition of wharfage or dockage fee by municipality on all vessels coming into harbor, irrespective of whether they use facilities or not, constitutes "duty on tonnage," prohibited by Constitution (Const. U. S. art. 1, § 10).

17. Commerce ⇨78.

Ordinance requiring every vessel to land at municipality's wharves, or, upon paying same charge, be permitted to land at some other wharf, *held* "duty on tonnage," prohibited by Constitution (St. 1911, pp. 1254, 1258; Const. U. S. art. 1, § 10).

Ordinance provided, in substance, that all vessels with certain exceptions "shall land or moor at the exclusive landings and landing places" established and prescribed "and at no other place in said harbor, without the written permission of the harbor manager, first had for that purpose, which shall be granted on payment to the city" of the dockage, wharfage, and tolls which would have accrued to city if permit had not been granted.

18. Municipal corporations ⇨719(1).

Ordinance requiring all vessels with certain exceptions to moor at wharves of city or pay wharfage charges *held* not valid exercise of police power (St. 1911, pp. 1254, 1258).

In Bank.

Appeals from Superior Court, Alameda County; James G. Quinn, Judge.

Two separate actions by the City of Oakland against the E. K. Wood Lumber Company, and two separate actions by the City of Oakland against the Pacific Fuel & Building Material Company and another. From judgments dismissing actions, plaintiff in each case appeals.

Appeals consolidated pursuant to stipulation. Judgment in each case affirmed.

Markell C. Baer, of Oakland (Hilton J. Melby, of Oakland, of counsel), for appellant.

Decoto & Calkins, Calkins, Haga, Hall & Linforth, and Clark & Heafey, all of Oakland, for respondents.

PER CURIAM.

The appeals in the cases above entitled are from judgments dismissing the actions after an order sustaining demurrers to the complaints without leave to amend. On stipulation the appeals were ordered consolidated and will be disposed of by one opinion.

The city of Oakland filed two actions against E. K. Wood Lumber Company. In the first action it was alleged that the defendant operated a certain landing place or wharf in the city of Oakland as lessee, pursuant to a lease executed by the city of Oakland to said defendant; that pursuant to the provisions of ordinance No. 991 (N. S.), establishing the harbor of the city of Oakland and providing for the regulation and control of the landing and mooring of vessels at the exclusive landing places designated therein, the defendant became indebted to the city of Oakland for wharfage and dockage fees due by virtue of the landing and mooring to the defendant's wharf, which is not one of the exclusive landing places established by said ordinance of vessels belonging to or operated by the defendant without the written permission of the harbor manager first had and obtained and without also paying to the plaintiff any dockage or tolls upon said vessels, etc. The plaintiff by that action sought to recover the amounts to which it would have been entitled had said vessels landed or moored at the exclusive landing places provided for by said ordinance. By the second action against the defendant E. K. Wood Lumber Company, the plaintiff, pursuant to the same ordinance, sought to recover amounts alleged to have been collected on its behalf by the defendant, as wharfage and dockage tolls from other persons operating ships arriving and landing at the wharf leased by said defendant. Two similar actions were filed against the defendants Pacific Fuel & Building Material Company et al., as the operators of Pacific Fuel & Building Material Company wharf, also not included by said ordinance as one of the exclusive landing places of the harbor of the city of Oakland, with the exception that in the latter com-

plaints the source of the right to operate the wharf is not alleged. The time when the tolls, charges, etc., are claimed to have become due to the plaintiff covers a period beginning in February, 1917. The actions were filed in September, 1922.

It is not contended that the complaints do not allege sufficient facts to constitute a cause of action if said ordinance No. 991 (N. S.) is valid. The main question on the appeals involves the validity of said ordinance in so far as it provides that all vessels, with the exceptions therein stated, shall land or moor at the exclusive landing places established and maintained by the city of Oakland, or shall pay wharfage and other charges in accordance with section 4 thereof.

On May 1, 1911, several hundreds of acres of certain described tide and submerged lands in San Francisco bay were granted by the state to the city of Oakland (St. 1911, pp. 1254, 1258), in trust for use by said city only for the establishment, improvement, and conduct of a harbor, and for the construction, maintenance, and operation thereon of wharves, docks, piers, etc., without power of alienation, except in the granting of franchises for limited periods, or leasing the same or parts thereof for limited periods for purposes consistent with the trust. The act further provided that said harbor shall be improved by the city without expense to the state and shall always remain a public harbor for all purposes of commerce and navigation, but that neither the city nor its successors shall make any discrimination in the rates, tolls, or charges or facilities for any use or service in connection therewith.

Pursuant to said grant and said trust, the city of Oakland commenced and completed the construction of wharves and landing places within the area granted by the state. On April 16, 1916, the city council enacted ordinance No. 991 (N. S.), entitled: "An ordinance establishing the harbor of the City of Oakland, regulating, controlling and restraining the landing and moorage of steamboats, sailing vessels, rafts, tugboats and all other water craft in said harbor, regulating the maintenance and erection of structures and other incumbrances over or in the tidewaters of said harbor, and prohibiting encroachments therein and providing penalties." The ordinance established and declared the entire water front and all tidewater and navigable water in the city of Oakland as the harbor of the city of Oakland. Section 3 thereof prescribed certain specified portions of the water front as and for the exclusive landings and landing places in said harbor, which are the wharves and landing places controlled and maintained by the city of Oakland. Section 4 of said ordinance provides: "All steamboats, sailing vessels, rafts, tugboats, and all other water craft (excepting only such vessels, ferryboats

and other water craft of any railroad corporation having terminal facilities in said harbor as are operated and exclusively used by it in the conduct of its railroad) shall land or moor at the exclusive landings and landing places hereinabove established and prescribed, and at no other place in said harbor, without the written permission of the harbor manager, first had for that purpose, which shall be granted on payment to the City of Oakland of the dockage, wharfage and tolls which would have accrued to the City of Oakland if such permit had not been granted, and upon compliance with such harbor rules and regulations as are now or may hereafter be provided by the City of Oakland. Provided, however, that nothing herein contained shall be construed to restrain or control the lawful rights of the owner or holder of any valid subsisting franchise, privilege, or lease granted by competent authority." The ordinance provided fines or imprisonment for violation of its provisions.

On behalf of the defendants it is contended that the charges attempted to be imposed by the ordinance constitute a tax on vessels entering the port in violation of section 10 of article 1 of the Constitution of the United States which provides that "No State shall, without the Consent of Congress, lay any Duty of tonnage"; that the enactment cannot be upheld as a valid exercise of the police power of the city; and that as to the defendant E. K. Wood Lumber Company any collection of such charges as against it pursuant to the terms of the ordinance would unlawfully impair contract rights and constitute a taking without due process inasmuch as said defendant operates its own wharf by virtue of the lease executed to it by the plaintiff city, and that, so it is contended, said lease by its terms also grants the privilege or franchise, irrevocable for the terms of the lease, to collect dockage and tolls from others for the use of the leased wharf.

[1-3] While the right to collect tolls for wharfage and dockage is stated by some authorities to be an incident to the ownership of land abutting on a navigable body of water, the better view is that such a right is a franchise which must have its origin in a legislative grant. Dillon, *Municipal Corporations* (5th Ed.) vol. 1, p. 504, and cases cited. The right to collect wharfage and dockage tolls is a franchise. *De Witt v. Hays*, 2 Cal. 463, 468, 56 Am. Dec. 352; *Pac. Coast S. S. Co. v. Kimball*, 114 Cal. 414, 417, 46 P. 275; *Pol. Code*, § 2906. The lease executed by the plaintiff to the defendant, which is annexed to the complaint, does not expressly grant a franchise or privilege to conduct a general wharfage business. The language relied upon as nevertheless conferring the privilege is the following: "No discrimination in rates, tolls, or charges, or in facilities for any use or service in con-

nection therewith, shall ever be made, authorized or permitted by said lessee, its successors or assigns, in the management, conduct or operation of any of the utilities, structures or appliances mentioned in this lease." But such language may not be considered as being effective to add anything to the operative portion of such an instrument which is not expressly granted thereby. Instruments executed by a public body are construed most strongly in favor of the grantor. Civ. Code, § 1069; *Los Angeles v. San Pedro, etc.*, R. R. Co., 182 Cal. 652, 189 P. 449. In *Pac. Coast S. S. Co. v. Kimball*, supra, the grant of the leasehold estate in the wharf and the grant of such a franchise were distinguished, and the former was held not to include the latter, at least so as to constitute the lessee a public utility. Such an incident of the property rights of the operator of a wharf in the absence of a franchise must be deemed to exist, therefore, only until there is a lawful interference by the state or municipality. By its own terms, however, the ordinance excepts from its operation leases granted by competent authority. Pursuant to this exception the defendant's right to use the wharf to land vessels owned or operated by it is preserved and unimpaired, unless the requirement that the defendant's vessels dock at the exclusive landing places named is a valid exercise of the police power.

[4-7] It is recognized that the owner of land riparian to a navigable body of water has no right below the high-tide line as against the state, the property in and dominion and sovereignty over the soils "covered and uncovered by the flow and ebb of the neap or ordinary tides" having been reserved to the states subject to the rights granted to the United States by the Constitution (*Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331), and on the same equality to California (*Weber v. Harbor Commissioners*, 85 U. S. [18 Wall.] 57, 21 L. Ed. 798), which holds the title in trust for the benefit of the people for purposes of navigation and fishing (*Ward v. Mulford*, 32 Cal. 365, 372). The erection of a wharf, dock, or other construction over tidelands by individuals without license is an encroachment upon the sovereignty or a purpresture which belongs to the state as the owner of the soil to which it is affixed. *People v. Davidson*, 30 Cal. 379; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118, 89 Am. Dec. 164; *Taylor v. Underhill*, 40 Cal. 471, 473; *Shively v. Bowlby*, 152 U. S. 1, 59, 14 S. Ct. 548, 38 L. Ed. 331; *Weber v. Harbor Commissioners*, 85 U. S. [18 Wall.] 57, 21 L. Ed. 798; 26 Cal. Jur., pp. 301, 311, 315 et seq., 590 and cases cited. The right of access which a littoral owner has from his land to the ocean or other navigable body may not prevail as against the state or its grantee in the exercise of a lawful use or purpose. Const. art. 15, § 2; *Boone v. Kingsbury*, 206 Cal. 148, 170, 273

P. 797, citing *Shively v. Bowlby*, supra; 26 Cal. Jur. 301.

[8, 9] By section 3 of article 15 of our Constitution all tidelands within two miles of any incorporated city or town fronting on the waters of any navigable harbor, bay, etc., are withheld from grant or sale to private persons or corporations. Rights to erect wharves are vested by special grant, privilege, or franchise subject to the same trust by which the title is held by the state. *Eldridge v. Cowell*, 4 Cal. 80; 26 Cal. Jur., p. 591. In furtherance of the trust for the public benefit and subject thereto, upon which such lands are held by it, the state may grant its tidelands to municipalities (*City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 185, 50 P. 277; *McQuillin Municipal Corporations* [2d Ed.] vol. 1, pp. 1020, 1021; *Dillon, Municipal Corporations* [5th Ed.] vol. 1, pp. 474, 481, 496; 26 Cal. Jur., pp. 329, 334, 593 and cases cited), with power to build and maintain wharves for public use and with power to grant leases, privileges, and franchises to private persons (*St. 1911*, pp. 1254, 1258; 26 Cal. Jur., pp. 335-6; *City of Oakland v. Williams*, 206 Cal. 315, 274 P. 328; *City of Oakland v. Larue Wharf & Warehouse Co.*, 179 Cal. 207, 212, 176 P. 361).

[10-12] Unquestionably the municipality so vested which has erected or acquired wharves, piers, docks, etc., for the use of the public may make reasonable wharfage and dockage charges for services and facilities rendered and furnished by it, and such a reasonable charge will not constitute a duty of tonnage prohibited by article 1, § 10, of the Constitution of the United States. *Dillon, Municipal Corporations* (5th Ed.) vol. 1, p. 513; *McQuillin, Municipal Corporations* (2d Ed.) vol. 1, pp. 1017, 1020; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Vicksburg v. Tobin*, 100 U. S. 430, 25 L. Ed. 690; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 S. Ct. 732, 27 L. Ed. 584; *Huse v. Glover*, 119 U. S. 543, 7 S. Ct. 313, 30 L. Ed. 487; *People v. Roberts*, 92 Cal. 659, 28 P. 689. It is established that neither a state nor a municipality may be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage, and such ordinances will be carefully scrutinized. *Packet Co. v. Keokuk*, supra, page 86 of 95 U. S. The leading case in which such legislation was held by the Supreme Court to impose a duty of tonnage, and the case mainly relied upon by the defendants as controlling the determination of the question in the present instance, is *Cannon v. New Orleans*, 87 U. S. (20 Wall.) 577, 581, 22 L. Ed. 417. There the city of New Orleans passed an ordinance which provided for the collection of levee and wharfage dues from all steamboats which should moor or land in any part of the port of

New Orleans. It was held on the state of the evidence in that case that, since the ordinance applied to vessels landing anywhere within the city limits, and the fees were by the terms of the ordinance collectible from vessels which landed at any point on the banks of the river, without regard to the existence of wharves, the dues claimed could not be supported as a compensation for the use of the city's wharves, but that they constituted a tax upon every vessel which stopped, either by landing or mooring, in the waters of the Mississippi river within the city of New Orleans, for the privilege of so landing or mooring. It was there stated: "Whatever more general or more limited view may be entertained of the true meaning of this clause [that no state shall, without the consent of congress, lay any duty of tonnage], it is perfectly clear that a duty or tax or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition." The defendants herein contend that the charge imposed by the ordinance is in its essence a contribution for the privilege merely of stopping in the plaintiff's harbor.

[13-17] We may take judicial knowledge of the fact that vessels engaged in commerce are not accustomed to stop or land in the harbor of the city of Oakland except at a wharf or pier or similar accommodation, and the effect of the present ordinance must necessarily be to collect the charge imposed from such vessel which lands or moors in the harbor of the city of Oakland, whether at the plaintiff's or some other wharf, or dock, or pier. It is conceded that the plaintiff may exact a wharfage or dockage fee from all who elect to stop at its wharves. But it appears to be settled that such a charge may be imposed only in its proprietary as distinguished from its sovereign capacity. When it becomes an imposition by virtue of sovereignty alone, i. e., where the limits of the imposition are not co-extensive with the bounds of its proprietary capacity, it then becomes a tax in violation of the Constitution. It is stated in *Packet Co. v. Keokuk*, 95 U. S. 80, at pages 84 and 85, 24 L. Ed. 377: "But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation. The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which

vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a State, a municipal corporation, or a private individual; and, when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not, at its election, and thus may incur liability for wharfage or not, at the choice of the master or owner." All of the cases cited by counsel and which independent research has discovered so limit and define the right of the state or municipality to collect wharfage and dockage fees. Other cases of the nature defined by *Cannon v. New Orleans* are cited and reviewed in *Packet Co. v. Keokuk*, 95 U. S. 80, 86, 24 L. Ed. 377. See, also, *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. Ed. 118. Any imposition of such a charge on all vessels which land in the harbor, irrespective of whether they use the facilities and services furnished by the municipality when there may exist an election to do otherwise, must be held to be an impost on navigation and therefore unconstitutional. The fact that they land at some wharf within the harbor is not sufficient. The charge may only be exacted in exchange for facilities or services belonging to or furnished by the municipality imposing the charge. We can see no escape from the conclusion that the present ordinance requiring every vessel to land at the city's wharves, or, upon paying the same charge, be entitled to a permit to land at some other wharf in the city, is not a charge, as to vessels so landing elsewhere, for facilities or services furnished by the city. As to such vessels the exaction must be deemed to be a charge for the privilege merely of stopping in the plaintiff's harbor and, as such, constitutes a restriction on free commerce and navigation in violation of the constitutional prohibition.

The plaintiff relies on *City of Dubuque v. Stout*, 32 Iowa, 80, 7 Am. Rep. 171, as authority for the rule that legislation will be considered valid which provides that vessels may be permitted to land elsewhere on payment of the same wharfage fees. But in that case there was no question of a tax. All of the charges were for use of the city's facilities, and the ordinance provided that boats other than steamships might use other city landing places than the places specially designated upon permission of the harbor master, who might grant such permission on payment of the same wharfage dues. The regulation was obviously based upon the necessity for proper policing and protection.

[18] The plaintiff attempts to justify the present ordinance as a valid exercise of its police power in the regulation and control of the harbor of the city of Oakland. It con-

tends that the authorities establish the power of the municipality to "monopolize its waterfront, and require all vessels to land at its wharves and landing and pay wharfage" (28 Cyc. 923); to prescribe "the rates of wharfage on wharves owned by the state or by the municipality, or by private parties, or prescribing a penalty for landing at a place other than a government wharf" (12 C. J. 117); that "a city may designate the proper landing places and prohibit the use of others" (Cincinnati, etc., *Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169); that a "city may regulate the construction, maintenance and use of landing places, docks and piers within the corporate limits, and require all vessels to land at its wharves" (44 C. J. 1093). The plaintiff also relies on *City of Dubuque v. Stout*, 32 Iowa, 80, 7 Am. Rep. 171. *City of Dubuque v. Stout*, 32 Iowa, 47, and *City of Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa, 196, as establishing the power of the municipality as a police regulation to compel all vessels to land at the public wharves maintained by it.

There can be no question of the correctness of the statements from the foregoing texts as applied to the facts in the cases cited in support thereof. All of those and similar cases relied upon by the plaintiff involve the exercise of the police power in the protection of the banks of such rivers as the Mississippi or the Ohio, and in none of them does it appear that any wharves existed except those maintained by the municipality. It does appear, however, in some of those cases that large steamers, in order to escape payment of wharfage and dockage charges, persisted in landing along the banks of the river to the great detriment thereof. A pertinent statement in *Packet Co. v. Catlettsburg*, supra, page 562 of 105 U. S., may be said to be the basis of the decision in all of those cases, viz.: "There can be no doubt that the rules which govern the landing and departure of vessels at points situated on navigable waters may seriously affect them in their business of navigation and transportation, and in some sense such rules are regulations of commerce. On the other hand, the necessity is obvious of the existence in each port, where vessels as large as steamboats land at the shore and deposit their cargoes on the banks of navigable streams, of some authority to prescribe the places where this may be done, the time of doing it, and the points at which they may discharge cargo, both as relates to the streets, shores, houses of the town, and other vessels landing at the same time. The protection of the shore of the sea or bank of a river on which a town is situated is a necessity to the town, and the washing and crumbling of the bank from the agitation of the waters, made

by the landing of large steamers, demand that such regulations should exist." The power claimed by the plaintiff to exist in municipalities to monopolize their harbors and require all vessels to land at the public wharves maintained by the city would seem to be upheld by language appearing in the case of *Dubuque v. Stout*, 32 Iowa, 80, 7 Am. Rep. 171, but in *City of Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa, 196, that result is shown to depend on the valid exercise of the police power. In the latter case it was stated: "In the exercise of their police powers the cities of the State may control the landings of boats, designating the place they shall receive or discharge freight and passengers. It is within their power to require this to be done at these wharves and to charge reasonable compensation therefor. The *City of Dubuque v. Stout*, 32 Iowa, 80 [7 Am. Rep. 171]. This doctrine is founded upon the clearest reason, well understood by all persons familiar with the transaction of business upon the Mississippi river. * * * We have seen that cities may build wharves and charge for their use a sum that would be a just compensation. Now unless they have power to compel vessels to land at the wharves, the masters of vessels, in order to escape payment of wharfage fees, may discharge and receive cargoes on the natural banks of the river, to the inconvenience and loss of shippers and consignees. This power is necessary to enable the cities to exercise their police authority in providing places for the landing of vessels. It has never been doubted that the police power of the State, exercised through the municipal corporations, may regulate in this way transactions connected with commerce. We will not be expected to cite authorities in support of a doctrine so familiar. It is fully recognized in the case which we now proceed to consider," and the opinion then proceeds to a discussion of *Cannon v. New Orleans*, supra. There is not in the present case even the semblance of an attempt to show the existence of any facts which would justify the ordinance as an exercise of the police power. With respect to the section of the ordinance under consideration, there is no police regulation to be enforced by the harbor manager. He has no discretion in granting or refusing the permit, but he must grant the same on payment of the required charges. This plainly characterizes the charge as a tax.

Inasmuch as none of the complaints seeks to recover for charges which may properly be imposed by the city for services rendered at its wharves or for facilities furnished by it, the demurrers were properly sustained.

The judgment in each of the cases consolidated is therefore affirmed.

109 Cal. App. 342

PEOPLE v. WARD.

Cr. 1140.

District Court of Appeal, Third District,
California.

Nov. 3, 1930.

Criminal law ⇨1130(4).

Where defendant on appeal from conviction filed no brief and made no appearance when case was called for hearing, judgment was affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Butte County;
H. D. Gregory, Judge.

Joseph Ward was convicted of a felony, to wit, escape, and he appeals.

Affirmed.

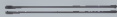
C. I. Bennington, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Butte county of a felony, to wit: Escape.

The transcript on appeal was filed in this court September 25, 1930. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on November 3, 1930. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.



109 Cal. App. 280

CITY OF SAN DIEGO v. LA MESA, LEMON GROVE AND SPRING VALLEY IRR. DIST. et al.

Civ. 444.

District Court of Appeal, Fourth District,
California.

Oct. 31, 1930.

Rehearing Denied Nov. 24, 1930.

Hearing Denied by Supreme Court
Dec. 29, 1930.

1. Waters and water courses ⇨202.

Railroad commission had no control over irrigation district which purchased water system of utility under agreement to continue serving its customers (St. 1897, p. 254, as amended).

2. Waters and water courses ⇨203(6).

Transfer of utility's water system to city did not give railroad commission authority to

fix rates charged by irrigation district (St. 1897, p. 254, as amended).

3. Waters and water courses ⇨203(6).

City had no authority to fix price of water purchased from irrigation district for individual consumers (St. 1897, p. 254, as amended).

4. Waters and water courses ⇨203(1).

Irrigation district could not fix rates in conflict with contract under which district acquired water system on condition of continuing to furnish water to utility's customers (Const. art. 11, § 13; California Irrigation District Act, § 55 [as amended by St. 1927, p. 205], § 61b [as added by St. 1915, p. 1291, § 1], § 15 [as amended by St. 1927, p. 23, § 1], § 15c [as added by St. 1917, p. 758, § 9], § 18 [as amended by St. 1929, p. 657], and § 39f [as amended by St. 1925, p. 501]).

Public utility engaged in impounding and distributing water for domestic use and irrigation purposes sold its entire system to irrigation district with exception of a portion remaining outside the district. The option given the irrigation district provided that the district should continue to furnish water to the outside territory now served by the utility "the price of said water to be nine cents per hundred cubic feet until such time as this rate may be changed by competent authority." The irrigation district further agreed not to ask for rehearing or re-rating for period of three years from date.

5. Waters and water courses ⇨203(1).

Irrigation district may not vary contract under guise of rate regulation.

6. Waters and water courses ⇨203(1).

Contract duty of irrigation district to furnish water to customers of utility at specified rate was not altered by utility's transfer of system to city.

7. Waters and water courses ⇨203(1).

Agreement of irrigation district purchasing utility's water system to continue to furnish water to customers outside district at specified rate until changed by "competent authority" was binding, and district did not become "competent authority" referred to.

[Ed. Note.—For other definitions of "Competent Authority," see Words and Phrases.]

8. Waters and water courses ⇨201.

Contract of irrigation district to furnish water to utility for customers outside district was not subject to termination after reasonable time.

9. Waters and water courses ⇨201.

Where irrigation district acquired water system under agreement to continue to furnish water for outside customers, water was dedicated to use of customers and was not "surplus water" which district could sell at its pleasure (Const. art. 11, § 13; California Irrigation District Act, § 55 [as amended by St. 1927, p. 205], § 61b [as added by St. 1915, p. 1291, § 1], § 15 [as amended by St. 1927, p. 23, § 1], § 15c [as added by St. 1917, p. 758, § 9], § 18 [as amended by St. 1929, p. 657], and § 39f [as amended by St. 1925, p. 501]).

[Ed. Note.—For other definitions of "Surplus Water," see Words and Phrases.]

10. Waters and water courses ⇨203(1).

Contract whereby irrigation district agreed to furnish water to utility at specified rate until changed by "competent authority" permitted change only by some authorized public agency.

11. Contracts ⇨170(1).

In case of doubt as to contract, court may look to understanding acted upon by parties.

Appeal from Superior Court, San Diego County; V. N. Thompson, Judge.

Action by the City of San Diego against the La Mesa, Lemon Grove and Spring Valley Irrigation District and others. From a judgment for plaintiff, defendants appeal.

Modified and affirmed.

Stearns, Luce & Forward, of San Diego, for appellants.

M. W. Conkling and C. L. Byers, both of San Diego, for respondent.

BARNARD, J.

This is an appeal from an order and judgment restraining the defendant irrigation district from discontinuing or shutting off a supply of water, and from raising the rate for the service of such water until such time as such action should be authorized, either by the railroad commission of the state of California or by the city of San Diego. The action was submitted to the trial court upon stipulated facts, which were adopted by the court as its findings. The agreed facts may be briefly stated as follows:

For some time prior to April 5, 1924, the Cuyamaca Water Company was a public utility engaged in impounding and distributing water for domestic use and irrigation purposes over a considerable area in San Diego county. On April 5, 1924, the Cuyamaca Water Company gave to the La Mesa, Lemon Grove and Spring Valley irrigation district

an option to buy, in consideration of \$1, 100,000, its entire system with the exception of a portion which was to remain outside of the irrigation district in which area the public utility was to continue to serve the consumers and as to which territory the option contained the following provision:

"It is understood that for East San Diego, Normal Heights and Kensington Park territory now being furnished with water by the Cuyamaca System, the district will continue to furnish water to us through a master meter at the east line of the East San Diego city limits, the price of said water to be nine (9) cents per hundred cubic feet until such time as this rate may be changed by competent authority; and further we agree not to ask for a rehearing or rerating for a period of three (3) years from date."

On June 13, 1925, a written agreement was entered into by which the irrigation district agreed to purchase from the water company the properties described in the option, upon the terms therein set forth, subject, however, to the consent of the railroad commission of the state of California. On June 15, 1925, the railroad commission authorized the sale, its opinion and order reciting that the officials of the irrigation district had represented that it was the intention and desire of the district to "assume all of the service obligations of the Cuyamaca Water Company," and the order was made subject to the condition that the consideration paid should not later be urged as a finding as to the value of the property for the purpose of rate fixing before the commission, "or any other public body." The order was also contingent upon the irrigation district filing with the commission its agreement to serve an adequate supply of water to all the present consumers of the Cuyamaca Water Company, outside the boundaries of said district, except such consumers as under the terms of the option were to continue to be served by the water company itself. Thereafter, the irrigation district passed such a resolution and filed the same with the commission, following which the actual transfer was consummated by deed. Later, the city of East San Diego, Normal Heights, and portions of Kensington Park were annexed to the city of San Diego, and thereafter, on September 27, 1926, the Cuyamaca Water Company gave to the city of San Diego a lease, with an exclusive option to purchase for \$150,000, covering that part of their system which had been reserved by them in the sale to the irrigation district. On January 26, 1927, the railroad commission approved transfer from the water company to the city of San Diego. Thereafter, the district continued to furnish to the city such water for distribution in East San Diego, Normal Heights, and Kensington Park at the 9-cent rate until March 1, 1929,

at which time the district notified the city that the rate thereafter would be increased to 25 cents per hundred cubic feet for the first thousand cubic feet, and 15 cents per hundred cubic feet for all additional water. Upon the refusal of the city of San Diego to pay bills rendered at this higher rate, a notice was served that unless the bills were paid the water would be shut off. This action followed. It is stipulated that at all times herein involved the Cuyamaca Water Company was a public utility engaged in the business of supplying, selling, and distributing water appropriated, dedicated, and impressed with a public use to the consumers entitled thereto for domestic, agricultural and municipal purposes.

[1-3] Appellants argue first that under the circumstances existing, the irrigation district has become the "competent authority" referred to in the option and contract. It is argued that while the railroad commission was such competent authority so long as the public utility continued to be the purchaser of the water, when the contract was assigned by the public utility to the city of San Diego, the railroad commission lost its authority; that the city then became the purchaser of water from the district on the same basis as any private individual, and that under the provisions of the Constitution and the California Irrigation District Act (St. 1897, p. 254, as amended), the irrigation district then became the competent authority referred to with full power to fix the rates for such water. We are unable to agree with this contention. While the railroad commission originally had control over the public utility, and while it continued to have control over the rates that this utility should charge its consumers, it had no control over the irrigation district. *Glenn-Colusa Irr. Dist. v. Paulson*, 75 Cal. App. 57, 242 P. 494; *Water Users' Ass'n v. Railroad Commission*, 188 Cal. 437, 205 P. 682; *Henderson v. Oroville-Wyandotte Irr. Dist.*, 207 Cal. 215, 277 P. 487. The only way the railroad commission could have exercised control over this rate would have been indirectly by refusing to permit the utility to sell its system to the irrigation district, except upon conditions that would have covered these rates. *City of Pasadena v. Railroad Commission*, 183 Cal. 526, 192 P. 25, 10 A. L. R. 1425; *Glenn-Colusa Irr. Dist. v. Paulson*, supra. No such conditions were inserted in their order approving this sale from the public utility to the irrigation district. The railroad commission neither had authority over this rate during the time the utility continued to receive water from the district, nor do we think any change in the authority to fix the rate was worked by the sale from the utility to the city. The city of San Diego, as such, would not have authority to fix the purchase price of water thus being purchased in bulk for distribution to individual consumers.

Marin Water, etc., Co. v. Town of Sausalito, 168 Cal. 587, 143 P. 767, 772. Nor do we think the irrigation district either possessed or acquired by this transfer an authority not possessed by the other party to the contract to change the rate at will. The contract remained the same and the transfer to the city was expressly approved and consented to by the irrigation district. In fact, the district appears to have received an additional benefit through the transfer, having stipulated in its consent thereto for a limitation on the amount of water to be furnished, which does not previously appear in the written agreements.

[4, 5] Appellants rely upon section 13 of article 11 of the Constitution and upon sections 55 (as amended by St. 1927, p. 205), 61b (as added by St. 1915, p. 1291, § 1), 15 (as amended by St. 1927, p. 23, § 1), 15c (as added by St. 1917, p. 758, § 9), 18 (as amended by St. 1929, p. 657), and 39f (as amended by St. 1925, p. 501) of the California Irrigation District Act, as giving to an irrigation district the right to fix rates in such a case as the one before us. Without quoting these various sections, we may observe that while authority is given to irrigation districts to fix rates within their boundaries, and for surplus water sold to outsiders, it is also to be noted that such a district is given rather broad powers in reference to making and entering into agreements with other individuals and corporations, both public and private, for the purpose of acquiring for the district water rights and water systems. We find neither in these sections nor elsewhere any specific authority given to an irrigation district to fix or establish rates for water sold or delivered outside its own boundaries, in disregard of or irrespective of such a contract as we now have under consideration under which a district has acquired practically an entire system upon the condition of continuing to furnish water for the benefit of ultimate consumers in a portion of the territory theretofore served by the water system thus acquired. Such water is in no sense of the word surplus water. *South Pasadena v. Pasadena Land, etc., Co.*, 152 Cal. 579, 93 P. 490, 496. As was said in the case of *Marin Water, etc., Co. v. Town of Sausalito*, supra: "No case has been presented holding that a municipal corporation may vary the terms of its own solemn contract, under the guise of rate regulation." We think the same applies to an irrigation district. In the same case Mr. Justice Shaw, in a concurring opinion, points out that even where a company has the right to fix its own rate, an agreement for the sale of its water upon such a rate is binding upon both parties, at least until a different rate is fixed by some proper authority. While an irrigation district is given authority by the Constitution and the Irrigation District Act to contract for and to acquire an existing water system,

and while with the consent of the railroad commission it may even acquire such a system from a public utility, on the other hand, when a district has made such a contract it has no inherent power in itself to change the terms thereof. In support of their contention that in the absence of any regulation by an authorized rate-fixing body, the rate for this water could be fixed by the irrigation district itself, appellants quote from *Henrici v. South Feather Land, etc., Co.*, 177 Cal. 442, 170 P. 1135, 1137, as follows: "Under the law, the water might have been furnished under rates fixed by public authority. In the absence of any such regulation (and there has been none during the period here involved), the service might have been rendered either on rates fixed by the corporation or on terms agreed upon by it with the customer."

[6, 7] While the fixing of the rate we are considering might have been left to the irrigation district, it was, in fact, fixed by an agreement between the district and its customer. We are unable to see that the situation, as thus established, was changed by operation of law by the later transfer of this agreement from the public utility to the city of San Diego, especially in view of the fact that this transfer was consented to by the district with full knowledge of the facts. *Henderson v. Oroville-Wyandotte Irrig. Dist.*, supra. In the absence of any competent authority to change the rate as contemplated in the agreement, the terms of the contract would continue binding upon the parties until such time as the same was changed by mutual consent, or until such time as such a competent authority should be created by law. We think, therefore, that the relationship between the parties hereto is purely contractual, and that the appellant irrigation district did not become, by operation of law, the "competent authority" referred to in the option.

[8] The second contention of appellants is that under the terms of the option of April 5, 1924, as later embodied in the contract under which they acquired the water system, their obligation to furnish water to these districts ceased at the end of three years. Their contention is that it was optional with the district whether it would continue to furnish water after that time, and therefore that any water so furnished was exactly like any surplus water sold by the district to any individual outside its boundaries, with the corresponding right in the district to fix the price thereof. Their argument is that this was merely a contract to sell a commodity, water in bulk, that no easement or servitude was involved, and that a contract for the sale of a commodity, which is silent as to its duration, may be terminated after a reasonable time by either party. In support of this, they cite the case of *Southern Pacific Co. v. Spring Valley W. Co.*, 173 Cal. 291, 159 P. 865, L. R.

A. 1917E, 680. As pointed out by the court in that case, such a principle, although discussed therein, does not apply where the parties are dealing in water, subject to the rights of others in its continued use. In this case the contract was entered into with knowledge of, and with a consideration of, the rights of the water users in the communities named, and the irrigation district is bound thereby. *Henrici v. South Feather Land, etc., Co.*, supra; *Henderson v. Oroville-Wyandotte Irrig. Dist.*, supra. The irrigation district definitely agreed to "continue to furnish water" to the utility, "for East San Diego, Normal Heights and Kensington Park territory now being furnished with water by the Cuyamaca System," and assented to the transfer of this agreement to the city.

[9] Under these circumstances, the irrigation district accepted the obligation and duty of delivering water, first to the Cuyamaca Water Company and later to the city of San Diego, for the purpose of distribution to the inhabitants of these particular communities. Having accepted such obligation and duty in consideration of other benefits accruing to the district, it must be held that the very considerable system acquired by the district from the water company, was acquired subject to the burden of continuing the service in question. The water in question was water theretofore dedicated to the use of the people of these districts, and was not such surplus water as the district may sell at its pleasure. In reference to a somewhat similar situation, the Supreme Court says in the case of *South Pasadena v. Pasadena Land, etc., Co.*, supra: "In truth, however, the city will not be selling its surplus in the sense intended by the statute. The right to the use of the required quantity of this water is now vested in the city of South Pasadena and its inhabitants within the portion of its territory where it is to be served, and the city of Pasadena does not propose to take away this right. It is about to buy only the right of the Pasadena Land & Water Company to the water, which did not include the use. It will be obliged to put it to the same use as fully as that company is now compelled to do so. Water which is in this manner dedicated to the use of an outside community, cannot be at the same time surplus water subject to sale to others. The sale is already, in effect, accomplished. The city of Pasadena, with respect to this part of the water, will hold title as a mere trustee, bound to apply it to the use of those beneficially interested."

To the same effect, see *East Bay Mu. Dist. v. Railroad Commission*, 194 Cal. 603, 229 P. 949. In *Fellows v. City of Los Angeles*, 151 Cal. 52, 90 P. 137, it was held that although a city may purchase an entire water system and water supply with the avowed object of securing the surplus water, it cannot continue

to hold and control such property as has been appropriated to public use and at the same time refuse to perform the public duty imposed upon it by possession, and it must continue to furnish water to those entitled thereto. See, also, *La Mesa, etc.*, District v. Halley, 197 Cal. 50, 239 P. 719; *Henderson v. Oroville-Wyandotte Irrigation District*, supra. In *Hewitt v. San Jacinto, etc.*, Irrigation District, 124 Cal. 186, 56 P. 893, 895, a water company had transferred its system to an irrigation district, with the exception of the right to the delivery of certain water previously granted to others, including the plaintiff. In speaking of the relation of the irrigation district to the rights of the plaintiff, the court said: "It purchased the property of the Water Company subject to this burden, and on no just principle can hold the property discharged thereof." Not only was this obligation a continuing one, but under the terms of the agreement under which the appellant acquired all its rights, the obligation was to continue to furnish water at the same rate until such time as this rate should be superseded by the order of some public agency, upon which had been conferred power sufficient for that purpose. In the case of *Henrici v. South Feather Land, etc., Co.*, supra, the plaintiff had a contract for the purchase of water at a certain price, with a corporation which was engaged in the business of furnishing and supplying water to the public for hire, which contract did not specify how long the obligation should continue. That corporation transferred its property to another public service corporation which undertook to change the rate. In reference thereto the court said: "The obligation to furnish water at the agreed rate was unlimited in time, and continued until the rate was superseded by order of a public body vested with the power of regulating the service."

[10] Not only have the rights of these parties, as fixed by contract, not been changed by operation of law, but in our opinion that clause of this contract providing for the delivery of water at the rate agreed upon "until such time as this rate may be changed by competent authority," does not contemplate that the "competent authority" referred to shall be the irrigation district. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636. In *Palmero L. & W. Co. v. Railroad Commission*, 173 Cal. 380, 160 P. 228, 229, it was held that a provision in a contract that water was to be supplied "at such rates as may be fixed by law in the district in which said lands are situated," contemplated that the rate should be fixed by public authority. The words used here, "until such time as this rate may be changed by competent authority," show an intention that any change in the rate

shall be made only by some public agency specifically authorized by law to regulate such charges. The language used seems to us to negative the idea that the seller or party collecting the charges is, or could be, the authority intended. To hold otherwise makes the clause meaningless. A contract should be so construed as to give force and effect to every part of it. Civ. Code, § 1641. In the same sentence the party who is to pay the rate fixed, agrees not to ask for a "rehearing or rerating" for a period of three years. This party had theretofore been subject to the regulation of the railroad commission, and while allowance was thus made for the fact that this regulation would cease, in so far as this rate was concerned, and for possible future changes in the law as affecting the rate-fixing authority it is apparent that the very thing the utility was trying to do was to protect itself from such an arbitrary raise in rates by the irrigation district as is now attempted. And to this protection the other party agreed.

[11] If there be doubt as to the meaning of words used in a contract, the court may look to the understanding which was given to it and acted upon by both parties. *D. Ghirardelli & Co. v. Students' E. & T. Co.*, 175 Cal. 427, 166 P. 16. Some light may here be obtained from this source. It appears that the railroad commission withheld for a time its approval of this transfer from the water company to the irrigation district in the hope that a compromise which had been suggested by the railroad commission could be arrived at between the irrigation district and the city of San Diego in reference to their conflicting claims to water from the San Diego river. In a supplemental agreement dated June 13, 1925, between the water company and the irrigation district, such a compromise is referred to at length, and it is therein agreed that in the event the irrigation district should be able to make such a satisfactory settlement with the city of San Diego, including an arrangement by which the city of San Diego should purchase from the water company its distribution system covering East San Diego, Normal Heights, and Kensington Park, then and in that event the water company "will waive and relinquish the right given it and contained in said option to purchase water from said Cuyamaca system, after the consummation and carrying out of this contract of purchase and sale, at the rate of nine (9) cents per hundred cubic feet, and will waive and relinquish all right to purchase any water for supplying said above mentioned territories." In a later agreement between the same parties, dated December, 1925, this provision in the supplemental agreement of June 13, 1925, is stricken out, the compromise not having been effected. It seems reasonable to suppose that had such a compromise gone through the irrigation district would

have given up something of value in consideration for the benefit thus obtained. In any event, it is apparent from this action that the irrigation district recognized a definite obligation to furnish water for distribution in those particular territories at the rate named, and that the obligation was one from which they desired to escape.

Again, in the agreement of September 27, 1926, under which the water company leased the remainder of its system to the city of San Diego with an exclusive option to purchase the same, the contract to purchase water at the 9-cent rate contained in the original option is copied verbatim, with the statement that while a number of modifications and extensions of time were subsequently executed, none of said modifications "in any shape, manner or form" changed "the obligation of the district to furnish to the lessors herein water at nine (9) cents per hundred cubic feet as above set forth"; and then appears the following: "Whereas, said obligation to so furnish said water now so rests upon said district; and

"Whereas, said district consents to the transfer of said contract to so furnish water by said Cuyamaca Water Company to The City of San Diego, as is shown by Exhibit A, attached hereto and made a part hereof."

The contract then goes on to provide as follows: "It is further understood and agreed that when and after this contract shall have been executed and The City shall be permitted to take water at nine (9) cents per hundred cubic feet under the assignment of the nine (9) cent water contract to it, the said payment shall be for water service and not for the purchase of water; it being understood and agreed that the lessors are only transferring such rights as to furnishing water as they have acquired from the La Mesa, Lemon Grove & Spring Valley Irrigation District in their said contracts with said districts."

Attached to said contract is a copy of a resolution unanimously adopted by the board of directors of the irrigation district, in which the president and secretary of the district are authorized to consent in writing "to the transfer of the existing contract between Cuyamaca Water Company and said District for water furnished and to be furnished to the East San Diego, Normal Heights and Kensington Park District. This consent is given, however, on the express understanding and in consideration that the assignee of said contract take the same subject to the understanding upon which said contract is now held by said Cuyamaca Water Company, to-wit: That the District shall not be obligated at any time to furnish more in any one year than the equivalent of a uniform flow of one million gallons of water per day." While it does not appear that any further consent was signed by the president and secretary of the

irrigation district, it does appear that the district acted upon the transfer by furnishing to the city the water it was obligated to furnish to the water company. It will be noted that in thus consenting to the transfer of this agreement, including the obligation to furnish water at the 9-cent rate, while the irrigation district is careful to call attention to a limitation in the amount of water that the district is obliged to furnish in any one year, no objection is made to the recital in the transfer from the water company to the city that "said obligation to so furnish said water now so rests upon said district," and further that the district is still obligated to furnish to the lessors water at 9 cents per hundred cubic feet. It seems to us this throws considerable light upon the intention of the parties. The language used in the resolution that the district shall not be obligated to furnish more than a certain amount of water "in any one year" is also significant. The record shows that the entire transfer of the water system from the water company to the irrigation district, when finally consummated, was put through as of the date of the original option, April 5, 1924, so when this consent to the transfer to the city of San Diego was given by the district, nearly two of the three years had passed. The use of the words "in any one year," instead of words appropriate to one remaining year, indicates that at that time the irrigation district still considered the obligation a continuing one.

A further indication that the irrigation district did not consider that their obligation to furnish this water ended with the three-year period, during which it had been agreed that no rerating or rehearing should be asked for, is found in the fact that, while under the terms of the contract this three years expired on April 5, 1927, the irrigation district continued to furnish water at the rate named until March 1, 1929, at which time their contention in this regard was first brought to the attention of the respondent.

For the reasons set forth we conclude, as an answer to the specific questions which the parties, by stipulation, have submitted as involved herein: 1. That the appellant irrigation district has not the right to fix and determine the price to be paid by the respondent city for water furnished for distribution to the individual consumers in East San Diego, Normal Heights, and Kensington Park under the terms of the option and contract mentioned. 2. That the irrigation district may be enjoined from discontinuing or shutting off such water for the nonpayment of a rate fixed by the district in excess of that named in the contract. We think, however, that from that portion of the judgment reading as follows: "It is Ordered, Adjudged and Decreed that the defendants and each of them be and they are hereby restrained from discontinuing or shutting off the supply of water heretofore

furnished to the plaintiff as set out in the Complaint herein or from the raising of rates for the service of such water until such time as the raising of rates therefor be authorized either by the Railroad Commission of the State of California or by the City of San Diego," the words "either by the Railroad Commission of the State of California or by the City of San Diego" should be stricken out, and instead thereof the words "by some public rate-fixing body" should be substituted. And the trial court is directed to make such modification.

As so modified, the judgment is affirmed.

We concur: MARKS, Acting P. J.; WAR-MER, Justice pro tem.

109 Cal. App. 438

SHERRIFFS v. SCOTT.

Civ. 7637.

District Court of Appeal, First District,
Division 2, California.

Nov. 10, 1930.

1. Appeal and error ¶543.

It was incumbent on appellant to start proceedings to restore papers removed or lost from clerk's office which were necessary part of record on appeal.

2. Appeal and error ¶607(1).

Court properly terminated proceedings for settlement of transcript on ground appellant's delay of more than year was unreasonable.

3. Appeal and error ¶627(2).

Where appellant failed to excuse unreasonable delay in preparing record on appeal, appeal would be dismissed (Supreme Court Rule 5).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Alex Sherriffs against A. W. Scott, Jr. From the judgment, defendant appeals. On motion to dismiss the appeal.

Appeal dismissed.

Sidney Rhein, Geo. M. Naus, and Frank Golden, all of San Francisco, for appellant.

Young, Hudson & Rabinowitz and Alan H. Critcher, all of San Francisco, for respondent.

NOURSE, P. J.

The respondent moves to dismiss the appeal upon the ground that the appellant has been guilty of unreasonable delay and laches in the preparation of the record and has failed to file a transcript within the time prescribed by law. Judgment was entered against the appellant on November 19, 1928, in an action upon appellant's written guaranty for the payment of a promissory note. Notice of appeal was filed on January 9, 1929, and, on the same day, the appellant filed with the county clerk his request to prepare a transcript under section 953a, Code of Civil Procedure. On August 12, 1930, upon motion of respondent, proceedings for the settlement of said transcript were terminated by order of the superior court. To date no transcript has been filed in this court.

Appellant's laches in the prosecution of the appeal is conceded, but he seeks to excuse the delay upon the ground that at some stage of the proceedings the papers constituting the judgment roll were removed from or lost in the clerk's office. Both parties seemed to have been content to place upon the other the burden of finding or restoring these papers. At this time, approximately two years after the entry of the judgment, they have not been restored, and, so far as we can learn from this record, no steps have been taken to restore them.

[1, 2] The existence of a judgment roll was of no interest to the respondent unless he might find it necessary for the purposes of execution of the judgment. It was of interest to the appellant if he intended to prosecute his appeal because it was a necessary part of the record on appeal. Having notified the clerk to prepare a transcript under section 953a and having learned that some of the necessary papers were lost or missing, it was incumbent upon him to start proceedings to restore those papers so that the record on appeal could be prepared. Hence, when, more than a year after the notice of appeal and after the notice to the clerk, the superior court was moved to dismiss and terminate proceedings for settlement of the transcript it had before it a case where appellant's delay and laches were unreasonable and upon that ground it ordered those proceedings terminated. In so doing that court was acting within the bounds of its discretion and nothing has been presented here which would tend to show that such discretion has been abused. *Williams v. Williams*, 176 Cal. 230, 168 P. 19; *Crocker v. Crocker*, 76 Cal. App. 606, 609, 245 P. 438.

[3] It being conceded that the transcript has not been filed within the time prescribed by law and the appellant having failed to excuse his unreasonable delay in the preparation of the record, this becomes a proper case

for the dismissal of the appeal under rule 5 of the Supreme Court.

Appeal dismissed.

We concur: STURTEVANT, J.; SPENCE J.

109 Cal. App. 386

SILVA v. KAVERT et al.

Civ. 7071.

District Court of Appeal, First District,
Division 2, California.

Nov. 8, 1930.

1. Appeal and error ⇐994(3), 1015(3).

Trial judge is in better position to judge weight of evidence and credibility of witnesses.

2. Appeal and error ⇐1002.

Appellate court will not disturb a verdict on appeal where evidence is in substantial conflict.

3. New trial ⇐72.

Trial judge, if satisfied that verdict is against weight of evidence, notwithstanding conflict in testimony, should grant new trial.

4. New trial ⇐70.

In action by stevedore for personal injuries sustained when tractor ran into his foot while working on pier, granting plaintiff's motion for new trial after verdict for defendants *held* not abuse of discretion under evidence.

Appeal from Superior Court, City and County of San Francisco; T. H. Selvage, Judge.

Action by William Silva against Frank Kaverter and others. From an order granting plaintiff's motion for a new trial after verdict and judgment for defendants, defendant named and another appeal.

Affirmed.

J. Hampton Hoge, of San Francisco, for appellants.

Daniel A. Ryan, of San Francisco (George F. Snyder, of San Francisco, of counsel), for respondent.

BURROUGHS, Justice pro tem.

This is an action for personal injuries. The cause was tried before a jury. The verdict was for defendants, and judgment was

entered accordingly. Plaintiff thereafter moved for a new trial, and the motion was granted upon the ground of insufficiency of the evidence to sustain the verdict.

Defendants appeal from the order granting a new trial. Appellants' sole contention in support of the appeal is that the plaintiff's version of the accident is impossible of credence because of the physical facts as shown by the evidence. Plaintiff was at work as a stevedore in the employ of the Bayside Steamship Company on Pier 17 adjoining the Embarcadero, San Francisco. Much of the testimony given refers to a blackboard map made by witnesses with the assistance of the attorneys which is not a part of this record.

However, after a careful study of the evidence as transcribed, it appears that Pier 17 extends in an easterly and westerly direction from the Embarcadero into the bay. Through the center of the pier from west to east extends a driveway estimated to be 25 feet wide. This driveway is for the use of the public in carrying freight to or from the pier, and is marked off from the sides by a seemingly slight depression variously described, but serving the purpose of defining the driveway from the side spaces immediately north and south of it in which freight is stacked to be loaded on ships or carried from the pier. On the day of the accident, a ship was on the north side of the pier, and this plaintiff with another stevedore in the employ of the Bayside Steamship Company was engaged in carrying freight on a flat truck from the ship across the driveway and there stacking it. Each flat truck was handled by two men, one pulling on the end of the tongue and one pushing from the rear. Plaintiff's story is that he and his companion worker had placed their flat truck in the space allotted, south of the driveway parallel to the driveway, and that the north side of the flat truck was about 4 feet south of the south line of the driveway, the tongue of the flat truck being to the east; that plaintiff and companion were in the act of removing a heavy case from the truck to the floor south of the truck; that plaintiff was on the north side of said flat truck pushing the case toward the south side, his companion pulling from the south side, with plaintiff facing south and bracing himself on his right foot, which was farthest to the north, when the accident happened. It is undisputed that in some manner one of the wheels of a Ford tractor or its trailer driven by one of the defendants from the western entrance of the pier toward the east ran over the plaintiff's right foot; the injury being on the outside of the foot from toe toward heel, and more or less on the front of the instep. There is no question as to this fact nor as to the extent of the injury.

Plaintiff contends that, as the tractor with

its trailer approached the place where he was at work, it swerved to the south of the south driveway line, and one of the wheels ran over plaintiff's foot while he was in the position above described.

Evidence shows that at some disputed point east of the spot where plaintiff received his injury the tractor and its trailer were turned across to the north side of the driveway to discharge its freight on the north side.

Defendants contend that the tractor with its trailer at no time swerved from the driveway south of the south driveway line, but that plaintiff was on or close to the driveway, and that he was working when the driver first saw him at a distance of 50 or 60 feet, but that, when the driver passed him, he was standing still and looking in the direction of the on-coming tractor; that the plaintiff misjudged his step and put his right foot under the wheel. Defendant did not know of the accident until after he had crossed to the north side of the driveway.

Defendant produced a number of witnesses who testified to the effect that the space on the south of the driveway in which plaintiff claims to have been was filled with stacked freight up to the south line of the driveway, thus making it impossible for the plaintiff to have been south of the driveway, and tending to support defendants' claim that plaintiff was standing on the driveway.

Plaintiff produced a number of witnesses who testified to the effect that the space was ample for him to have been exactly where he claims to have been. It was not disputed that the men had been at work not over a half hour and that this was the first load of freight these men had brought out.

We see nothing physically impossible in the plaintiff's contention that a wheel traveling east could have struck plaintiff's right foot at the toe, raking the outside of the foot toward the heel, with the plaintiff in the position above described.

It appears more probable than the defendants' contention, especially in view of the fact that plaintiff was injured in no way except the injury to his right foot. Had plaintiff been facing the tractor, and stepped forward, or in any manner toward the tractor, it is difficult to see how the foot alone would have been injured.

There are numerous controversies in the evidence. We have discussed only the one point raised by appellants. Appellants' au-

thorities are all to the effect that, where testimony in the light of undisputed facts is inherently improbable and impossible of credence, the appellate court is bound to recognize that certain facts are controlled by immutable physical laws, citing 10 Cal. Jur. p. 1169 § 381.

[1] A careful study of plaintiff's case as transcribed has presented no such difficulty to our minds. The trial judge, having the advantage of seeing and hearing all witnesses, is in a better position to judge the weight and bearing of the evidence offered and the credibility of the witnesses. As said in *Green v. Soule*, 145 Cal. 102, 78 P. 337, 340: "The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. 'Where the decision is against the weight of the evidence, it is the duty of that court to grant a new trial.'"

[2-4] There is conflict in the testimony, but, while an appellate court will not review a verdict where the evidence shows a substantial conflict, the trial court is in a very different position on a hearing of a motion for a new trial. As said in *Brush v. Pacific Electric R. R. Co.*, 58 Cal. App. 506, 208 P. 997, 1000: "If the trial judge, notwithstanding a conflict in the testimony, is satisfied that the verdict is against the weight of the evidence, he may, indeed he should, grant a new trial, although upon the same conflict an appellate court would be bound by the verdict." It is said in 20 Cal. Jur. p. 111 § 71: "A motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court, which has power to set aside a verdict or decision and to grant a new trial, in whole or in part, in every case where, in its judgment, the evidence is insufficient. Accordingly it is settled that an order granting or refusing a new trial on the ground of insufficiency of the evidence or where this is one of the grounds set up is conclusive upon the appellate court and may not be disturbed on appeal, unless it appears that there was a manifest abuse of such discretion."

No abuse of discretion has been shown.

The order is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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2. Pleading $\S$ 310.

Complaint alleging contractor agreed to construct barns for \$400 must be read with notice of claim of lien made part of complaint.

3. Pleading $\S$ 207.

Objection that allegations of complaint are ambiguous because inconsistent with annexed claim of lien must be made by special demurrer.

4. Appeal and error $\S$ 197(1).

Objection not raised during trial to variance between allegations in pleading and proof held waived.

In Bank.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by C. G. Martin against A. Della. Judgment for plaintiff, and the defendant appeals.

Affirmed.

Waldo E. Burford, of Porterville, and Farnsworth, Burke & Maddox, of Visalia, for appellant.

U. U. Blalock, of Los Angeles, for respondent.

PER CURIAM.

Defendant prosecutes this appeal from a judgment foreclosing a mechanic's lien, upon the ground that there is a fatal variance between the claim of lien and the proof. The verified claim, duly filed with the recorder of Tulare county, is attached to and made a part of the complaint. It states, in part, that the plaintiff had agreed to erect two barns for the defendant, "the material to be furnished by the owner, for the agreed construction price of two hundred (\$200.00) dollars each, or the total sum of four hundred (\$400.00) dollars, such cement work as was necessary for the construction of the foundations of said barns to be done by the contractor to be paid for as extra work; * * * that the amount of the contract price for the construction of said buildings and the concrete necessary for the foundations thereof is the sum of four hundred ninety-two (\$492.00) dollars. * * *" Plaintiff's evidence satisfactorily establishes that he orally agreed with the defendant to construct the barns for \$400, and was to receive, in addition thereto, \$8 a day for himself and \$3.50 a day for a helper while engaged in laying the cement foundations, and that the cement work consumed about nine days, totaling \$92 for himself and such help. The trial court found in accordance with this evidence.

[1-3] We fail to perceive any variance between the claim of lien and the proof. The

211 Cal. 74

MARTIN v. DELLA.

Sac. 4321.

Supreme Court of California.

Nov. 18, 1930.

1. Mechanics' liens $\S$ 277(6).

Complaint in action to foreclose mechanic's lien, alleging plaintiff contracted to construct barns for "agreed sum" of \$492, held not at variance with proof.

While the complaint alleged that plaintiff undertook to construct the barns for the agreed sum of \$492, the proof merely showed that defendant agreed to pay \$400 for the construction of the building and a specified per diem charge for cement work.

allegation of paragraph 4 of the complaint is to the effect that plaintiff undertook to construct the barns for the "agreed sum of four hundred ninety-two (\$492.00) dollars," and this allegation must be read with the notice or claim of lien, as the latter is distinctly made a part of the complaint. *Olson-Mahoney, etc., Co. v. Dunne Inv. Co.*, 30 Cal. App. 332, 342, 159 P. 178. Even if it be assumed that the allegation of paragraph 4 is inconsistent with the notice of lien, which, as stated, is made a part of the complaint, the point should have been raised by demurrer. In 17 Cal. Jur. 193, § 137, it is stated that: "If the allegations of a complaint are ambiguous or uncertain, as where a complaint is inconsistent with a claim of lien annexed to and made a part thereof, objection must be taken by special demurrer." No demurrer was interposed in this case. However, we are not prepared to say that this allegation is at variance with the proof. There is evidence tending to show that defendant agreed to pay \$400 for the construction of the buildings, and a specified per diem charge for the cement work. The work being done, it is not a distortion of the facts to say that plaintiff undertook the job for an "agreed" sum equal in amount to the sum due for the construction work plus the charge for the completed cement work.

[4] Moreover, it is an established rule of practice that, if a party desires to raise a question as to any variance between allegations in a pleading and the proof offered at the trial, such objection must be presented in the trial court, otherwise it is waived. *California Portland Cement Co. v. Wentworth Hotel*, 16 Cal. App. 692, 700, 118 P. 103, 113. Defendant herein raises the point for the first time on appeal. The only issue presented to the trial court had to do with the construction price of the barns, defendant contending that plaintiff had agreed to complete the entire job for \$200. The court below, upon competent evidence, found against defendant and in favor of the plaintiff on this issue.

The judgment is affirmed.

210 Cal. 656

POLLAK v. STAUNTON et al.

S. F. 13226.

Supreme Court of California.

Oct. 31, 1930.

Rehearing Denied Nov. 24, 1930.

1. Licenses ⇨18½.

Natural person owning securities of which he is not issuer or underwriter may sell them without permit (St. 1917, p. 673, § 3).

2. Licenses ⇨18½.

Where option in foreign corporation's name was executed by corporate officers in foreign state, but negotiations took place in state, sale of stock without permit was void (St. 1917, pp. 673, 679, §§ 3, 12).

Although option to purchase stock given in name of Nevada corporation was actually executed by corporate officers in Nevada, all offers to sell to buyer were made in oral negotiations with buyer in state, and all acts of buyer from which consent to issuance of stock might be implied took place in state, and upon execution of letters or agreements had in state, certificate for shares of stock was delivered to buyer.

3. Money received ⇨8.

Action for money had and received held proper remedy to recover proceeds of stock obtained through fraudulent representations.

4. Licenses ⇨39.

Purchaser, for whose benefit Corporate Securities Act has been enacted, is not in pari delicto with corporation or agents, violating statute (St. 1917, p. 673, § 3).

5. Licenses ⇨39.

Buyer of stock sold by corporation without permit could not by conduct impart validity to void stock (St. 1917, pp. 673, 679, §§ 3, 12).

6. Licenses ⇨39.

Where corporation or agents receives payment for stock illegally issued, and buyer in dealings with corporation assumes validity of stock, corporation cannot retain proceeds for stock (St. 1917, pp. 673, 679, §§ 3, 12).

7. Corporations ⇨317(4).

No obligation rested on stockholder delivering stock to officers to be sold to pay for other stock to investigate corporation's books to determine truth of officers' representation that cash payment had been made to corporation by them for the other stock.

8. Licenses ⇨39.

Corporation and officers issuing stock without permit were not relieved of liability because stock rose far above price which buyer was to pay (St. 1917, pp. 673, 679, §§ 3, 12).

9. Money received ⇨8.

Corporate officer's receipt of one-third of proceeds of sale of plaintiff's stock with knowledge of misrepresentations rendered him liable in action for money had and received.

10. Money received ⇨1.

"Action for money had and received" is based upon implied promise to restore money which defendant in equity and good conscience should not retain.

[Ed. Note.—For other definitions of "Money had and Received," see Words and Phrases.]

11. Money received ⇨19(4).

Measure of liability in action for money had and received is amount received.

12. Release ⇨27.

Release of several codefendants in action for money had and received for proceeds of stock did not release defendant.

13. Release ⇨27.

Release of one or more defendants upon their several liabilities does not discharge another defendant upon his several liability.

In Bank.

Appeal by defendant from a judgment of the Superior Court, City and County of San Francisco, John J. Van Nostrand, Judge, in an action for money had and received. Affirmed as modified.

Action by A. J. Pollak against John Salsberry and others. From a judgment for plaintiff, defendant named appeals.

Judgment modified and, as modified, affirmed.

Superseding opinion in 284 P. 226.

John H. Crabbe, of San Francisco, for appellant.

Arnold C. Lackenbach, of San Francisco, for respondent.

Norman T. Mason, of Los Angeles, amicus curiæ.

SEAWELL, J.

Plaintiff brought action to recover from defendants upon a common count for money had and received the sum of \$21,532.49. Upon receipt of \$5,000 from defendants Berger and Staunton, the action was dismissed as to them and as to the defendant Western Lead Mines Company. From a judgment entered against defendant Salsberry for the balance, to wit, \$16,532.49, said defendant appeals. The sum of \$21,532.49 was the price for which 20,000 shares of stock of the Western Lead Mines Company, a Nevada corporation, owned by plaintiff, were sold by defendant Staunton. The proceeds of the sale were divided equally between the three defendants.

[1] Said three defendants were the organizers and directors of said Western Lead Mines Company. In August, 1925, plaintiff

purchased said 20,000 shares from defendant Salsberry. Plaintiff also held an option given by the corporation and expiring May 1, 1926, to purchase 100,000 shares at \$.25 a share. In December, 1925, defendants falsely represented to plaintiff that they had paid \$25,000 from their personal funds into the treasury of the corporation on behalf of plaintiff and in the exercise of said option. A certificate for 100,000 shares was actually issued in plaintiff's name in December, 1925. By said false representation defendants obtained possession of said 20,000 shares and plaintiff's consent to the sale thereof and the division of the proceeds among themselves to repay them for the amount they claimed to have advanced on plaintiff's behalf, as will more fully hereafter appear. The 100,000 shares were illegally issued to plaintiff, inasmuch as no permit had been obtained from the corporation commissioner authorizing the sale of said stock in this state. The proceeds from the sale of the 20,000 shares, retained by defendants, represent the price paid by plaintiff for the 100,000 shares which were illegally issued. It is conceded that the 20,000 shares owned by plaintiff were legally issued. Said shares were the personally owned stock of defendant Salsberry, legally issued to him in the state of Nevada, and by him transferred to plaintiff. A natural person owning securities of which he is not the issuer or underwriter may sell such securities for his own account without procuring a permit from the commissioner of corporations. *People v. Pace*, 73 Cal. App. 548, 238 P. 1089.

The findings follow the allegations of the complaint for money had and received and merely recite the receipt by defendants of \$21,532.49 for the use and benefit of plaintiff, no part of which had been paid except the sum of \$5,000. We are of the view that the judgment against Salsberry for \$16,532.49 may not be sustained, but that recovery against him for \$7,177.49, the amount of the proceeds of the sale actually received by him, may be allowed.

The Western Lead Mines Company was organized in the state of Nevada in August, 1925, for the purpose of operating a lead mine in Inyo county, this state. The minutes of the corporation recite that the entire capital stock, consisting of 1,500,000 shares, was issued to defendant Salsberry in consideration of his transfer to the company of the mining property which the corporation was to operate, and, further, that Salsberry donated back to the corporation 600,000 shares. Plaintiff, who testified that his business was that of oil producer, agreed to purchase 20,000 shares at \$.25 a share in August, 1925, and also took an option given in the name of the corporation and expiring May 1, 1926, to purchase an additional 100,000 shares at said price. He com-

pleted payment for said 20,000 shares in November and received a certificate issued in the name of defendant Salsberry and by him endorsed to plaintiff. It is the proceeds from the sale of this stock, subsequently delivered by plaintiff to defendant Staunton, which plaintiff seeks to recover herein upon the count of money had and received.

In December, 1925, defendants represented to plaintiff that they were negotiating with C. C. Julian to interest him in the corporation, and that they had falsely told Julian that plaintiff had already exercised the option to purchase 100,000 shares. They urged plaintiff to exercise his option in order to make good their misrepresentations to Julian, and said that unless he did it would be necessary for them to raise the money themselves. In a subsequent conversation they represented to plaintiff that they had paid \$25,000 into the corporation. On December 28, 1925, Staunton executed and delivered to plaintiff two instruments in the form of letters, to which plaintiff gave his indorsement. One of said letters acknowledged the receipt of Pollak's certificate for 20,000 shares, which Staunton was "to handle and dispose of as he deems for the best interest of plaintiff." The proceeds in case of any sale were to be paid over to plaintiff, and if the stock was not sold by May 1, 1926, the certificate was to be returned.

The other letter referred to the 100,000 shares. It contains the following statement: "You are advised that with your consent, and without any responsibility attaching to you therefor, the undersigned has exercised the privilege granted in said option, and has paid into the treasury of said company the sum of Twenty-five Thousand Dollars (\$25,000.00) in lawful money of the United States, and has had issued to you Certificate No. 183 for one hundred thousand (100,000) shares of the capital stock in said Western Lead Mines Company." The letter then requests the indorsement and delivery of the certificate to Staunton, to be handled and disposed of as he deems best, Staunton to deduct and repay to himself from the proceeds of any sale the sum of \$25,000 before paying the balance to plaintiff. The letter further provided that if the stock had not been sold by May 1, 1926, plaintiff might at his option ("but no legal obligation shall be presumed to exist therefor") purchase the stock at \$.25 a share. A certificate for 100,000 shares, issued in the name of plaintiff, was exhibited to him on December 28, when the letters were signed and delivered to plaintiff, and at that time indorsed by him as provided by the terms of the letter. Staunton took the certificate and plaintiff at no time thereafter had possession of it. On January 11, 1926, Staunton sold the 20,000 shares, which plaintiff had bought at a price of \$5,000, to C. C. Julian for \$21,532.49, or \$1.07 a share. The proceeds of this sale were divided equally between the three defendants. Julian's check

for \$10,000 in favor of plaintiff was exhibited to him by Staunton, who requested plaintiff to indorse it to defendant to reimburse them for the payment claimed to have been made on plaintiff's account. Julian paid the balance directly to defendants. The membership of the board of directors was increased from three to five. Julian became a director in November, 1925. Some time after the sale of the 20,000 shares, the stock of the company became worthless.

The representation made to plaintiff that defendants had paid \$25,000 in cash into the corporate treasury to cover up misrepresentations made to Julian was false, and defendants had made no cash payment whatever for such purpose. The books of the corporation showed credits due defendants amounting to \$54,800, which appeared from testimony upon the trial to consist largely of commissions on the sale of stock to Julian and one other person. Said commissions seem excessively large. At or about the time the certificate for 100,000 shares was issued in the name of plaintiff in December, 1925, defendants reduced their credits on the books of the corporation by \$25,000 and credited the corporation with having received \$25,000 from plaintiff. Plaintiff did not discover that defendants had not paid \$25,000 in cash into the corporation until a few days before he instituted the action herein, on April 5, 1927.

[2] It appears from the evidence that one of the objects of defendant Staunton in obtaining possession of the 20,000 shares, as well as the 100,000 shares, with the right "to handle and dispose of the same," was to insure a unified control of all stock to facilitate the operations of Julian, which an outstanding option existing in plaintiff's favor would have prevented.

No permit authorizing the sale of the stock of the company in this state had been obtained. The sum of \$21,532.49, for which the 20,000 shares were sold by defendant Staunton, was to pay part of the purchase price of said 100,000 shares. Defendant's contention that the transaction with plaintiff as to the 100,000 shares did not violate the Corporate Securities Act (Stats. 1917, p. 673) cannot be upheld. Section 3 of the act provides that "No company shall sell * * * or offer for sale, negotiate for sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." Subsequent provisions of the section make it expressly applicable to corporations organized under the laws of other states. Plaintiff was ignorant of the fact that no permit had been obtained until after the sale of his 20,000 shares. Although the option given in the name of the corporation was actually executed by the corporate officers in Nevada, all offers to sell to plaintiff were made by defendants in oral negotiations with

plaintiff in this state, and all acts of plaintiff from which a consent to the issuance of stock may be implied took place in this state. Upon the execution of the letters or agreements of December, 1925, had in San Francisco, the certificate for 100,000 shares of the treasury stock of the corporation was delivered to plaintiff and thereupon indorsed by him and turned over to defendants, in accordance with the terms of said agreement. Plaintiff at no time authorized defendant Staunton, as his agent, to accept delivery of the 100,000 shares for him in Reno, Nev., on December 28, 1925, or at any other time.

[3, 4] Where stock has been issued without a permit it is void by the terms of the act (section 12), and the purchaser who is ignorant of such unauthorized issue may recover payments made by him on account of the purchase price. *Reilly v. Clyne*, 27 Ariz. 432, 234 P. 35, 40 A. L. R. 1005, with note; *Reno v. American Ice Machine Co.*, 72 Cal. App. 409, 237 P. 784; *Otten v. Riesener Chocolate Co.*, 82 Cal. App. 83, 254 P. 942; *Barrett v. Gore*, 88 Cal. App. 372, 263 P. 564. An action for money had and received is an appropriate proceeding in which to obtain relief. *Barrett v. Gore*, supra; *Hemmeon v. Amalgamated Copper Mines Co.*, 95 Cal. App. 400, 273 P. 74; *MacDonald v. Reich & Lievre*, 100 Cal. App. 736, 281 P. 106; *Smith v. Bach*, 183 Cal. 259, 191 P. 14. The purchaser, for whose benefit the Corporate Securities Act has been enacted, is not in pari delicto with the corporation or its agents. "Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." *Tatterson v. Kehrlein*, 88 Cal. App. 34, 263 P. 285, 291. See, also, *Reilly v. Clyne*, supra; *Smith v. Bach*, supra; *Hemmeon v. Amalgamated Copper Mines Co.*, supra; *Castle v. Acme Ice Cream Co.*, 101 Cal. App. 94, 281 P. 396.

Appellant also contends that plaintiff has lost his right to recover any part of the sum for which the 20,000 shares were sold by his conduct subsequent to the issuance of the 100,000 shares to him on December 28, 1925. He first learned, as a result of the investigation of the operations of C. C. Julian by the corporation commissioner, that no permit for the transfer of the stock had been granted late in January or in February, 1926. Immediately upon delivery of the stock to him, plaintiff indorsed it and returned it to defendant Staunton under the agreement of December 28, 1925, and at no time thereafter did he have possession of it. But plaintiff made repeated demands for delivery of the certificate,

and on April 26, 1926, his attorney wrote demanding its delivery. Salsberry testified that on one occasion plaintiff threatened to sue if the stock was not turned over to him. It would appear that the void stock was retained because Julian desired to maintain a unified control of the corporation. Appellant also relies on a statement of plaintiff made to Julian and other directors in May, 1926, when Julian was having difficulties with the corporation commissioner, to the effect that plaintiff "would stand by the crowd that was running the boat." Appellant also claims that a few days prior to the commencement of the action herein, plaintiff had discussed with Julian the advisability of turning over his 100,000 shares in exchange for shares of another corporation Julian was organizing.

[5, 6] Plaintiff testified upon the trial, and his conduct indicates, that he regarded himself as the owner of the 100,000 shares even after he knew that the corporation had obtained no permit. Plaintiff could not by his conduct ratify or impart validity to the void contract and void stock. As said by the court in *Reno v. American Ice Machine Co.*, 72 Cal. App. 409, 237 P. 784, 785: "Such a contract had no legal existence for any purpose, and neither action nor inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity." See, also, *Tatterson v. Kehrlein*, supra; *Reilly v. Clyne*, supra; *Boss v. Silent Drama Syndicate*, 82 Cal. App. 109, 255 P. 225. As between the corporation or its agents receiving payment for stock which is illegally issued and void, and the purchaser who in his dealings with the corporation persists in the notion that the stock possesses some validity, the corporation should not be privileged to take advantage of his error to retain money for which, by reason of its own violation of law, it gives nothing in return.

In addition to the stock being void, plaintiff was induced to become a party to the transaction by false representations of defendants, upon which he relied, to the effect that they had paid \$25,000 in cash into the corporation on his account, when, in fact, they had merely reduced the amount they claimed to be due them for commissions. Instead of there being \$25,000 in cash available for development of the mine in the corporate treasury, the corporation received no cash as a result of the transaction. The very fact that defendants represented that they had paid \$25,000 in cash into the corporation reveals a purpose to conceal from plaintiff their intention to use any cash received to pay commissions. It cannot be held that such a deception is immaterial. One of the factors most thoroughly investigated by the corporation commissioner before a permit is granted is the use to which the proceeds from the sale of stock are to be devoted.

[7, 8] No obligation rested on plaintiff to investigate the books of the corporation to determine the truth of defendants' representation that a cash payment had been made to the corporation. Although the certificate was issued in the name of plaintiff, he never had possession except to indorse it and return it to defendants under the agreement of December 28, 1925. He received nothing of value arising from the issuance of stock in his name which he can or should restore to defendant Salsberry as a condition to recovery. Defendants are not relieved of liability because during the time the stock stood in the name of plaintiff its listing price, for a very brief period, rose far above the price of 25 cents a share which plaintiff was to pay.

[9] Defendant Salsberry makes the claim that it was Staunton and Berger who conducted the negotiations with plaintiff. Plaintiff claims that Salsberry was present and actively participated in the transaction. However this may be, it appears from the testimony of Salsberry himself that at least he was kept informed throughout the transactions with plaintiff, and knew that no permit had been obtained from the corporation commissioner for the issuance of the 100,000 shares of stock and that his codirectors had misrepresented to plaintiff the payment of \$25,000 into the treasury to cover up misrepresentations made to Julian. Although the letters or agreements of December 28, 1925, were signed by Staunton, defendant knew the arrangements under which Staunton received possession of and sold the 20,000 shares. His receipt of one-third of the proceeds of the sale under such circumstances renders him liable in an action for money had and received.

[10, 11] Appellant Salsberry contends that in any event in an action for money had and received his liability is limited to the amount received by him, to wit, one-third of \$21,532.49, or \$7,177.49. This contention must be upheld. The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received. *Minor v. Baldridge*, 123 Cal. 187, 55 P. 783; *Whittier v. Home Savings Bank*, 161 Cal. 311, 119 P. 92; *French v. Robbins*, 172 Cal. 670, 158 P. 188; *Smith v. Bach*, 53 Cal. App. 63, 199 P. 1106; *Id.*, 54 Cal. App. 236, 201 P. 611; 2 R. C. L. 761; *Woodward*, *The Law of Quasi-Contracts*, p. 439; *Keener on Quasi-Contracts*, p. 200.

[12, 13] The release by plaintiff of all claims against Staunton and Berger arising from the transaction, upon payment by them of \$5,000 shortly before the trial, did not ter-

minate plaintiff's right to recover from Salsberry in an action for money had and received the amount actually received by Salsberry. We do not regard the rule of such cases as *Flynn v. Manson*, 19 Cal. App. 400, 126 P. 181, cited by appellant, as controlling. In the case herein the action was brought by plaintiff to recover the price paid by him for shares of corporate stock which, by reason of defendants' violation of law in failing to procure a permit from the corporation commissioner, were void. An action for money had and received sounds in *assumpsit*. Each defendant is severally liable in such an action for the portion of the amount paid by plaintiff which he received. The release of one or more defendants upon their several liabilities does not operate to discharge another defendant upon his several liability.

We have made close examination of the case presented, and upon mature consideration we are constrained to say that while the evidence is sufficient to sustain the modified judgment directed to be entered herein, the case, because of a failure to observe the law regulating the issuance, sale, and purchase of stock, is brought quite close to the borderline which courts will not cross in an effort to give assistance to those who have heedlessly followed the phantom of speculation into questionable realms.

It is ordered that the judgment be reduced from \$16,532.49 to \$7,177.49, with interest from January 11, 1926. As thus modified the judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

211 Cal. 52

HAHN et al. v. WILDE et al.

L. A. 10313.

Supreme Court of California.

Nov. 3, 1930.

1. Exchange of property §8(4).

Plaintiffs, merely seeking to recover amount allegedly paid for stock under exchange contract, must establish purchase price or consideration; otherwise, detriment is unascertainable.

2. Exchange of property §8(4).

Plaintiffs, seeking to recover par value allegedly paid for stock under exchange contract, had burden of proving extent of damage.

3. Damages §1.

Aggrieved person is entitled to compensation commensurate with injury, and no more.

4. Exchange of property ¶8(4).

Presumption, that par value of stock is prima facie actual value does not warrant presumption, in action to recover exchange price, that stock was actually purchased or accepted at par value.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Cliff Hahn and others against Frances E. Wilde and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Superseding opinion of District Court of Appeal in 285 P. 714.

Moore & Farraher, Ewell D. Moore, James Farraher, and Ben S. Hunter, all of Los Angeles, for appellants.

W. A. Alderson, of Los Angeles, for respondents.

WASTE, C. J.

Plaintiffs and defendants entered into a written agreement for the exchange of properties. Among the items of property to be transferred to the plaintiffs were seventy shares of the U. S. Grant Hotel Company, of the par value of \$100 each. Certificates for these shares were delivered to the plaintiffs, but they allege that at the time of the purported transfer the defendants were without right, title, or interest in or to said shares by reason of the prior sale of the stock to a third person for nonpayment of an assessment levied thereon. The complaint then avers that the seventy shares were of the par value of \$100 each, aggregating \$7,000, and that plaintiffs had received and accepted them in exchange at their par value. This latter allegation is denied by the defendants in their answer. There is also an allegation that plaintiffs had offered to return the asserted worthless certificates to the defendants, the tender having been refused. Defendants introduced no evidence, but rested after their motion for a nonsuit, made at the close of plaintiffs' case, had been denied. Finding all of the allegations of the complaint to be true and those of the answer to be untrue, the trial court gave judgment for the plaintiffs as prayed for.

[1] The parties disagree as to the nature of the action. Appellants insist that it is an action for rescission, or the equivalent thereof, and that in the absence of a return or tender of everything received under the contract respondents are not entitled to judgment. Respondents, on the other hand, state that it is neither an action for rescission nor an action for damages for breach of contract, but, rather, an action for breach of implied warranty of title, or, otherwise stated, an action "to recover the amount paid for * * * shares

of stock, for which the respondents gave a valuable consideration, and which was totally lost to them [respondents] because of failure of title." Whatever title be assigned to the action, it definitely appears from the averments of the complaint that the respondents are merely seeking to recover that which they assert was paid by them for seventy shares of stock, title to which they never received. In such an action it is essential, in order to determine the damage occasioned to the plaintiff by the nondelivery of the article sold, that he establish, among other things, the purchase price or consideration paid therefor. In the absence of such proof the detriment suffered by the vendee is incapable of calculation.

[2, 3] The record is destitute of evidence to support the allegation to the effect that the seventy shares of stock had been turned into the exchange at their par value, and in this particular appellants are correct in asserting that the findings are without support. During the course of the trial respondents offered no evidence as to the detriment incurred by reason of appellants' alleged failure to pass title to the shares of stock, but confined their proof solely and exclusively to the allegation that appellants were without right, title, or interest in or to said stock at the time of the purported transfer. It is the settled rule that the burden of proving the extent of his damage is on the plaintiff. *Parke v. Frank*, 75 Cal. 364, 370, 17 P. 427; *Weichers v. Dehail*, 41 Cal. App. 547, 549, 183 P. 187; 8 Cal. Jur. 895, § 131. This is not an action for tort, where the amount of recovery is within the sound discretion of the trier of the facts, but, on the contrary, is an action to recover the actual and proximate damages caused to the respondents by appellants' failure to pass title to certain shares of stock as agreed, viz., the purchase price or consideration given in exchange therefor. It is a paramount principle that the person injured shall receive a compensation commensurate with his injury, and no more. By reason of appellants' failure to transfer title to the shares of stock if, in fact, they did fail in this regard, appellants became liable for the full amount of damages resulting therefrom. It was for the respondents, however, to prove the extent of their loss with reasonable certainty.

[4] In the absence of proof that the shares had been turned into the exchange at their par value, as alleged—which proof, if supplied, would have definitely fixed respondents' loss at \$7,000, and would have warranted judgment for that amount—the respondents, in an attempt to overcome the deficiency in the proof as to damages, rely on the rule, which finds some support in the authorities, that, in the absence of evidence, the par value of stock is, prima facie, its actual value. *Peek v. Steinberg*, 163 Cal. 127, 134, 124 P. 834. This rule can be of little assistance to respondents

for they are not here seeking to recover the actual value of the stock, but the sum which they assert was paid therefor. In the absence of reasonably certain proof fixing such purchase or exchange price, it is impossible to properly determine the loss suffered by the respondents. To presume, under certain circumstances, that the par value of stock is, *prima facie*, its actual value does not warrant a presumption, in an action to recover the purchase price thereof, that stock was, in fact, purchased or accepted in trade at its par value. That the rebuttable presumption now relied on by respondents as evidence fixing the extent of their damage does not accord with the verity of the situation is admirably demonstrated by the statement of respondents' counsel in the trial court that this was an action to recover the par value of the stock, and that if appellants attempted "to show the real actual value of this stock we will object to it on the ground that this is not an action for damages for a breach of the contract to recover the value of the stock, but to recover what was paid for it, to-wit, the par value." By this statement respondents disprove the very presumption now relied on by them, viz., that at the time of transfer the par value and the actual value of the stock were one and the same thing. The presumption referred to might well be set up as evidence in an action for the conversion of stock, or for breach of an agreement to deliver stock, for in either case the plaintiff would merely be seeking to recover the loss proximately occasioned to him, namely, the value of the stock at the time of dispossession, or breach of agreement, as the case may be; and, in the absence of definite proof as to the value of the stock, the trial court might well presume, subject to the defendant's right to controvert the same, that the par value was, *prima facie*, its actual value. But where, as here, a plaintiff alleges that certain property was purchased or turned into an exchange at a certain definite figure or sum, which he paid and seeks to recover, the burden is upon him to establish that the property was, in fact, purchased or turned in at said figure or sum. In the absence of such proof, any determination of the issue is necessarily without support in the evidence. In passing, it may be said that the impropriety of giving effect in this case to the presumption relied on is borne out by the fact that stock of the par value of \$100 was permitted to be sold for a delinquent assessment of \$3.50 a share. The conclusion we have reached necessitates a retrial of the cause, and for this reason we will not consider the remaining contentions of the parties.

The judgment is reversed.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.

PEOPLE v. DAVIS.

Cr. 3352.

Supreme Court of California.

Oct. 27, 1930.

210 Cal. 540

1. Criminal law $\S$ 507½.

In prosecution of deputy district attorney for receiving bribe, testimony of prosecuting witness *held* to show he was accomplice required to be corroborated (Pen. Code, $\S$ 1111).

The testimony of the prosecuting witness was to the effect that the deputy district attorney asked the prosecuting witness to ask a defendant in a criminal prosecution to give attorney bribe money, and that the bribe, when paid, was paid by such defendant through the prosecuting witness to the deputy district attorney.

2. Criminal law $\S$ 511(1).

Evidence corroborating accomplice must be effective for more than merely raising suspicion of defendant's guilt (Pen. Code, $\S$ 1111).

3. Criminal law $\S$ 511(2).

Corroborating evidence is sufficient to support conviction if it, of itself, tends to connect defendant with offense (Pen. Code, $\S$ 1111).

4. Criminal law $\S$ 696(3).

Refusal to strike out testimony offered to show consciousness of guilt by conduct in face of accusation *held* error, it not being shown that defendant understood he was accused of criminal act.

5. Criminal law $\S$ 407(2).

Before failure to deny statement can be received as evidence of admission of guilt, it must appear that accused understands he is accused of criminal act.

6. Criminal law $\S$ 683(1).

Where witness testified concerning conversation with another over defendant's objection, refusing to permit the other to deny conversation *held* error.

7. Criminal law $\S$ 511(1).

In prosecution of deputy district attorney for receiving bribe, corroboration of accomplice *held* insufficient to support conviction (Pen. Code, $\S$ 1111).

8. Criminal law $\S$ 814(3).

Submitting case on theory evidence would authorize conviction of asking for bribe *held* erroneous, there being no evidence to support theory.

9. Criminal law $\S$ 1186(4).

Errors occurring in prosecution of deputy district attorney for receiving bribe *held* to

require reversal, evidence being weak and unsatisfactory (Const. art. 6, § 4½).

10. Criminal law ☞1186(4).

Where errors have been committed and it is doubtful whether without errors defendant would have been convicted, errors require reversal (Const. art. 6, § 4½).

11. Criminal law ☞742(2).

Whether go-between or intermediary respecting asking or receiving bribe was acting as agent or accomplice of both bribe giver and bribe receiver presents question for jury.

12. Criminal law ☞511(1).

Evidence corroborating that of accomplice in order to warrant conviction must do more than raise grave suspicion of defendant's guilt.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Harold L. Davis was convicted of crime of asking, agreeing to receive, and receiving a bribe, and he appeals.

Reversed.

For opinion of District Court of Appeal, herewith adopted, see 288 P. 95.

Jerry Giesler, Bourke Jones, Paul B. D'Orr, and Thomas A. Reynolds, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Robert P. Stewart, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

This case was transferred to this court for hearing after decision by the District Court of Appeal for the reason that we desired to give further consideration to several of the points raised by the Attorney General, particularly in reference to the question as to whether the case as written conflicted with the reasoning to be found in the recent case of *People v. Negra*, 208 Cal. 64, 280 P. 354. For reasons later made to appear, it is our opinion that the reasoning of the District Court of Appeal is not in conflict with the reasoning of the *Negra* Case, and it is likewise our opinion that the decision of the District Court correctly states the law applicable to this case. We, therefore, adopt as part of the opinion of this court the decision of the District Court of Appeal, Second Appellate District, Division 1, written by Presiding Justice Conrey, and concurred in by Justices Houser and York, which is as follows:

In the indictment it is charged, and the record shows, that at the times to which the indictment refers the defendant was the duly appointed, qualified, and acting chief deputy district attorney of the county of Los Angeles; that at and during said time there were pending undetermined in the superior court of said county two certain criminal actions wherein the defendants were charged with the commission of felonious crimes; that the defendant Davis, as such chief deputy district attorney, was charged with the duty of prosecuting said criminal actions; and that one E. H. Rosenberg was one of the defendants in each of said criminal actions. In one of these actions, No. 31043, the defendants, S. C. Lewis, E. H. Rosenberg, Jacob Berman alias Jack Bennett, were accused of the crime of conspiracy to obtain money by false pretense, and of the crime of conspiracy to violate the corporate securities act. In the other of said actions, No. 31044, I. L. Rouse, E. H. Rosenberg et al., were charged with the crime of conspiracy to violate the act to regulate the interest of money, known as the Usury Law. The indictment against Davis charges that on or about the 15th day of August, 1927, said Davis knowingly, etc., did ask, agree to receive, and did receive from the said E. H. Rosenberg, also known as Ed Rosenberg, charged as a defendant in said actions 31043 and 31044, and from one Ben Getzoff, a bribe, to wit, the sum of \$7,500, with a corrupt intent, and an agreement thereupon then and there made that the action of him, the said Davis, as chief deputy district attorney, would be knowingly, willfully, unlawfully, corruptly, and feloniously influenced thereby, in that he, the said Davis, then agreed that as such chief deputy district attorney, he would control and direct the prosecution of each and both of said causes so pending, to the end and in the manner that in so far as each and both of said causes related to the said E. H. Rosenberg, that each and both of said causes would be disposed of in such manner as to result in the discharge of the said E. H. Rosenberg without conviction. Upon trial of this cause before a jury, defendant Davis was found guilty as charged in the information. Pursuant to that judgment he has been sentenced to imprisonment for the term prescribed by law. He appeals from the judgment and from an order denying his motion for a new trial.

There is no evidence of any direct negotiation or transaction between appellant and Ed Rosenberg in relation to the alleged crime of appellant. If there were any such negotiations or transactions, they occurred between appellant and one Ben Getzoff acting as some kind of agent or go-between in said negotiations and in the alleged payment of the bribe. The prosecution is in no position to claim

that the defendant ever did anything to comply with his supposed corrupt agreement; for if any of the evidence for the prosecution could be given that construction, it would follow that the court erred in refusing the offered evidence concerning his actual conduct, some of which defendant was not allowed to produce. The first and foremost contention of appellant is based upon the proposition that Ben Getzoff, according to his testimony, was an accomplice in the commission of the crime charged against appellant. It is further contended by appellant that "the evidence is legally insufficient to sustain the verdict of guilty as there is no legal corroboration of Ben Getzoff, the only witness who testifies to any of the essentials of the crime charged, and who is an accomplice, according to his own testimony."

In order to obtain a clear understanding of the most important elements of fact in the case, and as a basis for consideration of the various errors alleged to have been committed at the trial, it is necessary to have before us the testimony of Ben Getzoff. We shall here summarize that testimony as we find it in the record. In making this summary it should be understood that we are not quoting his exact words, except where they are placed within quotation marks. Ben Getzoff said: For some years I have been engaged in the tailoring business in the city of Los Angeles. In the year 1925 the defendant Davis was introduced to me by Asa Keyes, the district attorney. Thereafter I met Davis at my places of business on Spring street, including my latest location at 609 South Spring street; also at his office in the Hall of Justice. I have known Ed Rosenberg for five or six years. He was introduced to me by his brother Jack Rosenberg. I have visited in the homes of the Rosenbergs and in the home of defendant Davis. In the year 1927 the Rosenbergs were engaged in the sale of stock of the Julian Petroleum Company. In May, 1927, the Julian Company was in financial difficulties. In May, 1927, I called on Davis in his office. He asked me, "What seems to be the trouble?" I told him the trouble was that Ed and Jack Rosenberg were subpoenaed before the grand jury. The defendant said: "You can talk to me about it. I have full charge of the case of the Julian Petroleum." I said, they don't want to be indicted. He said that he believed that they would be indicted. He promised that if there was any possible way he would stop the indictment, at least against Jack Rosenberg. I told him, "If you do anything for them they will appreciate it." He said, "All right, I will see what I can do."

In June there were two indictments returned against Ed Rosenberg and other defendants. That evening Davis called me up and said he had saved Jack, but Ed is in-

dicted but not to worry about it. The next day I phoned him, and he told me to come over at 2 o'clock that day, which was Saturday. I was in his office at 2 o'clock; no one else was there. He asked me if it was really true that Ed Rosenberg is worth \$3,000,000. I said, I don't know, but I do know they are wealthy. I said, what are you going to do with the indictment? He said: "It is too early in the game. Public sentiment is too strong against it right now to do anything." Later we will see what we can do. During July, 1927, I saw Davis at my place, 609 South Spring street, perhaps twice, and also saw him at his office. When I went to his office I would meet Mrs. Barrett, his secretary.

In August, 1927, Davis came to my store and told me to come to his office at 2 o'clock, which I did. When I came into his office, he asked me whether I had seen Ed Rosenberg and whether he was worried. I said yes, and he wants to know what you are going to do for his dismissal. He said, "I sure would love to dismiss Ed's case but it is time yet, don't have to worry." Then I asked him, "Buddy, is that true, you are going to run for district attorney?" And he asked me who told me, and I told him Asa Keyes told me that. He said, "That is correct." And he said, "Do you realize, Ben, it would cost me between \$35,000 and \$50,000 to make the run" for his office. I said "Does it take that money, Buddy?" He said, "Yes." He said, "It will take every penny of it, but," he said, "I have some friends, if they only come through with it." Then he told me, "Ben," he says, "if I want to make myself \$100,000 or \$200,000, I can do it right now, but," he said, "a man in my position you have got to be very careful with whom you do business."

Q. Well, what else was said, if anything?

A. Then I told him, I said, "Buddy," I said, "I will tell you what I will do, I will talk to Ed Rosenberg, and I am sure that he is going to do his share." He said, "What do you mean, money?" I said, "Yes." He said, "You think he is going to come through with anything?" I said, "He is not a cheap piker, he will come through." I said, "Now, Buddy, I want to tell you something, I am going to talk to Ed as soon as I get back to the store." He picked himself up from the chair, and he says, "Do you realize, Ben—do you think, Ben," he said, "that he will come through with \$10,000?" I says, "I do." He says, "That ought to be worth to him \$10,000." I says, "If you will dismiss that case, Buddy," I said, "he will give you more than that, and I am sure of it."

Q. Anything else about that matter? A. Then I told him, "As soon as I get back to the store, I will get in touch with Ed Rosenberg," and I did.

After I left Mr. Davis' office I had a talk with Ed Rosenberg. Then I called up defendant Davis and said to him, "I have got what you asked for." He told me to meet him in the basement of the Hayward Hotel. A few minutes later he met me there, in the basement between the telephone booths. I said to him, "I have got for you \$5,000." He said he wanted me to ask Ed Rosenberg for \$2,500 more as a loan; that he had to make good on some stock he had bought on margin. I said, "All right, you can have the \$5,000, and tomorrow I will get you the balance of \$2,500." He said: "No I wouldn't need it tonight. You can get that tomorrow, the whole thing." Then I left and telephoned to Ed Rosenberg, and he came to my place of business. The next morning I telephoned to Buddy Davis and told him I have got the balance what he wanted. He said, "I will meet you in the same place." Later in the day he telephoned me, and we did meet in the same place, in the basement of the Hayward Hotel. (This was next door to Getzoff's tailor shop.) When I left the store I spoke to my son David, who was working in the store. I went to the appointed place. I said to Davis: "I have got the balance of \$2,500 for you. That makes \$7,500." I had received that sum from Ed Rosenberg. It was in seven single \$1,000 bills and one \$500 bill. I handed it over to Buddy Davis. He said, "The first thing tomorrow I am going to get in touch with Asa, and tell Ed not to worry anything about it, as I will take care of it." He said: "You know what I done for Jack, Ed's brother. I prevented his indictment. He knows I will do the right thing by him." I said I thought it was Asa that prevented the indictment. He said, "Asa was a liar." While we were talking there, my son came down and told me that there was an urgent call from Ed Rosenberg. Then I went out through the Spring street side, and Davis went out through the Sixth street side.

In September I saw Davis at his office, when he got back from up north. I was up to see him the morning when Jack Bennett came. We were figuring he was going to dismiss the case in September, and Ed and I were supposed to leave town for a vacation. Davis told me he doesn't get any help from Asa Keyes. That he believed that Keyes feels that Ed is guilty. I saw Davis again the following day. He said that Ace was yellow and had no backbone. After that I left Davis alone entirely. I next saw him in January. In November I went to Chicago with Mr. Keyes. We got back the latter part of November. After we got back I saw Davis again. That was in November or December. He said he was unable to fix it. "I am going to send Ace a letter of resignation, and that will bring him to time." I did not see Davis again until the trial was on, not until the

day before Keyes was to deliver his argument before the jury. The trial of the case in which Ed Rosenberg was defendant ended some time in May, 1928. A day or two after the trial ended, Keyes and Davis and Jack Bennett and Ed Rosenberg and myself met in my office. They were having a few drinks and congratulating one another on the outcome of the trial. It was on Saturday. Keyes left first, then Jack Bennett, then Ed Rosenberg. Then Harold Davis said to me, "Is Ed going to come through with the balance of the \$2,500?" I said to him: "You have an awful lot of nerve to ask him for the \$2,500. If you want the \$2,500 you have got to ask him yourself." He said, "According to the circumstances, Ben, I have done the best that I knew how to do." I had a man named Joseph Sherman working for me at the time. His cloth table was right near the window outside the office. When he worked at the cutting table he stood just by that window.

On cross-examination of the witness Ben Getzoff, he said:

"Defendant Davis visited my house on Christmas eve, in December, 1926. He and his wife and Forrest Murray came to my apartment at Wilshire and Shatto Place. Prior to May, 1927, I had been to his house twice. I had been there in the summer of 1926. My son David took me over there. Mrs. Davis was there. Davis had been to my place and asked me if I had a bottle of whiskey. He gave me his address. I went over there and gave the bottle of whiskey to him. Again I went to Davis' house. I think it was in the spring of 1927, on a Sunday. Nobody was home. My son went with me. I brought a reading lamp. I went there and left it right in that little hallway. I was there again in May or June. Jack Rosenberg's brother drove me there and I delivered some booze. Davis was not at home. His wife was at home and she accepted it. Again I was at Mr. Davis' home in 1928. It was at night. I went there with Mr. Keyes. Davis was there but not Mrs. Davis. Again I went there and delivered a piece of white flannel for his wife's skirt. That was in 1927. Jack Rosenberg drove me over there. He did not go in with me. I took two pieces of white flannel. I gave them to Davis. Mrs. Davis was there. When I first talked with Davis, in his office, in May, 1927, I told him, 'The Rosenbergs will do the right thing by you.' The lamp which I took out to Mr. Davis' house was a tall standing lamp with a shade for reading. I got the lamp from my son-in-law, who manufactures lamps. I took one to Asa Keyes the same Sunday. When I took the lamp to Davis' house I left it in the alcove in front of the house. 'There is a neighbor who lives upstairs, and the door is opened and I am going in the house, and Forrest Murray came out from the house and he says to me, Ben, you can leave the lamp stand right here in

the little hall.' Also a man upstairs told me the same thing. Asa Keyes and E. H. Rosenberg and I were convicted of the crime of bribery in the Superior Court a few months ago." (Date of present testimony being July 3, 1929.)

"Q. Now, the first time that you ever told this story about having paid Mr. Davis money in consideration for his promising to do something for Ed Rosenberg was after you had been convicted of bribery in the Superior Court; isn't that true? * * * A. As soon as we were indicted for accepting or giving a bribe and when we had received our transcript, and when I read in that transcript where Buddy Davis has deliberately committed perjury, before the grand jury * * * so that is the time that I was ready * * * to go to the district attorney and tell him the whole story."

During the time of the trial before I was convicted "I told Buron Fitts (district attorney) that it doesn't make no difference whether it will be a conviction or a hung jury or an acquittal, I will tell him all about the whole transaction, and even told him about Buddy Davis, and so I done this right after we were convicted * * * and I told him the whole history of it." That was the following day after my conviction.

[1] According to the testimony of Ben Getzoff, the defendant Davis, through Getzoff, asked Rosenberg to give him bribe money. Likewise, according to that testimony, the bribe, when paid, was paid by Rosenberg, through Getzoff, to Davis. There is no evidence whatever of the asking for a bribe to be given by Getzoff, or the agreeing to receive or the receiving of a bribe from Getzoff. Undoubtedly, the testimony of Getzoff places him in the category of an accomplice. "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Pen. Code, § 1111. Upon the statement of facts contained in the testimony of Ben Getzoff, he was liable to prosecution for the identical offense charged against Davis. Pen. Code, §§ 31 and 971; *People v. Anderson*, 75 Cal. App. 365, 374, 242 P. 906.

[2, 3] The evidence relied upon to corroborate the testimony of an accomplice must be effective for more than merely the raising of a suspicion of the defendant's guilt. But the corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is

slight, and entitled, when standing by itself, to but little consideration. *People v. Kempley*, 205 Cal. 441, 456, 271 P. 478.

David Getzoff, twenty-eight years old, is a son of Ben Getzoff. During the year 1927, David was associated with his father in the tailoring business at 609 South Spring street. He testified substantially as follows:

In August, 1927, I returned from a vacation which I had taken during that month. One or two weeks after I came back from my vacation, an incident occurred with which the defendant and my father were concerned. This incident occurred in the basement of the Hayward Hotel. My father spoke to me and then went out of the store. After that I received a telephone call. Then I went to the basement of the hotel to call my father. At that place, in a little corner between the telephone booths, I saw Mr. Davis and my father. I told my father there was a phone call for him. He asked who it was, and I told him it was Ed Rosenberg. I said, "How do you do Mr. Davis," and he said, "Hello, Dave."

"Q. Did you see anything occur at that time between your father and Harold Davis as you walked toward them? A. My father handed Mr. Davis some money.

"Q. Could you tell how much it was? A. No, sir.

"Q. Could you see it? A. I saw it was money.

"Q. What did Mr. Davis do with it? A. I don't recall."

I left immediately. I did not stay there.

The foregoing testimony of David Getzoff is evidence which, if believed, would be sufficient to corroborate the testimony of Ben Getzoff upon the single fact that, at the stated time and place, money passed from the hands of Ben Getzoff to the defendant. But in view of the fact that there was in this case no evidence (other than the testimony of the accomplice) that any bribe was asked for, agreed upon, or paid—and no evidence, even in Ben Getzoff's testimony, that the defendant ever asked him, the said Ben Getzoff, for a bribe—it cannot reasonably be said that the testimony of David Getzoff had any force as evidence tending to connect the defendant with the commission of the offense. First, *there must be the offense, the crime, the corpus delicti*. If there had been evidence produced (other than that of the accomplice) that Ed Rosenberg, defendant in the criminal action then being prosecuted by Davis, had delivered money into the hands of Ben Getzoff, for payment to Davis (or, perhaps, even for some not reasonably explained purpose), then the further evidence that Ben Getzoff thereafter paid money to Davis might be sufficient to support the theory of a corrupt purpose, and so connect Davis therewith. In the absence of any evidence (other than that of Ben Getzoff) of any connection of Ed Rosenberg

with the transaction, there remains no ground for claiming that the transaction said to have been observed by David Getzoff had any connection whatever with the payment of a bribe. In the absence of any corroborating evidence connecting Ed Rosenberg with the transaction, the mere delivery of "some money" (as stated by David Getzoff) by Ben Getzoff to Davis was not evidence of guilt. To make such an act criminal there must be legally sufficient evidence connecting the act with a criminal transaction, intent or purpose. "The corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense." *People v. Kempley*, 205 Cal. 441, 271 P. 478, 484. But it must do that much.

What other evidence has been produced that could support a verdict against the defendant in this case? Ben Getzoff testified, as we have seen, concerning a visit of appellant and appellant's wife at his home, and certain other visits of himself at the home of Davis. He further testified to certain presents made by him to Davis, or to the wife of Davis. All of these are denied both by Davis and by his wife. Mr. Forrest Murray says that he never visited the home of Ben Getzoff in company with defendant and Mrs. Davis or at all, and that he never, at any time, saw Ben Getzoff come to the house of Davis with a lamp. Mrs. Davis denies the alleged visit said to have been paid by her and the defendant to the Getzoff home. She denies the incident relating to the lamp, and denies that she has ever had such a lamp. She denies the alleged present of the white flannel goods and denies that she ever had any such materials coming from Ben Getzoff. She denies that he was ever in her home or that she ever was in his home. But let it be assumed that these incidents, or some of them, as related by the witness Ben Getzoff, did take place. They had no evidentiary force concerning the crime charged, more than to create an atmosphere of suspicion.

[4] Besides the testimony of David Getzoff, to which we have referred, the evidence offered by way of corroboration is found in the testimony of Joseph Sherman, of Mrs. Jessie Barrett, and of John J. Kessler and his wife. Sherman testified that his place of work in the Getzoff shop was not more than five feet away from a window of the office; that in June, of 1928, several days after the verdict returned in the Rosenberg case, he overheard a conversation between defendant Davis and Ben Getzoff in which he heard Davis say to Getzoff: "Why doesn't he come across with the money? I am waiting too long." Cross-examined about the date of this occurrence, Sherman said that it was several days after the verdict, "Either about two weeks or three weeks; I can't remember exactly the date." Mrs. Barrett testified that she was secretary to the defendant in his office of chief deputy

district attorney during the months of May, June, July, August, and September, 1928; that she knew Ben Getzoff during that time; that he came to the office frequently and would ask for Mr. Davis and be admitted to his office; that she also made telephone connections between the defendant and Getzoff on frequent occasions.

The testimony of John J. Kessler and his wife is the only other testimony claimed to have corroborative value. That of Mrs. Kessler requires no separate mention, since that of her husband more fully covers the same matters. Apparently the purpose of this testimony was to prove that in the face of an accusation personally made by Kessler to defendant Davis, the conduct of Davis in response to that accusation was such as to show a consciousness of guilt. It appears that at some time prior to the trial of the Rosenberg case there had been a transaction between Mrs. Kessler and Jack Rosenberg, in which Jack Rosenberg received from Mrs. Kessler 200 shares of Julian stock, and that she had been unable to obtain from him any accounting therefor. Kessler testified to an interview which he had with Davis in the office of Davis, on May 17, 1928. He went there with Mrs. Kessler and asked Davis to take Jack Rosenberg before the grand jury for an investigation of that transaction. He said that he had found out that Jack Rosenberg had sold the stock of Mrs. Kessler, and he had told Jack that if he (Jack) did not return the money to Mrs. Kessler that he (Kessler) would go to the district attorney and swear to a warrant, and "you will be arrested, just like your brother."

"Q. Is this what you told Mr. Davis? A. Yes, I told Mr. Davis everything. He started to laugh. He said, 'I am not afraid. The Julian case is fixed by Mr. Getzoff.'"

Further on it appeared that what the witness meant to say was that in response to Kessler's threat of arrest, Jack Rosenberg laughed and said: "I am not afraid. The Julian case is fixed by Mr. Getzoff." Further on, Kessler said, "Mr. Davis, when I told him that—I said, 'Jack Rosenberg says he is not afraid, because the case is fixed.' He says, 'John, don't worry; wait until the trial will be over, and I will get you the money.'" Davis said that.

At the conclusion of the direct examination of Mr. Kessler, defendant moved to strike out said testimony as not illustrative of any of the issues in the case and not tending to prove anything in the indictment. Strenuous but unsuccessful efforts had been made by counsel for defendant to have this witness confine his statements to his conversation with Davis and to exclude direct statements of the conversation that he had had with Jack Rosenberg. The motion of defendant to strike out the testimony was denied. Upon a very similar rec-

ord of the testimony of Mrs. Kessler, similar objections and motions made by defendant were overruled.

[5] The testimony of the Kesslers was offered as showing an accusatory statement made to the defendant, and showing consciousness of guilt as exhibited by the conduct of defendant in the face of such accusation. The statement made by Kessler to Davis, in the form of an alleged quotation from Jack Rosenberg, was not an accusation directed personally to Davis. The record shows that in the then pending trial of the Rosenberg case the district attorney and several deputies other than Davis were also actively connected with the prosecution. There was also the possibility that any "fixing" of the case had been effected through contact with jurors. Before the failure of a person to deny a statement of fact can be received as evidence of an admission of guilt or of consciousness of guilt, it must appear that he understands that he himself is accused of the criminal act. Wharton on Criminal Evidence (10th Ed.) vol. 2, § 680, p. 1407; *People v. Hartwell*, 37 Cal. App. 799, 175 P. 21. We are of the opinion that the court erred in denying the motions to strike out said Kessler testimony.

[6] Another error of the court in relation to the Kessler testimony occurred at a later point in the trial. Jack Rosenberg was called as a witness for the defendant, and was asked whether he had a conversation with Kessler during the trial of the Rosenberg case, in which he told Kessler that he wasn't afraid of being taken before the grand jury because the case had been fixed by Getzoff. The district attorney objected to this question upon the ground that it was irrelevant and immaterial and that the conversation testified to by Kessler was a conversation of Kessler with Davis. The objection was sustained. If in fact the testimony of Kessler had been confined to his conversation with Davis, the objection to the question addressed to Jack Rosenberg would have been properly sustained for the reason that the question whether or not there had actually been such prior conversation with Jack Rosenberg would have been immaterial. But in fact Kessler had been permitted to testify and had testified, notwithstanding objections thereto, concerning a previous conversation with Jack Rosenberg, and had given a statement of that conversation. If the defendant had been permitted to produce the testimony of Jack Rosenberg denying the conversation, it would have been to that extent an impeachment of the Kessler testimony. The evidence of such prior conversation should not have been received by the court as against the defendant's objections, without permitting the defendant to produce testimony contradicting the same. The general rule, which excludes evidence in

rebuttal of testimony concerning an immaterial matter, is based upon the fact that controversies about such matters are likely to "lead to endless confusion." *Donnelly v. Curran*, 54 Cal. 282; *People v. Mitchell*, 62 Cal. 411. In the cases last cited, the irrelevant evidence had been received without any objection thereto. Moreover, the testimony which appellant sought to contradict was closely connected with the principal fact, to-wit, the supposed accusation. Without such contradiction, the defendant stood helplessly prejudiced before the jury.

[7] Taking the testimony of the several witnesses offered in corroboration of the story told by Ben Getzoff, it is exceedingly doubtful whether any of it, or all of it together, in and of itself amounts to corroborative evidence tending to connect the defendant with the commission of the crime charged. In order to give it effect even as tending in that direction, it seems at every point necessary to interpret and explain this "corroboration" in the light of the testimony of Ben Getzoff. It requires the testimony of Ben Getzoff to give it direction to the alleged crime, before it can be said to connect the defendant with the commission of the crime. But the law requires that such testimony offered in corroboration of the testimony of an accomplice shall of itself tend to connect the defendant with the offense charged. The following quotation seems appropriate: "As to all of the claimed corroborative evidence the prosecution must fail, for it does not even show 'the commission of the offense or the circumstances thereof' within the rule laid down in section 1111 of the Penal Code, and must further fail under the well-established rule approved in *People v. Robbins*, 171 Cal. 466, where, at page 470, 154 P. 317, 319, it is said that—'Where the circumstances when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside.' Therefore, eliminating, as we must, the evidence of the accomplice in order to determine whether the other evidence is sufficient to connect the defendants with the crime of bribery, we conclude that such other evidence falls far short of the legal requirements to constitute corroboration." *People v. Kempley*, 205 Cal. 441, 461, 271 P. 478, 487. The Attorney General suggests that the statements contained in the foregoing quotation should not be accepted as authority for the proposition that the corroborative evidence must show the commission of the crime. The general rule no doubt is that the corpus delicti, such as, for instance, that a certain man was murdered, may be established by testimony of an accomplice showing that the man was found dead under described circumstances indicating murder. In such case it would be only that part of his testimony implicating the defendant that would have to be corrob-

orated by other evidence. But in the case of a prosecution of a public officer on a charge of bribery, the fact that the crime was committed and the connection of the defendant therewith are of a single inseparable nature. In such case to hold that the testimony of the accomplice alone may be accepted as sufficient proof of the corpus delicti would wholly destroy the rule requiring corroboration of the testimony of an accomplice, as that rule is set forth in section 1111 of the Penal Code.

[8] Counsel for the people claim that the defendant "was convicted of the crime of asking a bribe of Ben Getzoff." This is true, because this was a part of the crime charged by the indictment, and the jury found the defendant "guilty of asking, agreeing to receive, and receiving a bribe, a felony, as charged in the indictment." Under instructions 23 and 26, reading them together, the court presented the case to the jury upon the theory that there was evidence which, if believed by the jury, would authorize them to find the defendant guilty of asking for a bribe, and upon the theory that this corrupt solicitation might be one occurring solely between defendant and Ben Getzoff. This theory was erroneous, because there was no evidence that the defendant asked a bribe of Ben Getzoff.

[9, 10] And even if it be assumed that the so-called corroborative testimony is technically sufficient to prove the asking, agreeing to receive, and receiving a bribe from Ed Rosenberg, nevertheless it leaves the case in that weak and unsatisfactory condition in which errors become important, because in such case they much more easily lead to a miscarriage of justice than in those cases where there is abundance of reliable evidence of the defendant's guilt. Section 4½ of article 6 of the Constitution was not intended to mean that the mere fact that the evidence may legally be able to stand up under the weight of the judgment is sufficient reason in all cases for refusing to set aside the judgment. The phrase "miscarriage of justice," used as descriptive of that condition of a cause which justifies the reversal of a judgment, has no hard and fast definition. It seems assured, however, that where errors have been committed, and where the appellate court finds that upon the record it is seriously doubtful that without such errors the defendant would have been convicted, then it may well be that errors which otherwise would not be considered to be seriously prejudicial, will require a reversal. See *People v. Adams*, 76 Cal. App. 178, 186, 244 P. 106, and numerous cases there cited.

There are numerous assignments of error, other than those to which we have referred. We do not find it necessary to elaborate upon them here. Let it be assumed that none of them would be sustained, or that if sustained they would not be of great importance. The

fact that the verdict rests upon the testimony of a self-confessed accomplice in the crime of bribery (a crime which necessarily impeaches the integrity of one who takes part in its commission), the fact that there is evidence indicating that the accomplice had interested motives for testifying against the defendant, the fact that the so-called corroborative evidence is of that inconclusive character which appears in the record, and the fact that these errors occurred to which we have given attention—these things together have left the cause in a condition which entitles the appellant to a new trial.

In answer to the contentions made on petition for hearing in this court, we add the following observations:

[11] The Attorney General contends, in effect, that since the testimony of Ben Getzoff, summarized by the District Court of Appeal, clearly shows that Getzoff was the accomplice of Rosenberg in the offering or giving of a bribe, he could not therefore be the accomplice of Davis in the asking or receiving of a bribe; and that it therefore follows that Getzoff's testimony did not have to be corroborated. This result is non sequitur. It is undoubtedly true, as the evidence shows, that Getzoff was an accomplice of Rosenberg in the giving or offering of a bribe, punishable under section 67 of the Penal Code. It is likewise true that since 1915, under the amendment of that year to section 1111 of the Penal Code providing that an accomplice is one who is liable to the prosecution for the identical offense charged against the defendant on trial, the giver and receiver of a bribe are no longer accomplices one to the other (although that was formerly the law of this state, *People v. Coffey*, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704), inasmuch as the asking or receiving a bribe is made a separate offense from offering or giving a bribe, under section 68 of the Penal Code. However, when the bribe is accomplished through the medium of an agent, or go-between, or intermediary, the mere fact that the evidence is conclusive that such emissary is the agent or accomplice of one of the parties does not necessarily determine that such emissary is not likewise the agent or accomplice of the other party to the transaction. We can see no impossibility, legal or otherwise, in a person acting as the agent or accomplice of both the bribe giver and the bribe receiver. Each case, of course, must turn on its own facts and circumstances, and, if there is any doubt as to the proper status of the emissary, the question is one, under proper instructions, for the jury. 8 Cal. Jur. 277, § 337. From the instructions given in this case, and from the testimony of Ben Getzoff himself, it seems reasonable to infer that the jury must have found that Getzoff was an accomplice of Davis; in fact, any

other finding would be contrary to the evidence.

The Attorney General strenuously contends that the law as stated, *supra*, in reference to the amount of evidence necessary to corroborate an accomplice, while following the rule of *People v. Kempley*, *supra*, is contra to the rule enunciated by this court in *People v. Negra*, *supra*. We find no inconsistency in the two cases. In the *Negra* Case, at page 69 of 208 Cal., 280 P. 354, 356, the rule is stated as follows:

"While the jury may consider the circumstance that a witness is an accomplice, in passing upon his credibility as a witness (*People v. Clough*, 73 Cal. 348, 354, 15 P. 5), his testimony is not to be rejected merely because he is an accomplice, and if there is other evidence which measures up to the requirement of the Code (*supra*), tending to connect the defendant with the commission of the crime charged, then such testimony of the accomplice is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled. *People v. Hoosier*, 24 Cal. App. 746, 142 P. 514. The evidence tending to connect a defendant with the commission of the crime may be slight and, when standing by itself, entitled to but little consideration. *People v. McLean*, 84 Cal. 480, 24 P. 32. The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. *People v. Martin*, 19 Cal. App. 295, 125 P. 919. The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. *People v. Armstrong*, 114 Cal. 570, 46 P. 611; *People v. Sullivan*, 144 Cal. 471, 473, 77 P. 1000. It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged. *People v. Solomon*, 6 Cal. Unrep. Cas. 305, 58 P. 55." (Italics added.)

[12] By the last sentence quoted above it was not intended to hold that the corroborating evidence is sufficient if it merely raises a suspicion of defendant's guilt. Any such rule would be directly contrary to the mandatory provisions of section 1111, Penal Code, which provides, in part, that the corroboration must be of such a nature "as shall tend to connect the defendant with the commission

of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." The corroborating evidence must do more than raise even a "grave suspicion" of defendant's guilt. *People v. Kempley*, *supra*, page 456 of 205 Cal., 271 P. 478; citing *People v. Robbins*, 171 Cal. 466, 470, 154 P. 317; *People v. Woodcock*, 52 Cal. App. 412, 417, 199 P. 565; *People v. Janssen*, 74 Cal. App. 402, 407, 240 P. 799. As already stated, *supra*, the corroboration relied upon in this case, after excluding the accusatory statement of the Kesslers, in no way corroborates the evidence of Ben Getzoff that Rosenberg paid money to Getzoff for Davis, and that, in fact, such money was so paid; nor is there any corroboration of Getzoff that Davis asked for and received such money. The most that can be said is that the corroborating testimony raises a suspicion of defendant's guilt, and this, as we have seen, is not sufficient.

The judgment and the order denying defendant's motion for a new trial are reversed.

DAVIS v. CHIPMAN. S. F. 13122.

210 Cal. 609

Supreme Court of California.
Oct. 30, 1930.

Rehearing Denied Nov. 24, 1930.

1. Brokers ⇐42.

Agent merely furnishing names of persons with whom he has dealt for sale of property is not "broker" within license statute (St. 1919, p. 1252, §§ 2, 20).

St. 1919, p. 1252, § 2, defines real estate broker as person who, for compensation, sells, or offers for sale, buys, or offers to buy, or negotiates purchase or sale of real estate, and section 20 requires such person, in order to recover compensation, to prove possession of license when cause of action arose.

[Ed. Note.—For other definitions of "Broker," see Words and Phrases.]

2. Brokers ⇐42.

Person dealing with another for sale of property held to be "broker" within license statute, defining broker as one who offers for sale (St. 1919, p. 1252, §§ 2, 20).

3. Brokers ⇐42.

That one dealing with third person actually offered to sell only to syndicate, intended to include such person, was immaterial under statute requiring broker's license

for one who offers for sale (St. 1919, p. 1252, §§ 2, 20).

4. Brokers ⇨42.

Broker, not procuring license until after sale, but before commissions became due, held unauthorized to recover commissions (St. 1919, p. 1252, §§ 1, 2, 17, 20).

5. Appeal and error ⇨1122(1), 1176(3).

For appellate courts to make new findings, and direct judgment thereon, it must appear that on no theory could unsuccessful party make further substantial showing.

6. Brokers ⇨42.

Services, being prohibited by statute requiring broker's license, could not be ratified by owner, or obligate him for commissions (St. 1919, p. 1252, §§ 2, 20).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Harry F. Davis against W. F. Chipman, as trustee of the estate of Josephine A. Phelps, deceased. Judgment for plaintiff, and defendant appeals.

Reversed.

Rehearing denied; SHENK and PRESTON, JJ., dissenting.

Superseding opinions of the District Court of Appeal in 282 P. 992 and 286 P. 429.

W. C. Sharpsteen, Cushing & Cushing, and William H. Gorrill, all of San Francisco, for appellant.

Fred L. Berry and Dozier & Kimball, all of San Francisco, for respondent.

CURTIS, J.

The defendant, as trustee under the last will and testament of Josephine A. Phelps, deceased, was on the 24th day of April, 1924, the owner of certain described real property situated in the county of San Mateo and comprising 1,400 acres of land or thereabouts. On said last-named day, defendant gave to Thomas B. Dozier, Jr., an option to purchase said real property for the sum of \$250,000, which said option is, in so far as the same is necessary for the purposes of this action, in the following words and figures:

"It is hereby agreed that I will sell and convey to you or your assignee, at any time within three (3) months from this date, unless previously sold or agreed to be sold, all of the property described in that certain agreement dated March 21st, 1923, made and entered into by and between myself, as Trustee of the Estate of Josephine A. Phelps, Deceased, under the terms of the Last Will and Testament of said Josephine A. Phelps, Deceased, the party of the first part, and California Homes

Association, a Corporation duly and regularly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California, the party of the second part, and recorded in Volume 75, at page 492, Official Records of San Mateo County, excepting therefrom such portions thereof as have been sold since the above date, for the total sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) in cash. * * *

"The price for the several parcels into which the said property is divided aggregates a sum largely in excess of the price quoted to you in this option to purchase. I reserve the right to sell or to agree to sell any portion of said property before you exercise this option to purchase. In the event that you exercise this option to purchase, the net sum for which said property is sold will be credited to your account on said purchase price.

"Anything contained in this agreement is not to bind me as an individual but solely as said Trustee.

"Yours very truly,

"(Signed) W. F. Chipman,

"Trustee of the Will of Josephine A. Phelps, Deed."

On the same date, and it would seem as part of the same transaction, although this is not a matter of material importance, the defendant executed and delivered to the plaintiff a certain written agreement, of which the following is a copy:

"Harry F. Davis, Esq., Attorney at Law, Hobart Building, San Francisco, California.

"Dear Sir: Enclosed please find copy of option to purchase, dated April 24th, 1924, from W. F. Chipman, Trustee of the Estate of Josephine A. Phelps, Deceased, under the terms of the Last Will and Testament of said Josephine A. Phelps, Deceased, to Thomas B. Dozier, Jr., Esq., First National Bank Building, San Francisco, California. Thomas B. Dozier, Jr., has requested me to send you this copy of the above option to purchase, as he states that such option to purchase was secured through your efforts, and that you interested him in the property from a purchase standpoint.

"I hereby agree, if Thomas B. Dozier, Jr., or his assignee or assignees, exercise the above option to purchase, or any modification or change therein which is effected by mutual consent of the parties thereto, to pay you a commission on the sale of the property of Ten per cent. (10%) of the purchase price of same, such commission to be due, and payable ratably and proportionately if, as and when such purchase price is received by me, and such commission to be due and payable only if a sale of this property is effected under such option to purchase, or any modification or

change thereof which is effected by mutual consent.

"It is further understood and agreed that, on or before the expiration of said option to purchase, both Mr. Dozier and yourself are to furnish me with the complete names and addresses of all parties with whom you are or have been dealing for the sale of said property under said option to purchase, and that no commission will be due or payable to you except it is effected within one (1) year of said expiration of said option to purchase and with one of the parties whose name and address has been previously furnished by one or both of you, and it is further understood that any party to whom a sale of the property is effected through your efforts must be a party with whom there have been no negotiations heretofore in connection with said property.

"Anything contained in this agreement is not to bind me as an individual but solely as trustee.

"Yours very truly,

"(Signed) W. F. Chipman,

"Trustee of the Will of Josephine A. Phelps, Decd."

Mr. Dozier failed to exercise his option to purchase said real property within the time fixed therein. He did, however, in conjunction with Mr. Davis, prior to the date of the expiration of said option, furnish to the defendant the names and addresses of certain parties with whom, they stated in said notice, they had been dealing for the sale of said property under said option. Among the names so furnished the defendant by the plaintiff and Mr. Dozier were those of V. M. Price and the Municipal Properties Company, the address of each of these parties being given as Santa Fe Building, San Francisco, Cal.

It is conceded that the option expired on July 24, 1924. On July 29, 1924, the plaintiff met the said V. M. Price on Market street, in the city of San Francisco. It might be said here that V. M. Price was then and at all times mentioned herein the president of the Municipal Properties Company, a corporation, and in all his dealings with the parties hereto or with Mr. Dozier he acted for said company. At the time of the meeting of the plaintiff and Mr. Price, as just related, the latter inquired of plaintiff how things were with the Phelps estate, to which the plaintiff replied, "Not so good, our option is up." Mr. Price then asked plaintiff to introduce him to the defendant, and at the same time said, "I wonder if he will accept improvements in lieu of a heavy down payment?" To which plaintiff replied, "I don't know but I will cheerfully introduce you." The two then went to defendant's office, and the plaintiff introduced Mr. Price to the defendant. As a result of this meeting Mr. Price, for the Municipal Properties Company, entered into an agreement with defendant for the purchase of the real property

described in the option. The terms of the agreement provided for a payment of \$2,500 down and the balance over a period of years, with the agreement on the part of Mr. Price that he and his company, who was the real purchaser, would put in certain improvements on the property such as streets, sewers, and water mains, and would grade the land in order to make it suitable for subdivision purposes. This agreement between the defendant and the Municipal Properties Company was executed on August 1, 1924. Before the defendant would accept Mr. Price's offer, or enter into any agreement of sale with him or his company, he secured an agreement from the plaintiff and Mr. Dozier waiving interest on commissions to be paid them. Upon this point Mr. Dozier testified as follows: "He told me that he would not accept that offer [Price's offer] unless Mr. Davis would waive the interest on his commission. * * * I told him I would take the matter up with Mr. Davis on the following morning and he asked me to write him a letter to confirm the arrangement if it was satisfactory to Mr. Davis and for both Mr. Davis and myself to sign the letter." As a result of this conversation the following letter was signed by the plaintiff and Mr. Dozier and delivered to the defendant:

"July 30, 1924.

"W. F. Chipman, Trustee, 525 Market Street, San Francisco, California.

"Dear Mr. Chipman: In regard to the matter of the Option to Purchase, dated April 24, 1924, between yourself and Thomas B. Dozier, Jr., and the Agreement for Commission on Purchase and Sale of Real Property, dated April 24, 1924, between yourself and Harry F. Davis, we desire to advise you that we are willing to accept a commission of ten per cent. (10%) of each payment on the purchase price on any sale by you to Virgil M. Price or the Municipal Properties Company of the property at San Carlos, such commission to be payable to us out of and from each payment on the purchase price if, as and when received by yourself, without interest.

"Trusting that this confirms our understanding of yesterday, and with kindest regards, we are

"Very respectfully,

• "(Signed) Thomas B. Dozier, Jr.

"(Signed) Harry F. Davis."

On August 7, 1924, the defendant mailed to plaintiff and Mr. Dozier his check for \$250, being 10 per cent. commission on the first payment of \$2,500, made by Mr. Price on the purchase of said real property. The letter accompanying said check is in part as follows:

"Gentlemen: Herewith my check, as trustee of the last Will of Josephine A. Phelps, deceased, in your favor for \$250, being 10% commission of the first payment of \$2,500 made by Virgil M. Price, pursuant to agree-

ment for the purchase and sale of real property by and between W. F. Chipman, Trustee, and Virgil M. Price, dated August 1, 1924.

"This payment to you is in accordance with your letter of July 30, 1924, a copy of which I enclose, wherein you confirm the understanding between us prior to the execution of the agreement for purchase above referred to.

* * *

"As you will recall, the new proposition made by yourselves in behalf of Mr. Price for the purchase of the properties differed so radically in the matter of payments that it was only entertained by myself and Mr. Sharpsteen because of several advantages that we believed would benefit the Estate.

"Among those advantages was the provision for immediate improvements on the premises at a cost of \$50,000.00, the payment of commission to you if when and as received without interest, and other features that convinced Mr. Sharpsteen and myself that such a contract would be desirable.

"Attached to the enclosed check for \$250.00 please find vouchers in duplicate which kindly sign and return to me promptly.

"Sincerely trusting that the agreement between Mr. Price and me may have most beneficial and satisfactory results for all concerned.

"With kind regards,

"Yours respectfully,

"(Signed) W. F. Chipman, Trustee."

Thereafter the defendant made the following payments on account of commission on payments made by Mr. Price on the purchase price of said real property: August 7, 1924, \$125; January 17, 1925, \$145; and January 31, 1925, \$105.

Defendant refused to make any further payments under his said agreement, although prior to the institution of this and the companion case of Dozier v. Chipman, 293 P. 47, Mr. Price had paid to defendant the full purchase price of said real property. Prior to the commencement of said actions the plaintiff, on or about July 28, 1924, assigned to the said Thomas B. Dozier, Jr., one-half of his claim against the defendant, and the court found that said assignment was with the knowledge and consent of the defendant. Plaintiff instituted this action to recover of the defendant the sum of \$12,125, being one-half of the commission of 10 per cent. of \$250,000, the full purchase price of said real property, less the sum of \$375, paid thereon by defendant. An action for a like amount against defendant was also instituted by the said Thomas B. Dozier under his assignment from plaintiff. The two actions were tried on the same evidence. Judgment was rendered in favor of the plaintiffs therein and against the defendant for the full amount sued for. The defendant has appealed from the judgment in each action.

The basis of defendant's refusal to pay the claim of the plaintiff was that plaintiff was not at the time defendant wrote the letter of April 24, 1924, in which he agreed to pay plaintiff said commission, nor at the time of the sale of said real property, on August 1, 1924, to the said V. M. Price, a licensed real estate agent or broker, and therefore plaintiff had no legal claim to said commission, or any part thereof.

Appellant now makes the same contention in this court that was made by him in the trial court—that is, that plaintiff, not having been a licensed real estate broker during any of the time he was dealing with the defendant, cannot recover for his services rendered under the agreement set forth in the letter of April 24, 1924.

Section 2 of the act, which we will refer to as the Real Estate Brokers' Act (St. 1919, p. 1252), as it stood at the time of the transaction involved, defined a real estate broker as follows: "A real estate broker within the meaning of this act is a person, copartnership or corporation who, for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who, for compensation, negotiates loans on real estate, leases, or offers to lease, rents, or places for rent, or collects rent from real estate, or improvements thereon, for others as a whole or partial vocation."

Section 20 of the same act provided that no person acting in the capacity of a real estate broker shall bring or maintain any action for collection of compensation "for the performance of any of the acts mentioned in section two hereof without alleging and proving that such person * * * was a duly licensed real estate broker * * * at the time the alleged cause of action arose."

Turning now to the letter of April 24, 1924, upon which the plaintiff relies in support of his claim for a commission on the sale of the property mentioned therein, we observe that in the first place it contains an agreement on the part of the defendant to pay the plaintiff a commission of 10 per cent. on the purchase price, "if Thomas B. Dozier, Jr., or his assignee or assignees, exercise the above option to purchase" said real property. This letter, which was addressed to the plaintiff, in its opening paragraph stated that "Thomas B. Dozier, Jr., has requested me to send you this copy of the above option to purchase as he states that such option to purchase was secured through your efforts, and that you interested him in the property from a purchase standpoint." As we read these two paragraphs together their meaning is clear. If Dozier, Jr., either personally or through others, exercised his option to purchase said property, defendant was to pay plaintiff a commission on such sale in consideration of the services rendered by plaintiff in interest-

ing Dozier in said property. The conditions of this agreement it is conceded were not met by plaintiff. Dozier did not exercise his option, nor was any agreement for the sale of said property effected during the life of said option. We may dismiss this agreement, therefore, from any further consideration. The sale which was entered into with Price was made after the expiration of the option. Accordingly plaintiff cannot claim under this agreement any commission for making such sale.

The third paragraph of the letter, however, contained a further agreement. This agreement was, in effect, that the plaintiff and Dozier, on or before the expiration of said option, were to furnish to defendant the names and addresses of all parties with whom they had dealt for the sale of said property under said option, and if the property, within one year after the expiration of said option, should be sold to one of the parties whose name and address had been previously furnished to defendant, then and in that event he would pay to the plaintiff a like commission on the sale of said property as that provided in the previous paragraph of said letter. It is under this paragraph of the letter that the plaintiff contends that he is entitled to recover in this action. Under the agreement set forth therein it was necessary before plaintiff was entitled to claim a commission for three acts to be performed. First, plaintiff or Dozier must have dealt for the sale of the property with the person to whom the property was subsequently sold. Second, they must have sent to defendant the name and address of said party on or before the date of the expiration of the option. Third, the property must have been sold within one year to one of the parties whose name plaintiff or Dozier had sent to the defendant as a party with whom they had dealt for the sale of said property under said option.

[1, 2] It is questionable whether, under the terms of this agreement, plaintiff or Dozier were required to bring about a sale of said property, after the expiration of said option. Their part was fulfilled, we think, when they had performed the first two conditions of this agreement. They were required, however, first to deal for the sale of said property under the option with the person who thereafter purchased it, and, secondly, they were to furnish the name of such purchaser to the defendant on or before the expiration of the option. For these services the defendant agreed to pay a commission on the sale of said property. Of course, the mere furnishing of the names of the parties with whom they had dealt for the sale of the property is not the performance of any act mentioned in section 2 of the Real Estate Brokers' Act, and such services could be performed and compensation collected therefor by one not a licensed real estate broker. But we hardly think we

can say the same thing regarding the act of dealing with a party for the sale of the property. It is not easy to perceive how a person could deal with another for the sale of property without offering to sell the property to such person. If, therefore, the plaintiff, acting as the agent of the defendant for a compensation, offered to sell said property to Price, then he was performing an act expressly mentioned in section 2 of the Real Estate Brokers' Act as one which could be legally performed only by a licensed real estate broker.

However, the plaintiff contends that while he dealt with Price for the sale of the property he did not offer to sell said property directly to Price but simply attempted to interest Price in joining a syndicate which would take over Dozier's option and purchase the property. The evidence shows that Price was interested in the purchase of the property during the life of the Dozier option, and approached the plaintiff and Dozier with that end in view, but that both plaintiff and Dozier refused to entertain any offer from Price for the purchase of the property, and sought to interest him in their scheme to form a syndicate to purchase the property. Price was not interested in the syndicate plan, and declined to become a party to it, and there the matter was dropped, so far as Price was concerned, until after the option expired. Under this state of facts, did plaintiff offer to sell the property?

[3] Plaintiff contends, as stated already, that while he dealt with Price for the sale of the property he did not offer to sell the property to Price. That plaintiff's dealings with Price contemplated and involved a sale of the property, we think, there can be no question. Under no other theory can it be held that plaintiff dealt with Price for the sale of the property. These negotiations with Price contemplated a sale of the property. The fact that the sale was not to be made to Price directly, but to a company or syndicate of which Price was to be a member, was not material. In either event the dealings of the parties contemplated a sale of the property, and if a sale, then, necessarily, there must have been an offer to sell the property, either to Price, individually, or to him as a member of the syndicate. As an offer to sell property by an agent for a compensation cannot legally be made except by a person holding a license as a real estate broker, it follows that the act of plaintiff in making said offer was illegal, and will not support a promise to pay for said services. *Wise v. Radis*, 74 Cal. App. 765, 242 P. 90; *Haas v. Greenwald*, 196 Cal. 236, 237 P. 38, 57 A. L. R. 1493.

We do not think the case of *Shaffer v. Beinhorn*, 190 Cal. 569, 213 P. 960, 961, is applicable to the facts of this case. There all that the plaintiffs, who were not licensed real estate brokers or licensed real estate sales-

men, were required to do in order to be entitled to compensation for their services was to "find any one interested in the purchase of such a ranch, to whom the said defendant would be able to negotiate a sale thereof," or to "introduce to said defendant any one to whom the said defendant would be able to negotiate a sale thereof." The court held that a complaint predicated upon such an agreement stated a good cause of action. "The acts of plaintiffs, therefore, as alleged in the complaint, fall short of those defined by the Real Estate Brokers' Act, as constituting either a real estate broker or real estate salesman." In that case the plaintiffs were not required to do anything except to find a person interested in the ranch and introduce him to defendant. They were not required to sell the ranch or to offer it for sale, or to deal with any person for the sale thereof, or to take any part in negotiating its sale. In the present action, while the plaintiff may not have been required to do anything towards effecting a sale of the property after the expiration of the option, yet during the option he was required to deal with the subsequent purchaser for the sale of the property, and this, as we have already stated, he could not do without either directly or indirectly offering to sell him the property.

[4] While plaintiff had no license to act as a real estate broker at or before the sale of said real property to Price, he did secure such a license on July 24, 1925, and from this last-named date continuously to the commencement of this action (except for the month of January, and the first 27 days of February of 1926) held a license to act as a real estate broker. While the plaintiff was thus the holder of a valid broker's license, there was paid to defendant on the purchase price of said real property approximately the sum of \$190,000. It is now contended by the plaintiff that he is entitled to recover the commission provided for in the agreement with defendant on all payments made on account of said purchase price during the time he held such license.

Plaintiff bases this contention upon the provisions of the Real Estate Brokers' Act (section 20), which provides that no recovery for commission on sale of real estate by a real estate broker can be had unless it is alleged and proven that such person was a licensed real estate broker at the time the action arose. In *Houston v. Williams*, 53 Cal. App. 267, 200 P. 55, the broker had no license required by said act at the time the commission contract was executed, but at the time he obtained a purchaser for the property he had the proper license. These facts were alleged in the complaint and found to be true by the court. A judgment in favor of the broker was sustained by the appellate court. In this action the court held that the cause of action arose when plaintiff obtained a purchaser for

the property. In discussing the question the court said, after quoting section 20 of the Real Estate Brokers' Act (page 271 of 53 Cal. App., 200 P. 55, 56): "Manifestly the Legislature herein undertook to prescribe an essential condition of recovery, but limited its operation to the time when the cause of action arose. By implication any earlier period was excluded. It is a reasonable construction of the act to hold that it is unlawful for any one to engage in the business of a real estate broker without having secured a license, but he is not precluded from recovering compensation for his services if he had such license at the time his cause of action arose, although his contract may have been executed prior to that time when he had no license. Herein, manifestly, the cause of action arose when plaintiff obtained a purchaser for the property, and it is not disputed that then he had the proper license, and it was so alleged in the complaint."

We find no decisions of our courts that have extended the rule beyond that enunciated in that case. To adopt plaintiff's construction of the statute would be to defeat the whole object and purpose of the Real Estate Brokers Act. In *Riley v. Chambers*, 181 Cal. 589, 185 P. 855, 856, 8 A. L. R. 418, this court held that the primary purpose of the Real Estate Brokers Act was to require the real estate brokers and salesmen to be "honest, truthful and of good reputation." In *Houston v. Williams*, supra, the appellate court held that: "It [the Real Estate Brokers Act] was designed * * * to protect the public against unscrupulous operators." Under plaintiff's version of this statute a person without a license to act as a real estate broker might enter into contracts for the payment of a commission for the sale of real property, might interest prospective purchasers in the purchase of said property, might actually effect a sale of said property for the owner, in fact, he might do anything that a licensed broker might do, and then by having his contract provide for the payment of his commission at a future date, collect his commission, provided he secured a license on or before the date his commissions became due. We are satisfied that the Legislature never intended the act should receive any such construction.

Then again the results that would follow from such a construction indicate its fallacy. The act provides that it shall be unlawful for any person to act as a real estate broker without first obtaining a license therefor. Section 1. It declares that the violation of this provision of the act shall be a penal offense punishable by imprisonment in the state prison or the county jail, or by a fine not to exceed \$2,000, or by both such fine and imprisonment. Section 17. If the courts were to place the construction upon this act contended for by the plaintiff, a person might be

prosecuted in the criminal court for the violation of this statute and convicted, suffer fine and imprisonment in the state prison for such act, and at the same time, but on the civil side of the court, might recover judgment for the same services for the doing of which he was then suffering punishment under the judgment of conviction entered against him in the criminal action. We cannot bring ourselves to believe that such contradictory and inconsistent results were ever contemplated by those responsible for the enactment of the Real Estate Brokers Act. In many instances, no cause of action arises in favor of a person for the performance of an act made illegal by statute. This is particularly true when the statute is one enacted for the purpose of regulating a particular business for the protection of the public. *Wood v. Krepps*, 168 Cal. 382, 143 P. 691, L. R. A. 1915B, 851. The Real Estate Brokers Act belongs to this class of statutes. *Riley v. Chambers*, *supra*.

In *Houston v. Williams*, *supra*, it was held that a limitation upon this rule was made by section 20 of the act, and that the rule in all its rigor should not apply to a person holding a broker's license at the time he consummated a sale of real property, even though he had no such license at the time he entered into a contract with the owner to pay him a commission. The court there held that a reasonable construction of the act would permit such a holding. While agreeing with the appellate court in this ruling, we are further of the opinion that it would be a most unreasonable construction of the statute to hold that it permitted an action to be maintained as in the present proceeding where the plaintiff had no license at the date the sale of the property was effected, or during any of the time during which he rendered the services for which he seeks to recover, and only secured such a license practically a year after the sale was effected. As plaintiff held no broker's license at the time the sale involved herein was consummated, he is not entitled to recover compensation for his services, all of which were rendered prior to his securing any license.

[5] We are asked by defendant in case we should reverse the judgment appealed from to make new and additional findings of fact and direct that judgment be entered in favor of the defendant. We are satisfied from a study of the findings that a judgment in favor of the defendant based thereon would not be proper, that the findings of the trial court would not support a judgment in favor of the defendant. Therefore, in order for us to direct the entry of a judgment in favor of the defendant, it would be necessary for this court to reverse the judgment and make new findings of fact. In *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970, 976, this court defined

the powers of appellate courts in cases like the present action as follows: "And if new findings be made as a basis of a reversal, with directions to the trial court to enter a judgment for the appellant, it must appear from the record * * * that on no theory grounded in reason and justice could the party defeated on appeal make a further substantial showing in the trial court in support of his cause." In view of the rule so recently promulgated by this court, we are of the opinion that the present action is not one in which we should exercise our power to make new findings and base thereon an order reversing the judgment and directing the trial court to enter a judgment in favor of the defendant. For this reason we are of the opinion that the order of this court should be limited to a simple reversal of the judgment.

[6] We reverse the judgment in this action reluctantly. The equities of the case are all in favor of the plaintiff. Even the defendant during the trial conceded that from an equitable standpoint plaintiff was entitled to recover for his services. During the negotiations between Price and the defendant which led up to the sale of the property to Price, defendant delayed acceptance of Price's offer until he could have an agreement with plaintiff and Dozier regarding their commission, and, after the sale to Price had been effected, defendant wrote the letter of August 7, 1924, in which he confirmed his agreement to pay a commission and acknowledged his liability to plaintiff and Dozier for their services. Not only that, but defendant actually paid to plaintiff and Dozier a commission upon the first and two subsequent payments on the purchase price of the land sold to Price. If it were in the power of the defendant to ratify his agreement with plaintiff and Dozier, he surely accomplished such a ratification by his letter just referred to. But the acts of plaintiff for which he seeks to recover compensation, having been expressly prohibited by statute, were beyond ratification by the parties.

It should be said, however, in explanation of the defendant's position in this matter, that he is not acting for himself, but as the trustee of trust property. He, therefore, cannot be governed by the equitable considerations of this transaction, but can be held accountable to the beneficiaries of his trust to a strict legal performance of his duties. It is apparent, therefore, that should he, as such trustee, expend any of the trust funds which may come into his hands for any purpose not permitted by some express provision of law, he could be held liable for such expenses to the beneficiaries of the trust, and could be forced by them to restore from his own private means all money thus illegally expended by him. There can be no criticism of the position taken by the defendant, and none is

intended by anything that we have said in this opinion regarding his failure to comply with his written agreement.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

210 Cal. 668

Thomas B. DOZIER, Jr., Plaintiff and Respondent, v. W. F. CHIPMAN, as Trustee of the Estate of Josephine A. Phelps, Deceased, Defendant and Appellant.

S. F. 13123.

Supreme Court of California.

Oct. 30, 1930.

Rehearing Denied Nov. 24, 1930.

In Bank.

Appeal by defendant from a judgment of the Superior Court, City and County of San Francisco, Frank J. Murasky, Judge, in an action for real estate broker's commission. Reversed.

Rehearing denied; SHENK and PRESTON, JJ., dissenting.

For opinions of District Court of Appeal, see 282 P. 995; 286 P. 433.

W. C. Sharpsteen, Cushing & Cushing, and William H. Gorrill, all of San Francisco, for appellant.

Dozier & Kimball and Fred L. Berry, all of San Francisco, for respondent.

PER CURIAM.

This is a companion case to the action of Davis v. Chipman, 293 P. 40, this day decided. In that action the facts involved in the present action are fully set forth as well as the nature of the plaintiff's demand. It is not necessary to repeat them here. Upon the authority of Davis v. Chipman, supra, the judgment herein is reversed.

211 Cal. 37

Ex parte McCUE.

S. F. 13987.

Supreme Court of California.

Nov. 3, 1930.

Rehearing Denied Dec. 3, 1930.

I. Attorney and client ☞3.

Motion to Supreme Court to be admitted to practice law was proper proceeding, where board of governors recommended admission, but committee of bar examiners denied application after due investigation.

2. Attorney and client ☞7.

Transcript of testimony in disbarment proceeding filed with committee of bar examiners, and certified to Supreme Court on review of order denying application for admission to practice, is before Supreme Court for all purposes.

3. Judgment ☞815.

Judgment of Supreme Court of another state in disbarment proceeding against attorney binds all parties to proceeding and their privies.

4. Judgment ☞822(2).

Foreign judgment in disbarment proceeding in matter of attorney's character held not conclusive on people on application for admission to practice in local courts.

Neither people of California nor any of its officers or agencies were parties to disbarment proceeding in state where judgment was rendered, or had any interest therein or any right to be heard therein.

5. Attorney and client ☞7.

Evidence held to show applicant for admission to practice law on certificate from another state possessed good moral character so far as charges in former disbarment proceeding were concerned.

6. Attorney and client ☞1.

Statutes regulating practice of law are inapplicable to federal courts (St. 1927, p. 38, as amended).

7. Attorney and client ☞4.

Practice before federal court, though applicant for admission to state bar was not previously licensed in state, held not to warrant refusal of admission to practice (St. 1927, p. 38, as amended).

8. Attorney and client ☞10.

Attorney licensed to practice in federal courts and in courts of foreign state held privileged to appear in local state courts to secure removal of action pending there to proper federal court, notwithstanding not licensed to practice in local courts.

9. Attorney and client ☞4.

Appearance of attorney not licensed to practice within state, but licensed in federal courts and courts of foreign state, before officer taking deposition at request of attorney of record, held improper practice.

10. Attorney and client ☞4.

Appearance of attorney not licensed to practice before officer taking deposition, though improper, held not to involve his

moral character or sufficient to deprive him of right to license to practice law.

11. Attorney and client ⇐7.

Evidence showing unlicensed attorney held himself out as attorney and entitled to practice law within state *held not* of such serious character as to warrant denial of admission to practice.

In Bank.

Application by Thomas F. McCue to review an order of the Committee of Bar Examiners of the State Bar of California denying petitioner's application for admission to practice law on certificate from another state.

Application for admission granted.

Rehearing denied; WASTE, C. J., and SHENK and PRESTON, JJ., dissenting.

Clarence G. Atwood, of San Francisco, for applicant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

PER CURIAM:

The applicant herein, Thomas F. McCue, in the month of December, 1927, filed in due form with the state bar of California his application to practice law in this state, basing the same upon his certificate to practice law in the state of Montana. This application was by the board of governors of the state bar referred to the committee of bar examiners. At a hearing held before said committee on February 24, 1928, the application of the said Thomas F. McCue for permission to practice law in this state was denied "on the ground that he does not possess the necessary qualifications."

On October 7, 1929, applicant requested permission of the board of governors of the state bar to renew his application. Before acting on this request of applicant, the board of governors appointed a special committee consisting of three of its own members, to wit: Judge M. C. Sloss, a former member of this court; Francis V. Keesling; and Joe G. Sweet, to examine the facts and circumstances involved in McCue's application. This special committee called a meeting at which the applicant was present and at which time he was fully interrogated by the members of the special committee as to his past life and as to his activities in the practice of law in the state of Montana and elsewhere. Upon the conclusion thereof, the special committee reported to the board of governors the facts developed at said hearing. Thereafter and on February 21, 1930, the board of governors, after considering the report of this special committee, passed the following resolution:

"Whereas, the application of T. F. McCue for recommendation that he be admitted to practice law in California has heretofore been

denied by the Committee of Bar Examiners; and

"Whereas, the Board of Governors has been requested by said applicant to review the action of the Committee of Bar Examiners, and said Board of Governors, through a special committee of three of its members, has examined the facts and circumstances of the application; and

"Whereas, in the opinion of this board, the facts developed by the further inquiry of said special committee, together with the lapse of time since the original denial of the application of said McCue, make it proper and advisable that the applicant should now be recommended for admission; and

"Whereas, this board recognizes that the Committee of Bar Examiners is vested with final authority to decide whether an application for recommendation should be granted or denied;

"Now be it Resolved, That this board, approving and supporting the action heretofore taken by the Committee of Bar Examiners, recommends to said committee that it reconsider said application of T. F. McCue and that, on such reconsideration, and on the basis of the report made to this board by its special committee, said Committee of Bar Examiners recommend said McCue for admission to the practice of law in California."

Acting, no doubt, in response to this resolution, a subcommittee of the committee of bar examiners was appointed and held a meeting for the purpose of determining whether the committee of bar examiners would reconsider the application of T. F. McCue to practice law in this state. Mr. McCue was summoned before said meeting and interrogated. His examination, however, was limited to his course of conduct after taking up his residence in the state of California some time in December, 1927, and particularly as to whether he had pursued the practice of law in this state without a license so to do. Upon the evidence taken before said subcommittee, the committee of bar examiners refused to reopen Mr. McCue's case and again expressly denied his application.

Whereupon the applicant moved this court, on July 8, 1930, for an order admitting him to practice law in this state. Notice of said motion had been previously served on the committee of bar examiners, and counsel representing said committee appeared at the hearing of said motion and resisted the granting of the same. At this hearing the matter was argued and submitted upon the oral arguments of counsel and briefs of the respective parties then on file.

While it does not appear that the original order of the committee of bar examiners of date, February 24, 1928, denying Mr. McCue's

application, was based upon a finding of the committee that the applicant was not a person of good moral character, the only argument advanced by counsel to sustain said order is predicated upon the showing made before the committee as to McCue's moral character. We think it must be, and is, admitted by the committee that McCue, at the date of his application, possessed "the necessary qualifications of learning and ability to practice before the courts of this state." The record before us shows that applicant was then fifty-eight years of age; that he was a graduate of the law department of the University of Northern Indiana; that he had been admitted to practice law before the Supreme Court of each of the states of Iowa, North Dakota, and Montana; that he practiced law nineteen years in the state of North Dakota before going to Montana on account of his wife's health; that he was admitted to practice law before the Supreme Court of Montana in 1918 and practiced in that state continuously up to the year of 1926 excepting comparatively short intervals when he was out of the state on legal business; that he was Attorney General of the state of North Dakota for a term of two years; and that since coming to California he had been employed in a number of cases pending before the United States District Court of the Northern District of California. His application was accompanied by a certificate from Chief Justice Calloway of the Supreme Court of Montana that applicant was a member of the bar of that state in good standing and that he had been engaged in the practice of law in the courts of that state for a period of three years within the period of seven years preceding the date of said certificate. The certificate bore date December 8, 1927.

We have recited the foregoing facts, not that there is any controversy regarding McCue's qualifications as to learning and ability, but that they might serve as a proper background to the discussion of the only seriously contested point in the case, and that is whether the applicant is possessed of the good moral character required by the laws of this state to entitle him to practice law.

[1] That the proceeding in this court by motion to be admitted to practice law is a proper proceeding has been held by this court in *Brydonjack v. State Bar*, 208 Cal. 439, 281 P. 1018, 63 A. L. R. 1507, and in *Harrington v. State Bar*, 292 P. 456.

Accompanying applicant's petition to the board of governors of the state bar there were filed numerous recommendations, letters, and certificates from prominent judges and attorneys and former clients of applicant residing principally in the state of Montana. These were not, however, confined to persons residing in said last-named state, but some of said letters were from persons occupying high of-

ficial positions in our own state. These testimonials all stated that applicant was trustworthy, honorable, and a man of good moral character, or used words equally laudatory. There can be no question but that the showing made by applicant in respect to his good moral character was sufficient unless it was counteracted by adverse evidence as to his character. This adverse evidence consisted of charges which were made against applicant before the Supreme Court of the state of Montana and upon which it was sought to disbar him from practicing law in that state. It is not necessary for us to state these charges in any detail for the reason that they are fully set out in the opinions of the Supreme Court of the state of Montana when the same were considered by that court. We deem it sufficient to say at this time that, when said charges were preferred against applicant in the Supreme Court of Montana, the court appointed a former member of the district court of that state to act as a referee and to take the testimony that might be offered bearing upon said charge and to report to the court his findings and conclusion in the matters before him. The referee held a hearing at which McCue was not present in person or by counsel. At the conclusion of said hearing the referee made findings sustaining said charges and reported the same to the Supreme Court. Thereupon that court reviewed the report of the referee, approved the same, and ordered that McCue be disbarred from the practice of law in that state. In *re McCue*, 77 Mont. 47, 248 P. 187.

[2] Thereafter McCue, who was absent from the state of Montana at the time of the hearing of said charges by the referee and during the time his disbarment proceedings were pending before the Supreme Court, returned to the state of Montana and asked that the judgment of disbarment against him be set aside on account of lack of notice to him of the pendency of such proceeding. The showing made by him in that respect was deemed sufficient by the court, and accordingly it made an order setting aside said judgment of disbarment, and permitted McCue to file an answer to the charges which were set forth in an amended complaint filed in said court. The matter was reset for hearing before the same referee on issue joined in each specification (four in number) contained in the amended complaint. Later the Attorney General was permitted to add thereto a fifth specification, which was duly denied by McCue. At the second hearing before the referee all of the evidence introduced on the first hearing was by stipulation considered as given on the second hearing, supplemented by further depositions and oral testimony on behalf of each of the parties to the proceeding, including the testimony of McCue. On July 11, 1927, the referee filed in the Su-

preme Court of Montana his report of said proceedings, including his findings of fact on each of the specifications on which testimony was introduced, his conclusion therefrom, and his recommendation that the proceedings be dismissed, "as on no one of the charges made had sufficient evidence been produced to warrant the disbarment of the accused." Upon this report of the referee the Supreme Court of Montana held a hearing, and, after the matter had been argued by counsel and exhaustively considered by the court, it adopted the report and approved the recommendation of the referee and dismissed the proceeding against the accused. *In re McCue*, 80 Mont. 537, 261 P. 341. It may be said, however, that the decision was by a divided court, three justices joining in the judgment of dismissal while two justices dissented therefrom. A transcript of the testimony taken before the referee at each of said hearings was filed with the committee of bar examiners at its hearing held for the purpose of considering McCue's application, and the same has been certified to this court and is before us for all purposes.

[3, 4] Applicant contends, however, that we are precluded from going behind the judgment of the Supreme Court of Montana in this matter and are prohibited from considering any evidence which might tend to sustain any of the charges considered by the court in said proceeding. In other words, the applicant contends that the question as to his good moral character in so far as the same was affected by the charges filed against him in the Supreme Court of the state of Montana has been judicially determined in his favor by the judgment of said court, and that the questions there raised and determined cannot be again considered by this court. In this we think the applicant is in error. The judgment of the Supreme Court of Montana in the disbarment proceeding against McCue binds all persons who were parties to said proceeding and their privies. But neither the people of this state nor any of its officers or agencies were parties to said proceeding, or had any interest therein, or any right to be heard therein. Upon well-established rules of law they would not therefore be bound by any adjudication that might be rendered by said court. 34 C. J., § 1405.

[5] While we have the power to go behind said judgment and examine and consider the evidence offered in support of the charges which were then before the Montana court, we doubt whether, if we did so, we should arrive at any different result than that at which the Supreme Court of Montana arrived in said hearing. In the first place, there is no original evidence before us in support of the charges determined by the Supreme Court of Montana. All there is before us, and all that the committee of bar examiners had be-

fore it when passing upon McCue's moral character, was a transcript of the evidence taken before the referee appointed by the Supreme Court of Montana to take the testimony in the proceedings against McCue. The referee had the advantage of seeing the witnesses before him, of observing their manner while testifying, and of judging of their credibility. The referee was a former district judge of Montana, and it is in the record that he was not entirely satisfactory to McCue, who objected to his acting as referee. This objection was overruled, but this fact goes to show that the referee was not prejudiced in favor of McCue. Nevertheless, his findings were all in favor of McCue. The Supreme Court of Montana reviewed these findings and found that there was substantial evidence before the referee to sustain them. Under these circumstances we question the propriety of this court, or of any of its administrative agencies, assuming a contrary position or arriving at a different determination from that of the Supreme Court of Montana in its judgment dismissing said proceedings against McCue.

We are further influenced in this conclusion by the action of the board of Governors of the state bar. As we have already seen, upon McCue's application to reopen his case, the board appointed a special committee from their own membership consisting of distinguished members of the bar of this state. This special committee reviewed the proceedings before the committee of bar examiners and held a hearing, at which McCue was interrogated in regard to his connection with the matters involved in the charges against him in Montana, and upon this special committee's report to the board of bar governors the latter body passed the resolution of February 21, 1930, hereinbefore set out in full, in which the board expressed as the opinion of its members that the evidence placed before them by its special committee made it proper and advisable that the applicant should be recommended for admission.

With this record before us we are not disposed to hold that applicant has not made a proper and sufficient showing as to his good moral character so far as the Montana charges are concerned.

The further claim is made, however, that the conduct of applicant since coming to this state, and particularly as to his activities in practicing law in this state, presents a sufficient reason and good cause for the denial of his application. These facts were brought out at the hearing before the subcommittee of the committee of bar examiners, held on April 7, 1930, and after the board of bar governors had passed the resolution of February 21, 1930, in which it expressed its opinion that the facts before it made "It proper and advisable that the applicant should be recom-

mended for admission." After this hearing and on April 21, 1930, the committee of bar examiners again denied the application of McCue. In the resolution passed by the committee in denying said application, the committee set forth the following recital, or finding, which appears to be the basis upon which it made its order of denial: "Whereas a further hearing was held on his application on April 7th, 1930, at which evidence was produced by both the applicant and by a representative of The State Bar, and whereas it appeared from said evidence that said applicant has been holding himself out to practice law in the state of California by the continued insertion of his name as an attorney-at-law in the telephone and city directories circulated in the city and county of San Francisco, and also by allowing his name to appear as a lawyer among the names of licensed attorneys-at-law on the entrance door of the offices occupied by him and them together, and by taking part in several trials in the superior court of the state of California, and in other respects. * * *

McCue came to the state of California in December, 1927, with the intention of engaging in the practice of law. He immediately filed his application with the board of bar governors, in which he called attention to the proceedings previously taken against him in the Montana Supreme Court. This application was denied by the committee of bar examiners on February 24, 1928. On October 7, 1929, McCue made application before the board of governors to renew his application. It does not appear in the record before us when the board of governors took action upon this application, but, after the board had appointed the special committee to examine into the facts and circumstances of said application and said special committee had made its report, the board of governors on February 21, 1930, passed its resolution in which it gave as its opinion that McCue should be recommended for admission. Thereafter and on April 7, 1930, the subcommittee of the committee of bar examiners held the hearing of which mention has already been made and at which hearing there was given evidence of McCue's activities in practicing law in this state without a license. It is contended by the committee of bar examiners that the evidence produced at this hearing, showing that between the date of McCue's first application and the date of said hearing last mentioned McCue had practiced law in this state without a license, furnishes ample support of the order of the committee of bar examiners denying his application.

The evidence in this respect may be grouped under three heads: (1) Evidence of his practicing law in the federal courts; (2) evidence of his practicing law in the state courts; and (3) evidence that during this time he held

himself out as an attorney at law and entitled to practice law in this state.

[6, 7] Appellant admits that since coming to California under a license so to do he has frequently appeared in the federal courts of this district in the trial of cases. He stated to the committee that he had acted as attorney in some twenty different cases in said federal courts. In our opinion this was not a violation of any law of this state. The State Bar Act (St. 1927, p. 38, as amended) and other statutes enacted for the purpose of regulating the practice of law in this state are applicable to our state courts only. The federal courts are governed entirely by federal enactment and their own rules as to admission and professional conduct. This state, should it attempt, and we do not think it has, to regulate the practice of law in the federal courts or to place any restrictions or limitations upon the persons who might appear before the federal courts within this state, would be acting entirely without right and beyond its jurisdiction. It follows, therefore, that applicant's activities before the federal courts of this district were not subject to criticism, nor do they furnish any legal reason why he should be refused admission to practice in the courts of this state.

[8-10] The evidence taken before the subcommittee of the committee of bar examiners shows that McCue appeared, when first coming to this state, as a foreign attorney and with the consent of the court in a case pending at Woodland in Yolo county; that made a like appearance in the superior court of the city and county of San Francisco before Judge Goodell and with Judge Goodell's consent; he was not the leading counsel in this case, but was asked by Mr. Barfield, who was the attorney of record, to accompany him to the courtroom and appear in the case; that he filed the necessary papers in a case begun in the superior court of this state to have it transferred to the federal court of this district; that in a case on trial before Judge Cabaniss of the superior court of the city and county of San Francisco the judge, who was personally acquainted with the applicant, asked what he thought about the question of law then under consideration by the court, and applicant, who had done preliminary work in the case, arose in court and gave his answer to the question propounded by Judge Cabaniss, and that his reply might be called an argument; that in one instance, at the request of the attorney in the case and without compensation, he appeared at the taking of a deposition, but that said deposition had never been used in court. None of these acts of the applicant, nor all of them together, show any flagrant violation of the rules and regulations governing the conduct of attorneys in this state. It is common practice, and one sustained by general usage in all of the states

of this Union, we believe, to permit upon request an attorney holding a license to practice law from one state to appear in the courts of a sister state and there take part in the trial of an action pending in said courts. This is all the applicant did when he appeared in the trial of the action in Woodland, and before Judge Goodell. The same may be said with regard to applicant's participation in the trial in the court presided over by Judge Cabaniss. It appears that the part he took in this latter instance was at the request of Judge Cabaniss and consisted merely of answering a question propounded to him by the trial judge. We do not deem the action of applicant in having a case properly within the jurisdiction of the federal court, but begun in the superior court, transferred from the latter court to the proper jurisdiction to be a matter of any great or serious consequence. The proceeding to have the case transferred from the state court was merely an incident to the defense and trial of the action in the federal court. If an attorney held a license to practice in the federal court, as well as a license from a foreign state, and could therefore represent his client in the trial of the case in the federal court, we think his appearance in the state court merely to have the action removed to the proper forum might well be considered within the rights and privileges accorded him by his said licenses. His appearance before the officer before whom a deposition was being taken at the request of the attorney of record is a practice not to be commended. This proceeding, even though held without the court, was in fact a proceeding in court. Applicant was not within his rights in appearing at said hearing, and the fact that he was acting without compensation does not furnish any justification for his actions. He had no consent from the court to appear at said hearing, and he was clearly violating the ethics of his profession as well as the laws of his adopted state by acting as an attorney in said matter without a license. However, we do not consider this conduct on his part as in any way involving his moral character, or that it is sufficient in itself to deprive him of his right to a license to practice law in this state.

[11] Finally, we will consider the acts and conduct of applicant which, it is contended by the committee of bar examiners, show and prove that McCue since coming to this state had held himself out as an attorney at law and entitled to practice law in this state. We have carefully examined the evidence bearing upon the conduct of applicant in the respect just mentioned, and we are of the opinion that it cannot be given the severe construction contended for by the committee. It is true that he maintained an office in the city of San Francisco at which he carried on his

practice which grew out of those actions in which he was retained and which were pending in the federal courts. He had printed cards and other stationery, but on all of these it was distinctly stated that his practice was confined exclusively to cases before the federal courts. He testified that he invariably refused to be consulted in regard to cases before the state courts, and declined employment in all such cases. His name was on the door leading to his office, together with other persons occupying the same suite of offices with him. This door was described by a witness as follows: "Well, the number appears, then 'Law Offices', then the name of Clarence G. Atwood, with two bars under the name 'Atwood,' then Thomas F. McCue, Clifton Hildebrand, then W. W. Chapin." It appears that Mr. Atwood and Mr. Hildebrand were attorneys, but that Mr. Chapin was not. It must be conceded that the meaning of the lettering on the office door is somewhat uncertain and to a certain extent the lettering is deceptive. Whether it was intended that the names of the persons under the two bars were to be understood as the names of persons who were attorneys may not be entirely clear, but certainly it would be so understood by the general public.

The name Thomas F. McCue appears in the telephone directory and in the city directory, followed by the words "attorney-at-law," as well as his address. He states that he did not authorize the insertion of his name in either publications, and that, if it was there, it was the work of one of his associates. While it would appear that applicant has not been as punctilious as he should have been in observing the niceties of professional ethics, and while it would have been much more in keeping with good taste for him to have refrained from the commission of some of the acts enumerated above until he had been regularly licensed to practice law in this state, we cannot bring ourselves to hold that his conduct has been such as to merit a denial of his right to practice law in the state in which he is now making his home. We cannot approve of his actions in every particular, but it is our judgment that they are not of such a serious nature as to be a bar to his right to practice his profession, for which in many respects he has shown himself to be so well qualified.

It is therefore ordered that applicant, Thomas F. McCue, be and he is hereby admitted to practice as an attorney and counselor at law, authorized to practice in all the courts of this state, and the clerk of this court is hereby directed to issue and deliver to him a certificate of such authority upon his taking the prescribed oath and signing the roll of attorneys.

211 Cal. 36

MORRISON et ux. v. SMITH BROS., Inc., and three other cases.**S. F. 13361, 13362, 13169, 13170.**

Supreme Court of California.

Nov. 3, 1930.

Rehearing Denied Nov. 28, 1930.

1. Municipal corporations ⇨2.

"Municipal utility district" is "public corporation," within meaning of statute (Civ. Code, § 284).

[Ed. Note.—For other definitions of "Public Corporation, see Words and Phrases.]

2. Municipal corporations ⇨745½.

Municipal corporations are not liable for torts of agents while acting in governmental capacity.

3. States ⇨112.

States or subdivisions are not liable for torts of agents while acting in governmental capacity.

4. Municipal corporations ⇨745½.

Municipal corporation proper, i. e., incorporated city or town, is liable for torts of agents committed while acting in proprietary capacity.

5. Drains ⇨19.

Waters and water courses ⇨228¾.

Irrigation districts and reclamation districts are state agencies performing governmental functions, and hence, subject to certain exceptions, not liable for torts of agents.

6. Municipal corporations ⇨266.

Term "municipal corporation," within meaning of constitutional provision empowering municipal corporation to establish public works for supplying certain public services, *held* to include municipal corporations proper and quasi municipal corporations (Const. art. 11, § 19, as amended in 1911).

[Ed. Note.—For other definitions of "Municipal Corporation," see Words and Phrases.]

7. Municipal corporations ⇨723.

Municipal utility district is "quasi-municipal corporation" and subject, as regards tort liability, to same rules as municipal corporation proper (St. 1921, p. 245; Const. art. 11, § 19, as amended in 1911).

[Ed. Note.—For other definitions of "Quasi Municipal Corporation," see Words and Phrases.]

8. Municipal corporations ⇨745.

Municipal utility district, engaged in construction project, as part of plan for convey-

ance and distribution of waters, *held* liable for agents' negligence in permitting water of creek to invade tunnel and connected workings, resulting in death of certain persons by drowning (St. 1921, p. 245).

In Bank.

Appeals from Superior Court, Alameda County; John J. Allen, Judge.

Actions by Angus Morrison and wife, by Methyl A. Larson and another, by Anna B. Anderson and another, and by Leona Hall and another, against Smith Brothers, Incorporated, and the East Bay Municipal Utility District. From judgment of dismissal in favor of the district, respective plaintiffs appeal.

Reversed.

L. R. Weinmann and W. E. Licking, both of Oakland, Fred S. Herrington, of San Francisco, and Frank W. Hooper and Donald McClure, both of Oakland, for appellants.

Everett J. Brown, Thomas J. Ledwich, T. P. Wittschen, and Brown & Ledwich, all of Oakland, for respondent.

Butcher & Haines, Maxwell Nichols, and Robertson & Crawford, all of Santa Barbara, amici curiæ for appellants.

Heaney, Price & Postel and Harold A. Parma, all of Santa Barbara, amici curiæ.

WASTE, C. J.

These several actions were commenced to recover damages for the alleged wrongful death of certain named persons. Briefly, and in substance, the complaints allege that the defendant district, organized under and pursuant to the provisions of the Municipal Utility District Act (St. 1921, p. 245), and while acting within the scope of the powers therein conferred, had adopted and entered into a project known as the "Mokelumne River Project" as a part of its plan for the conveyance, sale, and distribution of water to the inhabitants of the district; that in furtherance of said project it had entered into a contract with its codefendant, Smith Bros., Inc., for the construction of a certain tunnel and settling basin or diversion chamber; and that by reason of the negligence of said defendants the waters of San Pablo creek flowed into and through said tunnel and connected workings, causing the death by drowning of four named persons. The defendant district demurred generally to the several complaints, and the court below sustained each demurrer without leave to amend. From the judgment of dismissal thereafter entered in favor of the district, the respective plaintiffs appealed to this court. The causes have since been consolidated.

In sustaining the demurrers, the trial court concluded that a district formed under the

provisions of the above-entitled act was not answerable in damages for the negligence of its officers and agents. The appellants contend, in effect, that the court erred in so concluding, inasmuch as districts formed under said act are municipal or "quasi-municipal" corporations enjoying many of the rights and privileges of cities and whose duties and liabilities should therefore be measured by the same standard; in other words, that the respondent district, like a municipality, is liable to suit when injury results from the negligence of its officers or agents exercising powers in reference to matters not purely governmental but of a proprietary character. Respondent, on the other hand, urges that it is to be dealt with as an agency of the state, that is, as a separate and distinct governmental entity whose purposes, activities, and functions are necessarily public or governmental in character. Respondent concedes that incorporated cities and towns have been held liable in tort and have been held to be acting in a proprietary character when engaged in activities similar to those designated by the statute under which it was formed, but argues that this does not in any sense make the same activities proprietary when engaged in by a corporation such as it declares itself to be.

The Municipal Utility District Act, *supra*, among other things, provides that any municipal utility district formed thereunder shall have power to have perpetual succession, to sue and be sued, except as otherwise provided therein or by law; to adopt and alter a seal; to acquire, hold, and dispose of real and personal property necessary to the full and continued exercise of its powers; to acquire, construct, own, operate, control, or use works for supplying the inhabitants of the district with light, water, power, heat, transportation, telephone service, or other means of communication, or means for the disposition of garbage, sewage, or refuse matter, and to do all things necessary or convenient to the full exercise of the powers granted by the act. It is given power when there is a surplus of water, light, heat, or power above that required by the inhabitants of the district, to dispose of the surplus outside the district to any purchaser. It also may exercise the right of eminent domain for the condemnation of private property for public use, and may construct its works across or along any street or highway, or over the lands and property of the state. It may borrow money and issue bonds or other evidence of indebtedness within certain limitations, levy and collect, or cause to be levied and collected, taxes for the purpose of carrying on its operations and paying its obligations, and may make contracts, employ labor, and do all acts necessary or convenient for the full exercise of the powers granted to it, which are to be exercised by a board of directors elected by the voters in the district.

[1-4] The tort liability of such a corporation has never been determined by the appellate courts of this state. Such a corporation is clearly a public corporation within the meaning of section 284 of the Civil Code. Within the general class of public corporations, this court has already distinguished between two different species of such corporations, as far as liability for tort is concerned. On the one hand there are incorporated cities and towns, usually referred to as municipal corporations. In reference to this type of public corporation the rule is well settled that their liability for tort depends on the nature of the work being done at the time the tort is committed. If the agents were acting in a governmental capacity, no liability attaches to the corporation, under the elementary rule that the state or its various subdivisions are not liable for the torts of their agents while acting in a governmental capacity. But it is equally well settled that an incorporated city or town is liable for the torts of its agents committed while acting in a proprietary capacity. *Chafor v. Long Beach*, 174 Cal. 478, 484, 163 P. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106; *Davoust v. Alameda*, 149 Cal. 69, 70, 84 P. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847. This type of public corporation will be referred to in this opinion as a municipal corporation proper.

[5] The other type of public corporation upon whose tort liability this court has already passed is typified by irrigation, reclamation, or drainage organizations, whose main purpose is to assist the state in reclaiming, improving, and aiding the productivity of farm lands. In reference to this type of organization the law is well settled that, subject to certain exceptions not important in this case, they are not liable for the torts of their agents, upon the theory that they are state agencies, performing a governmental function. *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App. 234, 236, 212 P. 706; *Nissen v. Cordua Irr. Dist.*, 204 Cal. 542, 269 P. 171. It is somewhat difficult to determine the exact nature of this type of organization, due to some rather loose language used in describing them. In the leading case of *In re Madera Irrigation District*, 92 Cal. 296, 318, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, such organizations were referred to as "public corporations" for "governmental purposes," and, at page 317 of 92 Cal., 28 P. 272, 276, as "the agents or representatives of the state in the particular locality in which they exist." In *Nissen v. Cordua Irr. Dist.*, *supra*, at page 545 of 204 Cal., 269 P. 171, 173, and in *Lindsay-Strathmore Irr. Dist. v. Superior Court*, 182 Cal. 315, 335, 187 P. 1056, they are referred to as "public agencies." In *Jenison v. Redfield*, 149 Cal. 500, 501, 87 P. 62, they are called "public corporations." In *Turlock Irr. Dist. v. White*, 186 Cal. 183, 187, 198 P. 1060, 1062, 17 A. L.

R. 72, it was said "that such a corporation is not a municipal corporation, but a 'public corporation for municipal purposes.'" In *People v. Reclamation Dist.*, 117 Cal. 114, 120, 48 P. 1016, 1017, it was said that "if these districts can be said to be corporations at all, I think they are properly called 'public corporations for municipal purposes.' That phrase means no more than that they are state organizations for state purposes." In *Whiteman v. Anderson-Cottonwood Irr. Dist.*, supra, at page 237 of 60 Cal. App., 212 P. 706, 708, it is said: "As to the character of irrigation districts as organized under our statute, it must be conceded that they are public corporations or public agencies, but not 'municipal corporations,' as that term is usually understood." And in *Western Assurance Co. v. Sacramento, etc., Drainage Dist.*, 72 Cal. App. 68, 76, 237 P. 59, they are referred to as "governmental agencies of the state." For the purposes of this opinion such organizations will be referred to as state agencies.

[6] Organizations of the nature of respondent are of relatively recent origin in this state. They will be referred to in this opinion as quasi-municipal corporations. In 1911, article 11, section 19, of the Constitution was amended to read, in part, as follows: "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. * * *" That the term "municipal corporation," as above used, was not intended to be limited to municipal corporations proper, as defined in this opinion, but was intended to include quasi-municipal corporations similar to respondent, is well settled. Immediately after the adoption of the above constitutional provision, the Legislature amended the Municipal Water District Act of 1911 (St. 1911, p. 1290, amendment, Stats. 1911, Ex. Sess., p. 92), which permitted the creation of districts similar in many respects to respondent. In the case of *Henshaw v. Foster*, 176 Cal. 507, 169 P. 82, the constitutionality of this act was attacked. At page 511 of 176 Cal., 169 P. 82, 84, this court said:

"By the law and under its sanctions the people of one or more municipalities with the adjacent territory may unite for the joint benefit of all forming a municipal corporation through which they may accomplish that which it would be impossible for any one of the constituent municipal or suburban units to perform. * * *

"Respondents take the position that the act in question violates the above-quoted sections 12 and 13, because 'it delegates to some one other than the corporate authorities the power to assess and collect taxes for city and municipal purposes.' This argument, like the other objection discussed herein, is based

in part upon the supposed exclusive authority conferred by section 19 of article 11 upon cities. But, as we have seen, *that article applies not merely to cities and towns but to all municipal corporations*, and power to acquire and sell water may be given to municipalities larger in territory and including within themselves cities and towns or similar corporations." (Italics added.) Thus, from the very first, the courts have recognized that the above constitutional provision has created a new type of public corporation very similar to municipal corporations proper, but radically different from the state agencies above discussed.

The next step in the development of this new type of municipal corporation came with the passage of the County Water District Act of 1913 (St. 1913, p. 1049). This act was closely patterned on the Water District Act of 1911, except that it applied to unincorporated territory. In 1921 the Legislature, which had hitherto limited the new type of municipal corporation to water districts, decided to extend the same to the operation of other utilities. As a result, there was passed the Public Utility District Act (St. 1921, p. 906), and also the Municipal Utility District Act (St. 1921, p. 245), the two acts being similar in nature, except that the former applies only to unincorporated territory, while the latter has application to incorporated territory alone or in combination with unincorporated territory. It is under the latter act that respondent is incorporated. These two acts were closely patterned on the 1911 act above mentioned. In the case of *In re Orosi Public Utility District*, 196 Cal. 43, at page 56, 235 P. 1004, 1009, a case strongly relied on by both parties, it is said: "It is significant that, when the Legislature came to pass the act extending to the inhabitants outside of incorporated cities and towns, the privileges in regard to the acquisition and use of their own public utilities that are granted by the state Constitution to municipalities, it should have followed so closely the language of the constitutional amendment of 1911 in the statement of the purposes for which the districts may be created. We are convinced that it was its intention to provide for the creation of public corporations of a quasi municipal character, with power to carry on the particular functions committed to them." (Italics added.) The court in that case clearly and unequivocally held that such quasi-municipal corporations differ from state agencies as above defined, and are similar to municipal corporations proper. At page 52 of 196 Cal., 235 P. 1004, 1008, the court thus distinguishes between state agencies and quasi-municipal corporations:

"The purposes for which the Orosi District was formed, the appellant contends, are not municipal, and a district formed for such

purposes does not possess the essential characteristics of a municipal corporation. If the authorities cited by him were strictly in point, there would be an end to the controversy; but they are not. They deal with questions arising in connection with districts formed for the purpose of draining, irrigating, reclaiming, or otherwise directly benefiting the lands affected thereby. [Citing cases.] When related to that class of districts, the cases cited are clearly in point. The improvements contemplated by the acts under which they were formed cannot be considered 'municipal purposes.' * * * One of the distinguishing features of such districts is that they are created for the purpose, generally, of some special local improvement, and may exercise only such powers as may be conferred by the Legislature in the line of the object of their creation. They are merely special state organizations for state purposes, created to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. The other distinguishing feature is that the exactions which such districts may enforce in order to carry out their purposes are in the nature of assessments or taxes for local benefits, to be spread on the property in the districts in proportion to the peculiar advantage accruing to each parcel from the improvement. * * *

"Districts of the nature just discussed are not municipal corporations in the contemplation of the Constitution."

The final act in the development of this new type of quasi-municipal corporation came in 1927 with the passage of the Metropolitan Water District Act (St. 1927, p. 694), an act closely patterned on the other acts herein mentioned, and permitting the creation of a district which, for all practical purposes, is the same as respondent district. In the case of *Pasadena v. Chamberlain*, 204 Cal. 653, 269 P. 630, it was directly held that such a district, for all practical purposes, was a municipal corporation. At page 663 of 204 Cal., 269 P. 630, 634, it is said: "Municipal corporations, whether organized under special charters or general laws, derive these particular powers from the same legal sources as those which provide for the organization of quasi municipal corporations such as that provided for in this act, and we can perceive no real distinction between the organization of a municipal corporation, strictly so-called, for the carrying forth of the purposes usually committed to such governmental agencies and the organization under legislative sanction of such other governmental agencies as municipal water districts or public utility districts or metropolitan water districts, which, while these may not exercise all of the functions committed to municipal corpo-

rations, strictly so-called, are empowered to exercise certain of these functions which have come to be recognized as at least quasi governmental in character."

Thus, from 1911 to date, there has been developed a new type of public corporation, resembling in many respects municipal corporations proper, and radically different in nature from irrigation and reclamation districts. The case of *Henshaw v. Foster*, supra, clearly recognized the distinction, holding that such quasi-municipal corporations were municipal corporations within the meaning of article 11, section 19, of the state Constitution. Unless the court had so found a distinction, it could not have upheld the delegation to a board of directors of the general taxing power. In the *Orosi Case*, supra, the court again found a distinction between irrigation districts and quasi-municipal corporations. The court there pointed out that the purposes and means of operation are different. It stated that these quasi-municipal corporations pay their way, first, out of charges for services supplied, and, second, out of taxation by general assessment in the same manner as municipal corporations proper. State agencies, on the other hand, assess their costs according to the benefits conferred upon the individual property affected. In the *Chamberlain Case*, supra, the close similarity to municipal corporations proper of this new type of organizations was emphasized.

[7, 8] We feel that sufficient has been said to show that such quasi-municipal corporations as respondent more closely resemble municipal corporations proper than they do state agencies, such as irrigation and reclamation districts. Under such circumstances we deem the better rule to be that, so far as tort liability is concerned, such liability is to be governed by the same rules as are applicable to municipal corporations proper. No good reason occurs to us why those districts should be cloaked with the immunity that respondent claims when acting in a purely proprietary capacity; and, in fact, many reasons exist why the same rule that applies to municipal corporations proper should apply to respondent. It would certainly be an anomalous situation if a municipality engaged in a proprietary function, such as running, operating or constructing waterworks, would be liable for the torts of its agents, but if that same municipality should join with other municipalities and organize a municipal utility district it would thereby immunize itself from all such liability. Such a rule does not appeal to our sense of justice nor to our reason. The rule excluding state agencies from liability for tort is an exception to the general rule which we are not inclined to extend. In so far as liability for tort is concerned, the respondent district is to be governed by the same rules as govern municipal corporations with reference to the same ques-

tion—that is, respondent is liable for the torts of its agents if said torts are committed while the agents are acting in a proprietary capacity. It therefore follows that the trial court was in error in sustaining the general demurrers without leave to amend. Whatever defects may appear in the complaints may easily be corrected by amendment.

For the foregoing reasons the judgments of the trial court are reversed.

We concur: PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

210 Cal. 625

RICE et ux. v. HANRAHAN CO. et al.
S. F. 13341.

Supreme Court of California.
Oct. 31, 1930.

1. Municipal corporations ⇨269(1)—Proceedings where work is done on street not acquired at time are not invalid, if land is acquired before judgment is entered (Improvement Act 1911, § 26, as amended by St. 1923, p. 117, § 5).

Under Improvement Act (St. 1911, p. 730) § 26, as amended by St. 1923, p. 117, § 5, where work is done on street or right of way not lawfully dedicated or acquired at time, proceedings are not invalid provided land is lawfully dedicated or acquired at any time before judgment is entered in suit involving such proceeding.

2. Constitutional law ⇨289—Inclusion of undedicated strip in street improvement does not deny property owners due process of law (Improvement Act 1911, § 21).

Inclusion of undedicated strip in street improvement proceeding does not deny property owners within assessment district due process of law, since if because of failure to acquire necessary rights their property shall be subjected to an invalid assessment, property owners have their legal remedy under Improvement Act, § 21 (St. 1911, p. 743), and general rules of law applicable.

3. Municipal corporations ⇨294(3)—Street improvement proceeding held not invalidated by slight departure from statutory requirement as to lettering of notice of improvement.

Street improvement proceeding held not invalidated by slight departure from statutory requirement as to lettering of heading "Notice of Improvement," in that some of letters fell slightly below statutory standard.

4. Municipal corporations ⇨294(4)—Notice of street improvement held not defective because of failure to state work was to be chargeable upon a district and failure to de-

scribe district, since Improvement Act, § 5 (St. 1911, p. 734), makes no such requirement, and, where resolution gave detailed description of district to be benefited and made subject to assessment, notice, with its reference to resolution, thus afforded necessary information.

5. Municipal corporations ⇨339(1)—Award of street improvement contract held not objectionable where contractor had reasonable discretion to vary somewhat proportions of sand and rock in order to fill all voids.

Award of street improvement contract, in which specifications for concrete pavements called for one part of Portland cement, two parts of sand, and four parts of broken rock or stone by measure, with proviso that proportions might be changed by contractor whenever voids in materials used were not filled by use of ingredients in specified proportions, held not objectionable, since discretion of contractor to vary somewhat proportions of sand and rock in order to fill all voids was reasonable.

6. Municipal corporations ⇨339(2)—Specifications in street improvement contract held not defective because of clause declaring contractor, if requested, should furnish tests of cement made by reliable chemist, such tests to conform to specifications required by American Association of Civil Engineers.

Specifications in street improvement contract held not defective because of clause in relation to cement for use in concrete pavements, declaring that contractor, if requested by engineer, should furnish tests of cement made by some reliable chemist, such tests to conform to specifications required by American Association of Civil Engineers, where specifications required that all cement should be Portland cement, and should be delivered as specified and be kept dry.

7. Municipal corporations ⇨339(1)—In specifications of street improvement contract, details regarding implements used and material to cover pavement held properly left to engineer's judgment.

In specifications of street improvement contract, details of implements for mixing materials and regarding material to be used in covering concrete pavements during curing process held properly left to expert judgment of engineer as supervising officer.

8. Municipal corporations ⇨339(2)—Provision of street improvement contract requiring concrete pavements to be not less than thickness shown in plans held not invalid.

Provision of street improvement contract requiring concrete pavements to be "not less than thickness shown in plans, after being thoroughly tamped," held not invalid, where contractor was required to keep upon the work a copy of plans and specifications available at all times to engineer.

9. Municipal corporations ⇨339(2)—Clause of specifications in street improvement contract requiring contractor to furnish work or material unintentionally omitted in description but necessary held not objectionable.

In specifications of street improvement contract, clause stating that "any work or material

which may have been unintentionally omitted in description of work, but which is clearly necessary for proper prosecution of contract, shall be furnished by contractor, the same as if it had been specified" *held* not objectionable.

10. Municipal corporations ⚡318—Objections to specifications not presented to town council in protest against proceeding with street improvement were waived (Improvement Act 1911, § 16).

Objections to specifications not made in protest presented to town council under Improvement Act, § 16 (St. 1911, p. 737), against proceeding with street improvement, were waived, and injunction to restrain work would not issue upon grounds not stated in protest.

11. Municipal corporations ⚡331—Notices inviting sealed bids on street improvement held sufficient, where streets were named and reference was made to resolution of intention for further particulars (Improvement Act 1911, § 9).

Notices inviting sealed bids on street improvement *held* sufficient, where streets were named and specific reference was made to resolution of intention for further particulars and description of work, and resolution contained all information necessary, since Improvement Act, § 9 (St. 1911, p. 735), makes reference to resolution sufficient for purposes of description.

12. Municipal corporations ⚡335(2)—Notice of award of contract for street improvement held sufficient, though not naming one of streets to be improved (Improvement Act 1911, § 11).

Notice of award of contract for street improvement *held* sufficient under Improvement Act, § 11 (St. 1911, p. 736), though not naming one of streets to be improved, where notice referred to bid and resolution.

SHENK, J., and WASTE, C. J., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Samuel Wallace Rice, also and usually known as and called S. W. Rice, and wife, against the Hanrahan Company and others, to enjoin the performance of street work. From a judgment in favor of defendants, plaintiffs appeal.

Affirmed.

For opinion of District Court of Appeal, herewith adopted, see 285 P. 414.

R. M. F. Soto, of San Francisco, and Kirkbride & Gordon and Kirkbride, Wilson & Brooks, all of San Mateo, for appellants.

Albert Mansfield, of Redwood City, and D. T. Jenkins, of San Jose, for respondents.

PRESTON, J.

This cause involves the validity of certain street improvement proceedings in Los Gatos, had under the Improvement Act of 1911 (Stats. 1911, p. 730) and the Improvement

Bond Act of 1915 (Stats. 1915, p. 1441). The only serious point urged on the appeal is that a certain small area included in the improvement was private property. There is, however, no proper record upon which to found this contention.

Appellants recite a portion of an opinion of the railroad commission rendered some four months after judgment in the case before us, and upon this showing alone assert the invalidity of the whole street proceedings. The learned District Court of Appeal treated the point as properly before them and disposed of it contrary to appellants' contention. We are entirely satisfied with the opinion and conclusion of said court and hereby adopt same as the opinion of this court herein, as follows, to wit:

This is an action to enjoin performance of street work at Los Gatos, pursuant to a contract made on May 4, 1928, with the defendant Hanrahan Company under the Improvement Act of 1911 (St. 1911, p. 730), supplemented by the Improvement Bond Act of 1915 (St. 1915, p. 1441). The trial court gave judgment in favor of defendants, and from that judgment appeal was taken by plaintiffs, who are the owners of property within the district assessable for the work. Plaintiffs contend that the proceedings leading up to the award of the contract were insufficient to confer jurisdiction upon the town council to proceed with the improvement.

Among the streets designated for improvement in the resolution of intention and in the notices preceding the award were Royce street, Gray's lane, and Elm street, Gray's lane lying between the other two streets, and all three running from University avenue on the east to Santa Cruz avenue on the west. The three streets are crossed by tracks of the Southern Pacific Company; and, after the contract had been awarded, the town applied to the railroad commission for an order authorizing the widening and improvement of the crossings at the intersection of these streets and the railroad tracks. The commission gave the desired permission for improvement of the crossing at Elm street, but denied the application as to the other two crossings, upon the ground that the volume of traffic at those points did not justify expenditure by the railroad company to the extent involved in the installation of an improved type of crossing.

In such work the railroad company bears the expense of the improvements within lines set two feet outside of the outermost rails; and both the resolution of intention and the notices described the proposed improvement so as to exclude from the public contract awarded to the Hanrahan Company the crossing work within the lines drawn as just stated. It appears, however, that at Gray's lane some

widening of the street will be necessary, and that, in addition to the land already dedicated for street purposes, the city will need to acquire and has included in the portion of Gray's lane, as described in the contract, a strip 5.7 feet wide by 27.6 feet long, said to belong to the railroad company.

It is contended that the inclusion of this strip in the public contract renders the contract void, and it is further contended that certain alleged defects in the legal notices and certain alleged shortcomings in the specifications were serious enough to deprive the town council of jurisdiction to charge upon property owners the expense of the proposed improvements.

[1, 2] So far as the undedicated strip of land is concerned, it is quite possible that the town may acquire the necessary rights there-to either by dedication or otherwise before any assessment is imposed. And under section 26 of the Act of 1911, as amended in 1923 (St. 1923, p. 117, § 5), though work is done on a street or right of way not lawfully dedicated or acquired at the time, the proceedings are not to be held invalid, provided the land is lawfully dedicated or acquired at any time before judgment is entered in the suit involving such proceeding. If, because of failure to acquire the necessary rights, plaintiffs' property shall be subjected to an invalid assessment, plaintiffs will have their legal remedy under section 21 and the general rules of law applicable under such circumstances. The inclusion of the undedicated strip does not result, therefore, in denying to plaintiffs due process of law. *Chase v. Trout*, 146 Cal. 350, 359, 80 P. 81; *Watkinson v. Vaughn*, 182 Cal. 55, 58, 186 P. 753; *Noyes v. Chambers*, 202 Cal. 542, 544, 261 P. 1006.

It appears further that the plaintiffs did not deem this objection to be of sufficient merit to receive specific mention in the notice which they filed with the council under section 16 of the act, protesting against the award of the contract. In that notice plaintiffs contented themselves with the general objection that the council never acquired jurisdiction of the subject-matter of the proceeding.

Plaintiffs rely upon *Spaulding v. Wesson*, 115 Cal. 441, 47 P. 249, and *Hall v. Fairchild Co.*, 66 Cal. App. 615, 227 P. 649. The former, having been decided long before the amendment of 1923, is not now applicable to the situation found here, and in the *Hall* Case the area in question formed part of a public park which could not legally be withdrawn for highway purposes. Accordingly the assessment in that case was beyond cure.

We are of the opinion that the legal rights of plaintiffs are fully protected under the provisions of the act as it read at the time of the proceedings in question.

[3] Another objection made relates to the heading of the posted "Notice of Improvement." The law requires such heading to be in letters of not less than one inch in length. Some of the letters fell slightly below this standard, but the trial court found that the letters were of sufficient height and size so that the words "Notice of Improvement" could be easily read by a person of average eyesight, at a distance of 45 feet (about the width of a street), and that there was a substantial compliance with the legal requirement in that particular. All the letters in this case were larger than those in *Coleman v. Spring Construction Co.*, 41 Cal. App. 201, 182 P. 473, where the notice, being found sufficiently legible, was held to be in substantial compliance with the law. So also in *McCaleb v. Dreyfus*, 156 Cal. 204, 210, 103 P. 924, stress is laid on legibility rather than on literal compliance with the statute. In view of the finding of the trial court, we conclude therefore that the proceedings were not invalidated by the slight departure from the statutory requirement as to the lettering. *Beck v. Ransome-Crummey Co.*, 42 Cal. App. 674, 682, 184 P. 431.

[4] It is urged further that the notice of improvement was defective because of failure to state that the work was to be chargeable upon a district and to describe the district. Section 5 of the act makes no such requirement. It directs that there shall be a brief statement of the work proposed, with reference to the resolution of intention for further particulars. The resolution gives a detailed description of the district to be benefited and made subject to assessment. The notice, with its reference to the resolution, thus afforded the necessary information.

[5] An additional objection to the award of the contract is based on the ground that the specifications are defective because of indefiniteness in requirements concerning materials and also because of unlawful discretion conferred upon the contractor. The specifications for concrete pavements call for one part of Portland cement, two parts of sand, and 4 parts of broken rock or stone by measure, with the proviso that the proportions may be changed by the contractor whenever the voids in the materials used are not filled by use of the ingredients in the specified proportions. But it is also stated that a cubic yard of concrete in place shall contain not less than 6 sacks of cement. And the specifications contain likewise detailed provisions concerning the kind, quality, and condition of the sand and stone, and the sizes of the meshes through which those materials must be screened to assure general uniformity.

It thus appears that the contractor is required to furnish materials definitely described and to mix them ordinarily in the fixed proportions with a view to having a serviceable pavement with all voids filled. It was recognized, however, that occasionally,

in order to fill all voids, it might be necessary to vary somewhat the proportions of sand and rock so as to procure the right density and make a durable pavement. The contractor has no discretion to depart from the specifications determining the condition and quality of the materials, and since the purpose is to assure, through intelligent exercise of discretion, an admixture making a pavement free of the voids which are apt to occur in any such work because of occasional variation in uniformity of one or another of the ingredients, there is not that vice in the specifications which the law condemns. It is, of course, desirable to have all details precisely fixed so far as reasonably possible, but allowance must be made in practice for contingencies bound to arise in every piece of actual construction. Some modicum of discretion must therefore in sound reason be conceded, and, though a measure of practical judgment is exercised by the contractor, the property owners are safeguarded by the requirement of fulfillment of the contract under the direction, and to the satisfaction, of the city engineer. There is nothing to indicate that the discretion authorized will have any bearing on the cost of the work proposed or any appreciable effect upon the assessments. Public contracts, as well as private contracts, must be dealt with in a practical way. They are intended to get beneficial results, and, while the property owners' rights must be protected by due legal procedure and such definiteness and certainty in plans and specifications as will guard against jerry-building and dishonesty, the tendency to strain at gnats is to be deprecated. The discretion authorized in this instance is reasonable, and is justified by the views expressed in *Mill Valley v. Massachusetts Bonding Co.*, 68 Cal. App. 372, 380, 229 P. 891; *Chase v. Trout*, 146 Cal. 350, 364, 80 P. 81; *Haughwout v. Hubbard*, 131 Cal. 675, 679, 63 P. 1078; *Thoits v. Byxbee*, 34 Cal. App. 226, 234, 167 P. 166; *Burnham v. Abrahamson*, 21 Cal. App. 248, 258, 259, 131 P. 338; *Burns v. Casey*, 13 Cal. App. 154, 168, 109 P. 94.

[6] Defectiveness in the specifications is charged also because of a clause, in relation to the cement for use in concrete pavements, declaring that the contractor, if requested by the engineer, shall furnish tests of cement made by some reliable chemist, such tests to conform to specifications required by the American Association of Civil Engineers. This, however, is not the only provision concerning such cement. Immediately preceding the clause criticized appears the following: "All cement shall be Portland Cement. It shall be delivered in original unbroken barrels or bags, with the name and brand of the manufacturer plainly marked. It must be perfectly dry and free from lumps, and when stored must be protected from the weather and moisture of the ground." Portland ce-

ment is a standard commodity, and the products of the different manufacturers are known to builders and engineers. There is nothing in the language used making it mandatory upon the engineer to demand tests, but as a matter of precaution the contractor is obligated to furnish tests if called for. In relation to cement for use in the construction of sidewalks and curbs, the provision is that "The cement used must be Portland Cement meeting the requirements and tests of the Standard specifications for Portland Cement adopted by the American Society of Testing Materials." There is nothing in the record to indicate that the specifications of the organizations mentioned are not commonly accepted as trustworthy standards, and there is no good reason why general trade usages should not enter into public contracts as well as private. If the engineer may satisfy himself by tests "made by some reliable chemist," and those tests are "to conform to specifications required" in the one case by the American Association of Civil Engineers and in the other by the American Society of Testing Materials, it is fair to conclude that "reliable chemists" in general, as well as engineers and contractors, are thoroughly familiar with the specifications intended. We find no merit in the objection.

[7] The specifications are assailed further because the type of implements for mixing materials is made subject to the approval of the engineer. There is a provision that materials shall be mixed in a batch mixer or a pug mill mixer approved by the engineer, and that, if the latter sort is used, the paddles shall be of the number and type approved by the engineer. Such matters are mere operative details properly committed to the judgment of the engineer as the supervising officer. *Thoits v. Byxbee*, 34 Cal. App. 226, 234, 235, 167 P. 166; *Burns v. Casey*, 13 Cal. App. 154, 158, 109 P. 94. The same may be said concerning the attack upon the provision in relation to the curing of concrete pavements, which on being laid are to be covered with not less than two inches of earth or other material approved by the engineer, and kept wet for at least ten days. The "other material" does not enter into construction any more than the earth, if used. It is a mere temporary protective device, and the substitution may properly be left to the expert judgment of the engineer. *Mills v. City of Elsinore*, 93 Cal. App. 753, 769, 270 P. 224.

[8] Another provision which is said to make for invalidity is that in relation to the concrete pavement, which is required to be "not less than the thickness shown in the plans, after being thoroughly tamped." This is a hypercritical objection. The specifications refer repeatedly to the plans on file, and the plans and the specifications are to be read together; the contractor being required to "keep upon the work a copy of the plans and

specifications" available at all times to the engineer.

[9] Under the head of "General Requirements," the specifications contain a clause stating that "any work or material which may have been unintentionally omitted in the description of the work, but which is clearly necessary for proper prosecution of the contract, shall be furnished by the Contractor, the same as if it had been specified." Criticism is leveled, not at the purpose or effect of the clause, but at the use of the words "unintentionally omitted," without designation of an arbiter. The clause is merely included as a general rule of interpretation of the plans and specifications; the clear intent being to declare that all the incidents to the performance of a workmanlike job are to be deemed incorporated, whether expressly mentioned or not. We apprehend that similar provisions are included in almost every such set of specifications as a precaution against disputes over trivial matters. The provision cannot justly be condemned.

[10] Though plaintiffs presented to the town council, under section 16 of the act, a protest against proceeding with the improvement, none of the various objections now made to the specifications was included in their protest. Therefore, according to the express provision of the section, the objections were waived, and injunction to restrain the work will not issue upon grounds not stated in any protest. *Blake v. City of Eureka*, 201 Cal. 643, 648, 258 P. 945; *Brydon v. City of Hermosa Beach*, 93 Cal. App. 615, 624, 270 P. 255.

[11] All preliminary proceedings having been duly had, the council acquired jurisdiction to order the improvement. It thereupon passed a resolution to that effect, ordering at the same time posting and publication of notices inviting sealed bids. It is contended, though not seriously, that these notices were deficient in their indication of the character of the work to be done and the district to be affected. The streets were named and specific reference was made to the resolution of intention for further particulars and a description of the work. The resolution contained all the information which plaintiffs would have included in the notices, and section 9 of the act expressly makes reference to the resolution sufficient for purposes of description of the improvement and the assessment district. The notices therefore complied with the law.

[12] Hanrahan Company, having been the lowest bidder, received the award of the contract. Notice of the award was then given, but in the notice one of the streets to be improved, Wilder avenue, was, through inadvertence, not named. The notice of award, referred, however, to the bid on file, to the resolution of award, and also to the resolution of intention for a description of the work and the particulars thereof. Section 11 of the act makes

no specific requirement as to the contents of the notice of award, and, since it was not essential that such notice should recite the names of the streets, we are of the opinion that the reference to the resolutions previously adopted and the bid of the successful contractor charged the property owners with notice of the extent of the work actually included in the contract as awarded.

This objection was really the only one now made which was specifically embodied in the protest presented by plaintiffs to the council, and reliance is placed upon the decision in *McNutt v. Los Angeles*, 187 Cal. 245, 201 P. 592, dealing with the concurrent improvement and change of grade of a tunnel and adjacent streets under the act of 1913 (St. 1913, p. 954). Under section 3 of that act, however, it was made the express duty of the city clerk to mail to each property owner in the assessment district a notice of the passage of the resolution of intention "with the name of the street to be improved and between what streets located." There being in the act of 1911 no such mandatory direction to name streets in the notice of award, the case cited is inapplicable.

We have given consideration to the several objections urged by plaintiffs, notwithstanding the fact that these objections, with one exception, had all been waived by failure to present them in the protest to the town council. Our conclusion is that the notices given were in substantial compliance with the law; that the specifications possess legal definiteness and certainty; that the council was invested with jurisdiction to order the work; and that the contract therefor was legally awarded and made.

The judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

SHENK, J.

I dissent. I cannot subscribe to that portion of the main opinion which holds that the city authorities had jurisdiction to institute and carry forward the street assessment proceedings in the face of the admitted fact that the improvement was to be made in part on privately owned property. Since the cases of *Spaulding v. Bradley*, 79 Cal. 449, 22 P. 47, and *Spaulding v. Wesson*, 115 Cal. 441, 47 P. 249, the law has been uniform that private property may not be improved under a street assessment proceeding, and that a proceeding which attempts to do so is void. Section 26 of the act of 1911 was amended in 1923 (Stats. 1923, p. 117) to provide that no proceedings taken under the act should be held invalid on the ground that the right of way on which the work is to be done has not been lawfully dedicated or acquired, "provided the same is lawfully dedicated or acquired at any time before judgment is entered in the suit in-

volving such proceeding." The present suit unquestionably is one involving such proceeding. It is conceded on all hands that a portion of the property to be improved is privately owned property, and that no dedication thereof for public use took place before the entry of judgment herein. Furthermore, section 21 of the act affords no protection to the plaintiffs if, because of the failure to acquire the necessary right of way, the plaintiff's property be subjected to an invalid assessment. The question is one of jurisdiction, and that section, in my opinion, does not afford protection or relief in such a case.

I concur: WASTE, C. J.

210 Cal. 644

KRAUSE et al. v. RARITY et al.
S. F. 13320.

Supreme Court of California.
Oct. 31, 1930.

Rehearing Denied Nov. 24, 1930.

1. Appeal and error ⇨1002.

Jury's finding of railroad's negligence on conflicting evidence as to whether statutory signals were given on approaching highway where automobile was struck would not be disturbed.

2. Railroads ⇨327(12).

Guest in automobile was under no legal obligation to warn driver of presence of tracks or of approaching train.

3. Railroads ⇨350(21).

Contributory negligence of guest injured when automobile driven by one-eyed man was struck by train held for jury.

4. Automobiles ⇨245(24).

In action for death of guest, negligence of driver of automobile struck by train at crossing held for jury.

5. Automobiles ⇨244(36).

Railroads ⇨348(2).

Evidence warranted jury's finding that collision between automobile and train in which guest was injured occurred through concurrent negligence of automobile driver and railroad.

6. Negligence ⇨93(1).

Negligence of automobile driver could not be imputed to guest.

7. Automobiles ⇨246(60).

In action for guest's death, instruction that, if jury found facts therein stated, auto-

mobile driver was conclusively presumed to have been guilty of negligence in railroad crossing collision, held proper (St. 1927, p. 1436, § 30, amending St. 1923, p. 553, § 113).

The instruction was in substance that, if jury found facts indicated therein which would constitute grade crossing in question an obstructed railway crossing at grade, as contemplated by California Vehicle Act, § 113 (St. 1923, p. 553), and if it should further find that driver was traveling at rate in excess of 15 miles per hour as he came on crossing, then automobile driver was conclusively presumed to have been guilty of negligence at time of collision. The facts indisputably pointed to negligence of automobile driver, and compelled conclusion that he was guilty of negligence as matter of law on establishment of facts called for in instruction.

8. Death ⇨99(4).

\$35,000 for death of man 42 years old, earning \$4,000 to \$5,000 yearly, and contributing \$250 to \$350 monthly to wife and children, held not excessive.

9. Negligence ⇨136(9).

Court properly denied motion for nonsuit and directed verdict, where evidence for plaintiff and reasonable inferences therefrom tended to establish defendant's negligence.

10. Death ⇨31(5).

Right of heirs to sue for death of guest in automobile was statutory right (Code Civ. Proc. § 377).

11. Constitutional law ⇨105.

Action for death depending solely on statute is not vested right protected by Constitution (Code Civ. Proc. § 377).

12. Death ⇨9.

Statute did not abolish right of action for death or injury of guest in automobile, but merely changed proof required to permit recovery (St. 1929, p. 1580, adding § 141¾ to St. 1923, p. 517).

13. Negligence ⇨11.

"Gross negligence" is want of slight diligence; an entire failure to exercise care, or exercise of so slight a degree of care as to justify belief there was indifference to things and welfare of others.

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

14. Negligence ⇨136(14).

Where liability attaches only for gross negligence, jury under proper instructions determines whether such negligence exists.

15. Automobiles ☞6.

Death ☞9.

Statute relating to action for injury or death of guest in automobile did not repeal prior statute, but simply changed degree of negligence required to permit recovery (St. 1929, p. 1580, adding § 141¾ to St. 1923, p. 517; Code Civ. Proc. § 377).

16. Statutes ☞263.

Statute will not be given retrospective effect unless legislative intention to do so clearly appears.

17. Automobiles ☞6.

Death ☞9.

Statute respecting action for injury or death of guest in automobile *held* not retroactive (St. 1929, p. 1580, adding § 141¾ to St. 1923, p. 517).

18. Automobiles ☞6.

Death ☞9.

Statute respecting action for injury or death of guest in automobile, not being retrospective, had no effect on litigation pending when it was enacted (St. 1929, p. 1580, adding § 141¾ to St. 1923, p. 517).

In Bank.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Betty K. Krause and another, minors, by their guardian ad litem, Lena Krause, and Lena Krause individually, against John W. Rarity and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Superseding opinion in 285 P. 879.

Leo J. McEnerney, of San Francisco, and Ray W. Hays, of Fresno, for appellant Rarity.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant Atchison, Topeka & Santa Fé Railway.

H. A. Frank, of Oakland, for respondents.

SHENK, J.

On September 12, 1927, William Krause was killed when the automobile in which he was riding as a guest was struck by a locomotive of the defendant railway company. The plaintiffs are the heirs of the deceased, and the defendant Rarity was the driver of the car. A verdict was rendered against both defendants as joint tort-feasors, and from a judgment entered thereon the defendants have presented separate appeals.

Central avenue is a paved rural highway extending east and west from Del Rey to

Malaga in the county of Fresno. The defendant railway company maintains a spur track known as the Mattei spur crossing Central avenue at right angles and at grade. The accident occurred at about 6 o'clock p. m. on a clear day when the automobile approached and entered upon the railway crossing from the east at a speed of 30 to 35 miles per hour and when a locomotive and tender of the railway company reached the crossing from the north at a speed of about 10 miles per hour.

The country surrounding the scene of the accident is practically level. The railway track is flush with the pavement on the highway. North of the highway and east of the track is a vineyard, the tops of the grapevines rising from 5 to 6 feet above the highway. About 70 feet east of the track, and on the north line of the highway, stands a tree about 20 feet high, and with a spread of about 12 feet. There are no other obstructions north of the highway and east of the track for more than 700 feet. On the south line of the highway, east of the tracks, is a row of olive trees extending to within 28 feet of the track; 12 feet east and 7 feet north of the paved portion of the highway is a standard railroad crossing sign, consisting of an upright post 10 feet high, painted white, and at the top of which are two cross-arms painted white with the words "Railroad Crossing" painted in large black letters. About 300 feet east of the crossing on the northerly side of the pavement is a smaller sign, called a target sign, which is a disc 2 feet in diameter, on a post 6 feet high, on which the letters "R. R." are painted in black letters with a white background.

The defense of the railway company was, first, that it was not guilty of any negligence in the operation of its engine and tender, and, secondly, that the deceased was guilty of contributory negligence. On this appeal the railway company advances the same contentions and complains of certain instructions given and refused and certain rulings of the trial court.

[1] The evidence on the issue of the negligence of the railway company need not be recounted at length. It consisted of testimony of the several witnesses as to whether the statutory signals were given by the engine crew upon approaching the highway. This evidence was substantially in conflict on this point, and may not now be disturbed.

On the issue of the contributory negligence of the deceased, it appears beyond dispute that the defendant Rarity was totally blind in his left eye, and that the deceased knew that fact, having been acquainted with him rather intimately for some years; that the deceased was riding in the back seat as the automobile approached the crossing holding a

conversation with O. E. Orr, who was also a guest of the defendant Rarity and riding in the front seat; that the railway crossing signs above described were within the view of the deceased as the automobile approached the crossing, and that the deceased said nothing to Rarity about the nearby railway crossing, nor did the deceased do anything to protect himself against a possible accident. It also appears that the persons in the automobile were not familiar with this particular grade crossing and knew nothing thereof except such information in the way of warning as was imputed to them by the railway signs above described.

[2, 3] From the foregoing facts it is contended that the deceased was guilty of contributory negligence as a matter of law. There is no evidence that the deceased exercised, or had the right to exercise, any control over the driver Rarity, and he was under no legal obligation to warn the driver of the presence of the tracks or of an approaching train. *Marchetti v. Southern Pac. Co.*, 204 Cal. 679, 269 P. 529. Nor did the fact that the deceased knew that Rarity was a one-eyed man convict the deceased of contributory negligence as matter of law. The loss of one eye does not necessarily prevent a person from operating an automobile with due caution and circumspection. The evidence on this issue, tendered by the plaintiffs and joined by the defendant railway company, clearly presented questions for the jury to determine.

[4-6] The defense of the defendant Rarity was that he was operating his automobile without negligence. In this connection he offered evidence to show that he did not see or hear the approaching locomotive; that he was intently watching the highway in front of him; that his vision was obscured by the sun shining in his face; and that he did not see the railway signs as he approached the crossing. The evidence further showed that the crossing in question was an obstructed steam railroad grade crossing as contemplated by section 113 of the California Vehicle Act in effect at the time (St. 1927, p. 1436), and which it was unlawful to cross at a greater rate of speed than 15 miles per hour. By his own admission he was traveling at least 30 miles per hour at the time of the accident. Unquestionably he was guilty of negligence, and the accident occurred, as found by the jury within its province, through the concurrent negligence of both defendants. Under the law the negligence of Rarity may not be imputed to the deceased. *Irwin v. Golden State Auto Tour Corp.*, 178 Cal. 10, 171 P. 1059; 19 Cal. Jur. p. 659.

[7] Both defendants complain of certain instructions given and refused. They have been examined, and no error is found in the action of the trial court thereon. One in-

struction only need be commented upon. That is an instruction given and of which the defendant Rarity complains. In substance it instructed the jury that, if it should find the facts indicated therein which would constitute the grade crossing in question an obstructed railway crossing at grade as contemplated by section 113 of the California Vehicle Act, and if it should further find that Rarity was traveling at a rate in excess of 15 miles per hour as he came upon the crossing, then "the defendant Rarity is conclusively presumed to have been guilty of negligence at the time of the collision." The words "conclusively presumed" are especially objected to. There is no merit in the contention. The facts indisputably point to the negligence of this defendant at the time, and compel the conclusion that he was guilty of negligence as matter of law upon the establishment of the facts called for in the instruction.

[8] One other contention is common to both defendants, and that is that the verdict in the sum of \$35,000 is excessive. The evidence disclosed without conflict that the decedent was 42 years of age at the time of his death and had been in good health. His expectancy was 26.72 years. He was earning between \$4,000 and \$5,000 per year, and was contributing between \$250 and \$350 per month toward the support of his wife and children. His wife was 47 years of age, and the children were 14 and 9 years old, respectively. He was a kind and affectionate husband and father. A motion for a new trial was made on the ground of excessive verdict and denied. It cannot be said that the verdict is so plainly excessive as to suggest at first blush, that the same was the result of passion or prejudice or corruption rather than an honest and sober judgment on the part of the jury. *Kelley v. Hodge Transportation System*, 197 Cal. 598, 242 P. 76; 8 Cal. Jur. p. 834.

[9] Under familiar rules there was no error in denying the motions of the defendant railway company for nonsuit and a directed verdict when, as here, the evidence on behalf of the plaintiffs and the reasonable inferences to be drawn therefrom, disregarding evidence in conflict therewith, tended to establish negligence on the part of this defendant.

As to the other points made by the defendants with reference to alleged errors of the trial court in the admission and exclusion of evidence, we do not find sufficient merit therein to require discussion.

[10] One other point made by the defendant Rarity will be considered. The right of the plaintiffs to maintain this action is a statutory right under section 377 of the Code of Civil Procedure. No such right existed at common law. *Dickinson v. Southern Pacific Company*, 172 Cal. 727, 730, 158 P. 183; *Kramer v. Market Street Railroad Co.*, 25 Cal.

434; 8 Cal. Jur. p. 948. At the time the present cause of action arose, on September 12, 1927, it was and still is provided by section 2096 of the Civil Code that "a carrier of persons without reward must use ordinary care and diligence for their safe carriage." *Nichols v. Pacific Electric Ry. Co.*, 178 Cal. 630, 174 P. 319. In 1929, the Legislature added section 141½ to the California Vehicle Act. St. 1929, p. 1580. It is therein provided in part: "Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. In the event that such person while so riding as such guest is killed, or dies as a result of injury sustained while so riding as such guest, then neither the estate nor the legal representatives or heirs of such guest shall have any right of recovery against the driver or owner of said vehicle by reason of the death of the said guest. If such person so riding as a guest be a minor and sustain an injury or be killed or die as a result of injury sustained while so riding as such guest, then neither the parents nor guardian nor the estate nor legal representatives or heirs of such minor shall have any right of recovery against the driver or owner or person responsible for the operation of said vehicle for injury sustained or as a result of the death of such minor." The section then continues with the following proviso: "Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct, or gross negligence of such owner, driver or person responsible for the operation of such vehicle."

* * *

The defendant Rarity contends that, by reason of the enactment of the foregoing statute, the cause of action of the plaintiffs has been wiped out, that section 377 of the Code of Civil Procedure and section 2096 of the Civil Code have been repealed in whole or in part by the enactment of section 141½ of the California Vehicle Act, and that the rule of law to be applied is laid down in such cases as *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148; *Wilcox v. Edwards*, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; *Moss v. Smith*, 171 Cal. 777, 155 P. 90; *Freeman v. Glenn County Telephone Co.*, 184 Cal. 508, 194 P. 705, and *Chenoweth v. Chambers*, 33 Cal. App. 104, 164 P. 428. By those cases the rule obtaining elsewhere has become thoroughly established in the law of this state that, when a right of action did not exist at common law, but depends solely

upon a statute, the repeal of the statute destroys the right, unless the right has been reduced to final judgment, or unless the repealing statute contains a saving clause protecting the right in pending litigation. In the case at bar the cause of action depended solely on the statute. There is no saving clause, and the action is still pending.

The plaintiffs rely first on the general rule that repeals by implication are not favored and are recognized only when there is an irreconcilable conflict existing between two or more legislative enactments. *Railroad Commission v. Riley*, 192 Cal. 54, 218 P. 415; 23 Cal. Jur. p. 694. They contend that there is nothing in section 141½ which has expressly repealed section 377 either in whole or in part, and such repeal is not necessarily implied. Secondly, they rely on the general rule that a statute should have prospective operation only unless it clearly appear that it was the legislative intention that the statute operate retrospectively (*Cooley, Constitutional Limitations* [8th Ed.] p. 772; In *Matter of Cate*, 207 Cal. 443, 279 P. 131; 23 Cal. Jur. p. 628); and, thirdly, that the new section 141½ could not operate retrospectively so as to deprive the plaintiffs of a right which they claim became vested in them under section 377 immediately upon the death of the deceased, citing *Sutherland on Statutory Construction*, § 671; *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 P. 1082, and other cases.

[11] A disposition of the third contention of the plaintiffs will tend to confine the point within its proper limits. The present action unquestionably is one for damages for the death of one not a minor caused by "the wrongful act or neglect of another," as defined by section 377 of the Code of Civil Procedure. This cause of action did not exist at common law. It depends solely on the statute, and the right was not a vested right protected by the state and Federal Constitutions. Under the authority of *People v. Bank of San Luis Obispo*, supra, and other cases to like effect, above cited, a repeal of the statute conferring the right, prior to final judgment, would abolish the right and place the parties in the same position as if the statute never existed.

If the present action were one brought by Krause, during his lifetime, for damages for personal injuries inflicted upon him while a guest of the defendant Rarity, such a cause of action would be one grounded on the common-law liability, and the right of action would be a vested right and survive a repeal of the statute. *Callet v. Alioto* (Cal. Sup.) 290 P. 438. The case of *James v. Oakland Traction Co.*, supra, relied upon by the plaintiff, was one for damages for personal injuries inflicted upon the plaintiff therein. That case is illustrative of the numerous decisions hold-

ing that upon the wrongful infliction of the injury a vested right accrued to the party injured freed from any disturbance by subsequent legislative enactment.

In passing, it may be said that a recent statute of Connecticut similar in purport to section 141¾ was attacked on constitutional grounds, but the validity thereof was affirmed by the Supreme Court of the United States. *Silver v. Silver*, 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221.

[12] The question is therefore narrowed to this: Did section 141¾ work a repeal of section 377 of the Code of Civil Procedure? If so, to what extent and when did such repeal become effective so far as the plaintiffs' cause of action is concerned?

It cannot be doubted that section 377 of the Code of Civil Procedure and section 2096 of the Civil Code should be read together. When so considered with reference to the present controversy, they would mean that the heirs on September 12, 1927, had a cause of action against the defendant Rarity for the death of Krause, and that Rarity's liability would be tested by the rule of ordinary care. Suit was brought on November 2, 1927, alleging a cause of action under the then existing law on ordinary negligence which is the same as the want of ordinary care as provided in section 2096. Judgment on the verdict was entered September 22, 1928, and the notice of appeal was filed November 19, 1928. Pending the appeal and on August 14, 1929, section 141¾ of the California Vehicle Act was enacted.

It is apparent that, if the new section had been enacted without the proviso, the rule contended for by the defendant Rarity would apply, the plaintiffs' cause of action would have been wiped out, and no recovery could be had on the judgment against said defendant, for the reason that said judgment has not become final. In such case the Legislature would have been unrestrained by constitutional barriers, and its intention, in the absence of a saving clause, would have been conclusively manifest. But the Legislature did not stop with the enactment of the portions of the statute which would have worked a repeal irrevocably, but added the provision which in effect continued the right of action on account of the death of the guest. In other words, there has not been a moment of time since the enactment of section 377 to the present time when an action would not lie on behalf of the heirs on account of the death of the guest. The only change brought about by the new law was in the nature and character of the proof required in each case. There was no abolishment of the right or cause of action, but only a change in the proof required, not to maintain the action, but to permit a recovery.

[13-15] In many jurisdictions the division of negligence into degrees is not countenanced (20 R. C. L. 21); the concept being that such phrases as "gross negligence" and "slight negligence" are misnomers. In this state the degrees of negligence have been frequently recognized. The term "gross negligence" has been defined as "the want of slight diligence," as "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and as "that want of care which would raise a presumption of the conscious indifference to consequences." 19 Cal. Jur. p. 554; *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 63 P. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153. Where liability attaches only for gross negligence, it is for the jury, under proper instructions by the court, to pass upon the question whether such negligence exists. *Merrill v. Pac. Transfer Co.*, 131 Cal. 582, 63 P. 915; 19 Cal. Jur. p. 728. It must therefore be concluded that the enactment of section 141¾ did not repeal section 377 of the Code of Civil Procedure in whole or in part, but simply changed the degree of negligence required to permit a recovery.

The statutes involved in the cases of *Moss v. Smith*, and others above cited and relied on by the defendant Rarity, will be found to have repealed entirely the statute conferring the right, without a saving clause, or to have so amended the prior law on which the cause of action was founded as to remove from the operation of the old law, either specifically or by necessary implication, certain parties who might theretofore have been subject to the litigation which was held to have terminated by reason of the amendment. Those cases are readily distinguishable from the case at bar. Here no driver has been relieved absolutely of liability to the heirs of his deceased guest, but is still liable, dependent on the degree of his negligence under the proof.

[16-18] The case, then, falls within the operation of the rule contended for by the plaintiff, namely, that, although the Legislature has the power to give a statute retrospective operation, if it does not impair the obligation of contracts or disturb vested rights, yet it is to be presumed that no statute is intended to have that effect, and it will not be given that effect, unless such intention clearly appear from the language of the statute. *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48. We find nothing in section 141¾ which would justify, much less compel, the conclusion that said section was intended to be retrospective. In such case the new law would have no effect on litigation pending at the time it was enacted. *Estate of Benvenuto*, 183 Cal. 382, 191 P. 678; *State Commission in Lunacy v. Welch*, 20 Cal. App. 624, 129 P. 974; 5 Cal. Jur., p. 750.

The judgment as to both defendants is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

211 Cal. 70

WEHRLE v. BOARD OF WATER AND POWER COM'RS OF LOS ANGELES et al.
L. A. 12556.

Supreme Court of California.

Nov. 18, 1930.

1. Municipal corporations ⇨271.

Los Angeles board of water and power commissioners has power to determine whether acquisition of water rights appurtenant to land is needful or beneficial (Const. art. 11, §§ 6, 8, as amended in 1914).

2. Waters and water courses ⇨190.

Question of price city should pay for land and appurtenant water rights in light of all facts is entirely for board of water and power commissioners to determine.

3. Municipal corporations ⇨57.

Under Constitution, Los Angeles has authority to make laws and regulations in respect to municipal affairs, as citizens deem proper, subject to charter limitations (Const. art. 11, §§ 6, 8, as amended in 1914).

4. Waters and water courses ⇨190.

Under charter, Los Angeles board of water and power commissioners has authority to take necessary steps to acquire adequate water supply.

5. Municipal corporations ⇨271.

Supplying water to inhabitants is "municipal purpose."

[Ed. Note.—For other definitions of "Municipal Purposes," see Words and Phrases.]

6. Waters and water courses ⇨200(1).

City's contract for water supply, made under power possessed by city, may be overthrown by courts only for fraud, abuse or excess of authority, or inequity in terms.

7. Evidence ⇨12.

Supreme Court may take judicial notice of great increase in population of city of Los Angeles.

8. Evidence ⇨25(2).

Need of adequate water supply for Los Angeles is common knowledge.

9. Waters and water courses ⇨190.

Acquisition of lands and needful water rights by board for city of Los Angeles by direct purchase, though at appraisal higher than original appraisal, not charged to be fraudulent or in excess of authority, *held* justified (Const. art. 11, §§ 6, 8, as amended in 1914).

The proposed purchase involved more than 3,000 separate parcels of land, and the process of acquiring water rights appurtenant thereto by condemnation would be a very long and expensive proceeding, whereas an amicable settlement with all, or greater portion, of the property owners was greatly to be desired, and the acquisition of these valuable rights by direct purchase, without the necessity of legal steps being taken, was ample justification for the alleged action about to be taken by the board of commissioners.

10. Evidence ⇨83(2).

Presumption obtains that board of water and power commissioners of Los Angeles, in purchasing land and appurtenant water rights, considered wisdom and policy of whole plan in light of objects.

In Bank.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action for injunction by Edward F. Wehrle against the Board of Water and Power Commissioners of the City of Los Angeles. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Anderson, Anderson & Sheahan and Trent G. Anderson, all of Los Angeles, for appellant.

Erwin P. Werner, City Atty., W. Turney Fox, Asst. City Atty., and F. M. Bottorff and Carl A. Davis, Deputy City Attys., all of Los Angeles, for respondents.

A. L. Bartlett, Walter J. Little, Jess Hession, and Kenneth W. Kearney, all of Los Angeles, amici curiæ.

WASTE, C. J.

Plaintiff, as a taxpayer, brought this action to enjoin the board of water and power commissioners of the city of Los Angeles from carrying out a proposed plan to acquire by purchase thirty-one hundred privately owned properties in the towns of Lone Pine, Independence, Big Pine, and Bishop in the Owens river valley in Inyo county. The complaint was demurred to on general and special grounds, and the demurrer was sustained with leave to amend. The plaintiff declining to amend, judgment of dismissal followed, from which judgment plaintiff appeals.

It is alleged in the complaint that, after

a detailed survey and appraisalment of the properties involved, the board of water and power commissioners "arbitrarily, recklessly, improvidently, injudiciously, and unlawfully increased said appraised values by adding to the values so determined for each separate piece of privately owned property," in three of the locations named, certain percentages of value, making a total of \$5,696,334 instead of \$4,521,736.58, as originally fixed by the survey and appraisalment, and that the commission is proceeding to acquire the properties according to such increased valuations. A judgment is sought enjoining and restraining the board of water and power commissioners from purchasing or offering to purchase the properties in accordance with the adjusted prices referred to in the complaint, "or otherwise," and restraining the other defendants, who are officers of the city of Los Angeles, from carrying out certain designated details of the purchase.

The demurrer was properly sustained. The defendant board of water and power commissioners of the city of Los Angeles is a board duly organized pursuant to the provisions of the charter of that city, and has the management, charge, and control of the department of water and power of the city. In particular, the board has the management, charge, and control of what is known as the Los Angeles aqueduct, by means of which waters within the Owens river watershed in Inyo and Mono counties in this state are conveyed approximately two hundred and forty miles from a point in the Owens river valley to the city of Los Angeles for domestic, industrial, and other uses by the city and its inhabitants. These waters, consisting of the natural flow of the Owens river and of the underground waters already developed by the board by pumping operations at various points in the Owens river valley, are regarded, not only as of great importance, but almost of necessity in the development of the water supply of the city, and it is essential that its acquisition of the water rights in the valley be not interfered with.

[1-6] The charter of the city of Los Angeles empowers the department of water and power, of which the defendant board is the administrative and executive head, to acquire anything useful or convenient in connection with the exercise of the city's rights and powers, and to appropriate or use money in or belonging to the water revenue fund of the department for the purchase of lands, water rights, and other property, and for the necessary expenses of conducting and extending the business of the department pertaining to such works. It cannot be questioned that, under the law, the board has ample discretion and full power to determine whether or not it is needful or beneficial that the city of Los Angeles acquire water rights appur-

tenant to the land it is intending to purchase, as alleged in the complaint. Furthermore, it is not charged in the complaint that there was any fraud in the action of the board in securing the property by the method which it adopted. On the contrary, it is admitted there was no fraud. We think that the question of the price the city should pay for the lots of land and for the accompanying water rights, in the light of the needs of the city and the available water supply secured by the purchase, and all other facts in connection therewith, is a question which must be left entirely to the disposition and judgment of the board. Sections 6 and 8 of article 11 of the state Constitution, as amended in 1914, confer ample authority upon the citizens of the city of Los Angeles to make and enforce all laws and regulations in respect to its municipal affairs as they deem proper, subject only to the restrictions and limitations provided in the city charter. The provisions of the charter, in turn, confer ample authority upon the respondent board of water and power commissioners to take the necessary steps to acquire an adequate water supply. That the supplying of water to its inhabitants is a municipal purpose there can be no doubt. *City of South Pasadena v. Pasadena L. & W. Co.*, 152 Cal. 593, 93 P. 490. And it is the general rule that when a municipal corporation possesses authority to enter into contracts for the supply of water for its own use and for the use of its inhabitants, such contracts, when entered into, may be overthrown by courts only in cases of fraud, abuse, or excess of authority, or inequity in the terms of the agreements. *Marin, etc., Co. v. Town of Sausalito*, 168 Cal. 587, 598, 143 P. 767.

[7-10] This court may take judicial notice of the great increase in the number of inhabitants of the city of Los Angeles, and common knowledge supplies the necessary information as to the need of an adequate water supply for the city and its people. It cannot be questioned that the process of acquiring the water rights appurtenant to more than three thousand separate parcels of land in the Owens river valley by condemnation would be a very long and expensive affair. On the other hand, an amicable settlement with all, or the greater portion even, of the property owners in the valley is a matter greatly to be desired; and the acquisition of these valuable rights by direct purchase, without the necessity of legal steps being taken, seems ample justification for the alleged action about to be taken by the defendants, particularly in view of the fact that it is not charged that such action is either fraudulent or in excess of the authority of the board.

It must be presumed that the board of water and power commissioners, in forming its judgment, considered the wisdom and policy of the whole plan it is here alleged to have

adopted in the light of the objects to be attained. In re City and County of San Francisco, 191 Cal. 172, 185, 215 P. 549.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.

211 Cal. 29

MILLHOLEN v. RILEY, State Controller, et al.

L. A. 11805.

Supreme Court of California.

Nov. 3, 1930.

1. Courts ⇐1.

In absence of enactment to contrary, duty of court to function includes by implication power to properly apply funds appropriated for that purpose.

2. States ⇐67.

Statute requiring consideration by department of finance of contracts made by departments does not apply to judicial department (Pol. Code, §§ 654, 675a, as added by St. 1927, p. 455, § 1; Const. art. 6, § 1).

3. States ⇐67.

Word "department," in statute requiring consideration by department of finance of contracts entered into by departments relates to administrative departments created in aid of Governor in enforcement and execution of laws (Pol. Code, §§ 654, 675a, as added by St. 1927, p. 455, § 1).

[Ed. Note.—For other definitions of "Department," see Words and Phrases.]

4. Courts ⇐1.

Court set up by Constitution has within it power of self-preservation and power to remove all obstructions to its successful operation.

5. Constitutional law ⇐56.

Legislature may aid courts and may regulate their operation, so long as their efficiency is not thereby impaired.

6. Courts ⇐55.

Appointment and compensation of law secretaries is left to courts they serve (Pol. Code, §§ 654, 675a, as added by St. 1927, p. 455, § 1).

7. Courts ⇐55.

State controller and department of finance had power to audit claim of secretary of District Court of Appeal (Pol. Code, §§ 654, 675a, as added by St. 1927, p. 455, § 1).

8. Constitutional law ⇐61.

Legislature, in conferring authority upon court to fix in its discretion compensation of persons upon whom duty of carrying out authorized governmental object has been cast, is not thereby delegating legislative power.

In Bank.

Original proceeding in mandate by Madge Millholen against Ray L. Riley, State Controller, and others.

Writ issued.

Bart F. Wade and H. C. Lillie, both of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondents.

PRESTON, J.

Original proceeding in mandate. Petitioner was on July 1, 1929, appointed a secretary of the District Court of Appeal, Second Appellate District, Division 2. Respondents are the state controller, the department of finance of the state of California, and the members thereof.

Petitioner received her appointment from the court she was serving, and her compensation for such services was fixed by the same authority at \$225 per month. She served during the months of July and August, 1929. The court approved her demand for said sum as salary for each of said months, and ordered it paid from the treasury of the state. Petitioner thereupon made demand upon respondent department of finance for approval of said claims and upon the controller for the issuance of warrants in her favor in said amounts. Her request was refused. This proceeding followed; the issue being made by petition and answer. Admittedly ample funds appropriated by the Legislature for the support and maintenance of the court exist and are available for the liquidation of petitioner's claims.

In a budget proposed to the Legislature for the fiscal years from July 1, 1929, to June 30, 1931, pursuant to section 34 of article 4 of the State Constitution, an appropriation of \$208,530 was requested for support of the Second District Court of Appeal, which included the following items for each of said years: Secretaries (law), \$9,000; secretaries (10 months), \$3,000. The budget was reduced by the Legislature, which appropriated a total amount of \$202,330 for the support of said court, without specification of any kind as to the

manner in which the money should be expended.

[1] If the authority to appoint and fix compensation of persons in the category of petitioner is not lodged elsewhere by some other provision of the law, it seems too clear for argument that the court itself, in aid of the duty enjoined upon it by law, has both the power of appointment and the power of fixing compensation. In other words, in the absence of any enactment to the contrary, the duty to function includes by implication of law the power to properly apply the funds appropriated for that purpose. Abundant authority exists to this effect. *Rankin v. Colgan*, 92 Cal. 605, 28 P. 673; *Bateman v. Colgan*, 111 Cal. 580, 587, 44 P. 238; *Harris v. Gibbins*, 114 Cal. 418, 46 P. 292; *Lewis v. Colgan*, 115 Cal. 529, 47 P. 357.

In the appropriation bill is found the following provision: "The officers of the various department, boards, commissions and institutions for whose benefit and support appropriations are made in this act are expressly forbidden to make any expenditure in excess of such appropriations, except the consent of the state department of finance be first obtained, and a certificate, in writing, duly signed by the director of said department, of the unavoidable necessity of such expenditure. * * * Stats. 1929, p. 98, § 5. This provision further confirms the conclusion above deduced.

[2, 3] This being true, we are required to search elsewhere to see if the power to fix the compensation of petitioner has been delegated to any other officer or bureau. The position of respondents is that the department of finance has that power abiding in it by virtue of sections 654 and 675a of the Political Code. Section 654 gives the department of finance general supervision over the financial and business policies of the state. Section 675a (Stats. 1927, p. 455, § 1), so far as here involved, reads as follows: "All contracts entered into by any state officer, board, commission, department, or bureau for the purchase of supplies, materials, or services, shall before the same become effective be transmitted with all papers, estimates and recommendations concerning the same to the state department of finance for consideration. If such department approve the same, the contract shall, from the date of such approval, be in force and effect. * * *"

At the time these two sections were enacted, a new article was added to the Political Code, which covers sections 654 to 685, inclusive (Stats. 1927, c. 251, pp. 449-459). In the margin opposite the statute (Stats. 1927, § 675a, p. 455) is found this annotation: "State departmental contracts." This article was added pursuant to the policy announced in part 3, tit. 1, c. 3, art. 2, of said Political Code, being sections 348 to 359b, in-

clusive, thereof. Section 348 then read: "It is the policy of this state to vest in the governor the civil administration of the laws of the state and for the purpose of aiding the governor in the execution and administration of the laws to divide the executive and administrative work into departments as provided by law."

Taking these provisions in the context where found, coupled with the objects and purposes for which the enactments were made as disclosed in the other provisions of the same title, we have no hesitancy in declaring that the said sections of the Code here invoked were intended to and do apply only to the executive department of the government and were not intended to and do not apply to the judicial department thereof set up by article 6, § 1, of the Constitution. The word "department" found in said sections simply relates to the administrative departments created in aid of the Governor in the enforcement and execution of the laws of the state.

A case practically on all fours with the one before us, where an able discussion of this identical question under a similar situation is found, is *State v. Cunningham*, 39 Mont. 165, 101 P. 962, 965. The statute there involved (section 262, Rev. Codes 1907) read: "The board of examiners may at any time when necessary, employ clerical help for any state officer or board, and no clerks must be employed by such officers or board without the authority of the board of examiners, and no such clerks must be employed by the board of examiners except when all the duties of the office cannot be performed by the officer himself." The court in part said: "Whatever application section 262, supra, may have to the help employed in the executive department, it cannot have, and was not intended to have, any application to the necessary employees attached to this court. This court, viewed as a department of the state government, is neither an officer nor a board, and therefore does not fall within the terms of this provision."

In fact, it may well be doubted whether the employment of petitioner is the making of a contract for personal services. Her duties partake more of the nature of a public office, and there seems to be no contractual relation in the holding of such a position. *Mansfield v. Chambers*, 26 Cal. App. 499, 147 P. 595; *Mono County v. Industrial Accident Commission*, 175 Cal. 752, 167 P. 377.

Another observation makes the conclusion above referred to manifest. Section 682 of the Political Code, a part of the same article (Stats. 1927, p. 458), provides in part: "The department of finance shall also be in possession and control of all records, books, papers, offices, equipment, supplies, moneys, funds, appropriations, land and other property, real or personal, now or hereafter held for the benefit or use of all of said bodies, offices and

officers mentioned in the article. * * *

A literal interpretation of this section would require the judicial department of the state to transfer the possession of the court records and all its equipment to the said department of finance.

[4, 5] We may reach the same conclusion in another manner. A court set up by the Constitution has within it the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation. This arises from the fact that it is part of and belongs to one of the three independent departments set up by the Constitution, art. 6, § 1. This power is recognized, among other places, in sections 47 and 144 of the Code of Civil Procedure. While the above statement is true, there is this qualification thereof, which has been recognized at all times in this state, the Legislature may at all times aid the courts and may even regulate their operation, so long as their efficiency is not thereby impaired.

In *Brydonjack v. State Bar*, 208 Cal. 439, 281 P. 1018, 1020, 66 A. L. R. 1507, this court said: "Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. In *re Garner*, 179 Cal. 413, 177 P. 162; *Nicholl v. Koster*, 157 Cal. 416, 108 P. 302. * * * The sum total of this matter is that the Legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions."

Admittedly, therefore, the Legislature, within the foregoing limitations, could in its wisdom provide the compensation that should be paid petitioner, and could delegate that duty to a bureau of the executive department thereof. As is said in *Nicholl v. Koster*, 157 Cal. 416, 423, 108 P. 302, 305: "The Legislature may indeed provide for the appointment of such assistants of the court by the executive department, or by election of the people, and thus relieve the court of the burden of choosing such persons. But if the Legislature or the Constitution should fail to provide such persons, a court invested with jurisdiction would have all the powers necessary to its convenient exercise, and could appoint such assistants as might be required." For a profound discussion of the inherent power of the court under circumstances quite similar to the case at bar, see *State v. Cunningham*, supra.

[6, 7] But, as above noted, we have found that the Legislature has not reposed the power to appoint petitioner or to fix her compen-

sation in any other officer or bureau. This, indeed, is as it should be. A law secretary is called upon to do work of a highly specialized and confidential character. Such a person must possess certain legal attainments as well as certain powers of discretion and discernment that may not be so readily recognized or appraised by another as by a member of the judiciary. Besides, such person necessarily must have advance knowledge of decisions and judgments of the court. For these and many other reasons that could be assigned we have no doubt that it was the intention of the Legislature to leave both the appointment and the compensation of law secretaries to the courts they serve. Of course, respondents have the power of audit of petitioner's claim, but this is far from being authorized to appoint her or to fix her compensation.

In the case of *U'Ren v. State Board of Control*, 31 Cal. App. 6, 159 P. 615, 618, the court had under consideration in a situation similar to the instant case, the duties of the state board of control, a predecessor of respondent department of finance, and there said: "The doctrine is well settled in numerous cases that where one official, board, or body is given authority by statute to create an obligation against a specific fund in the state treasury, and another official, board, or body is intrusted with the powers of an auditor in respect to claims generally against the state, the powers and duties of the latter in respect to such claims may be controlled by the courts and compelled by writs of mandate." *Lewis v. Colgan*, supra; *Scott v. Boyle*, 164 Cal. 321, 128 P. 941, and cases cited; *Lawrence v. Booth*, 46 Cal. 187; *Sullivan v. Gage*, 145 Cal. 759, 79 P. 537.

[8] It is now well settled that the Legislature, in conferring the authority upon a bureau, court, or officer to fix in its discretion the compensation of persons upon whom the duty of carrying out some duly authorized governmental object has been cast, is not thereby delegating legislative power to another, but in reality is authorizing but an executive act. *Nicholl v. Koster*, supra; *Stephens v. Chambers*, 34 Cal. App. 660, 168 P. 595; *Tarpey v. McClure*, 190 Cal. 593, 213 P. 983; *Ryan v. Riley*, 65 Cal. App. 181, 223 P. 1027. For a discussion of the general subject, see *Davenport v. Elrod*, 20 S. D. 567, 107 N. W. 833; *State ex rel. Gubbins v. Anson*, 132 Wis. 461, 112 N. W. 475. The doctrine found in *Smith v. Strother*, 68 Cal. 194, 8 P. 852, that is opposed to this holding, may now be held abrogated by these later and, we think, sounder views on the subject.

Let the writ issue as prayed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

108 Cal. App. 721

PEOPLE v. SHEFFIELD et al.

Cr. 1950.

District Court of Appeal, Second Appellate
District, Division 2, California.

Oct. 3, 1930.

As Modified on Denial of Rehearing Oct. 17,
1930. Hearing Denied by Supreme Court
Oct. 30, 1930.¹**1. Bribery** *§*1(1).

Substantive offense of agreeing to receive and receiving bribe includes elements of conspiracy.

2. Criminal law *§*814(5).

Where no conspiracy was charged, and bribery case was not tried on theory of conspiracy, *held*, instructions on law of conspiracy were error.

Charge against defendant and codefendant was that of agreeing to receive and receiving a bribe, which charge necessarily included the elements of a conspiracy, but no conspiracy was charged, and case was not tried on such theory.

3. Criminal law *§*814(3).

Instruction must be adapted to evidence and circumstances of case on trial.

4. Criminal law *§*1172(6).

Instruction having no bearing on evidence or circumstances of case, though containing correct statement of abstract legal principles, is reversible error, if prejudicial.

5. Bribery *§*14.

Intent being essential element of "bribery," *held*, requested instruction as to necessity of coexistence of intent and act should have been given.

6. Witnesses *§*274(1).

In bribery trial, permitting question to character witness whether by integrity of public officer he meant one who had sworn to support Constitutions *held* error.

7. Criminal law *§*1170½(5).

Misconduct of deputy district attorneys in cross-examining character witnesses on irrelevant matters beyond scope of direct examination, etc., *held* prejudicial, though in some instances questions were withdrawn.

In some instances the questions were withdrawn, in others the court admonished the jury to disregard the questions, and in still other instances defendant's objection was overruled. Alleged misconduct consisted of asking character witnesses on cross-examination as to quali-

ties other than those asked on direct testimony, namely, honesty and integrity, in suggesting to defendant's counsel to put defendant on stand, etc.

8. Criminal law *§*1037(2).

Ordinarily, misconduct will not be reviewed, unless foundation was laid in trial court by objection and request to admonish jury to disregard matters complained of.

9. Criminal law *§*1037(2), 1129(1).

When entire record fairly shows misconduct could not, with reasonable probability, have been obviated by instruction, absence of assignment and request will not preclude review.

10. Criminal law *§*655(1).

Trial court should not inject personal views into trial directly or in manner in which he asks questions.

11. Criminal law *§*700.

It is district attorney's duty, not to obtain conviction, but fully and fairly to present to court evidence material to charge.

12. Criminal law *§*633(1).

It is trial judge's duty to see facts material to charge are fairly presented and defendant's constitutional guaranties neither violated nor infringed.

13. Criminal law *§*633(1).

Trial court should be alert to see that immaterial issues are not injected into trial.

14. Criminal law *§*1170½(1).

In bribery trial of police officer, permitting jurors to question witness relating to methods of police department *held* misconduct, not cured by instructions that police department was not on trial and relative to attitude of court.

15. Criminal law *§*1186(4).

Where conviction likely resulted from errors and misconduct shown by record, *held*, miscarriage of justice resulted, requiring reversal (Const. art. 6, § 4½).

16. Criminal law *§*742(1), 747.

There being conflict in testimony, it was for jury to determine credibility of witnesses, and facts.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Maceo B. Sheffield was convicted of bribery, and he appeals.

Reversed.

For memorandum of Supreme Court modifying opinion, see 293 P. 77.

*§*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹For memorandum modifying order see 293 P. 77.

Rehearing denied; SCHMIDT, Justice pro tem., dissenting.

Hearing denied by Supreme Court; SHENK, SEAWELL and CURTIS, JJ., dissenting.

Thomas P. White and Martin J. Burke, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and William R. McKay, Deputy Dist. Atty., both of Los Angeles, for the People.

SCHMIDT, Justice pro tem.

Appellant, Maceo B. Sheffield, by indictment returned by the grand jury of Los Angeles county, was charged jointly with Roscoe C. Washington and Richmond Dunn on twelve counts of bribery and twelve counts of extortion; it being alleged that appellant with his codefendants, while acting as police officers of the city of Los Angeles, accepted money and property from different underworld characters and bootleggers pursuant to an agreement upon the part of appellant and his codefendants that they, in return for the payment of said money and property, would not arrest or prosecute the bootleggers named in the indictment for violation of what is commonly known as the Wright Act (St. 1921, p. 79).

On the opening day of trial the district attorney moved to dismiss all twelve counts involving extortion and all counts except 13, 15, 17, 19, 21, and 23, charging bribery, in relation to the alleged bribe givers, Mr. and Mrs. Hendricks. Defendants Washington and Dunn were acquitted on all counts. Appellant was acquitted on counts 15, 17, 19, and 21, and was convicted of the crime of bribery as charged in counts 13 and 23. Appellant moved for a new trial, which was denied, and he was sentenced to San Quentin for the period prescribed by law. From the judgment and order denying his motion for a new trial the defendant Sheffield prosecutes this appeal.

I. Appellant claims the trial court erred in its rulings during the progress of the trial and in the giving and refusing to give certain instructions.

[1-4] (a) In five separate instructions the court instructed the jury fully and elaborately on the law of conspiracy, showing clearly, however, that these instructions were given upon the theory of a conspiracy existing between the defendants, as illustrated by one of the instructions: "If you believe from the evidence that the defendants * * * or any two of them, pursued by their acts the same object * * * the jury will be justified in the conclusion that such defendants so pursuing the same object were engaged in a conspiracy to effect that object." The charge against appellant and his two codefendants was that of agreeing to receive and receiving a bribe, which charge necessarily includes

within the substantive offense the elements of a conspiracy; and, had the trial been had upon this theory, the instructions would have been proper. *People v. Keyes* (Cal. App.) 284 P. 1096; *Id.* (Cal. Sup.) 284 P. 1105. In this particular case these instructions on conspiracy should not have been given, because no conspiracy was charged, nor was the case tried on the theory that a conspiracy existed between the defendants. On the other hand, it was stated repeatedly throughout the trial that no conspiracy existed between the defendants. In such event the instructions went to an immaterial matter, and could only mislead the jury. Counsel for respondent contends that no error can be predicated in view of the fact that the instructions complained of constitute a correct pronouncement of the law. The law is well settled that instructions given to a jury must be adapted to the evidence and circumstances of the case on trial. To give instructions, even though they contain a correct statement of abstract legal principles, which are prejudicial will warrant a reversal of a judgment of conviction, and constitutes error. See *People v. Savinovich*, 59 Cal. App. 240, 210 P. 526, involving a prosecution for arson, yet quite parallel to the case at bar.

[5] (b) The court also refused to give the following instruction requested by appellant: "In every crime or public offense there must exist a union of intent and act or criminal negligence." Intent being one of the essential elements of the crime of bribery, the court should have given this instruction. The substance thereof was not contained in any other instruction given.

(c) There is no merit in the contention that the court erred in refusing to give certain other instructions asked by appellant.

[6, 7] II. Appellant claims error by reason of misconduct on the part of the deputies district attorney in the cross-examination of character witnesses produced by appellant, which character witnesses were asked on cross-examination as to qualities other than those asked on their direct testimony; namely, honesty and integrity. For instance, the witness Morgan T. White was asked on cross-examination if he had not heard the reputation of appellant as a brutal officer discussed, to which question objection was interposed but overruled by the court. The witness A. M. Rochlen, on cross-examination, was asked if he knew Will Anderson of the grievance committee of the bar association; whether he read the Bar Association Journal. He was then asked the question: "Don't you know that it was spread through the bar of this community by Mr. Anderson as one of the leading members of the bar, the analysis of the brutality of Mr. Sheffield?" When objection was interposed, the deputy district attorney stated: "All right, perhaps you are right on that." Again James E. Davis, formerly

chief of police of the city of Los Angeles, one of the principal witnesses for the defense, was asked on cross-examination as to his familiarity with the arrest of the defendant. He was then asked the question: "As a matter of fact, don't you know that it was generally reported even among public officials that at the time of his arrest, he was arrested in possession of intoxicating liquor." Then, after strenuous objection and the assignment of same as misconduct, the question was withdrawn by the deputy district attorney, whereupon the deputy district attorney stated: "I withdraw it. Let me ask you this, Mr. Witness: You addressed your opinion as to his honesty as a public official. Do you believe that a public official whose duty it is to enforce the law who drinks liquor and has it in his possession is an honest man?" Upon objection of appellant the deputy district attorney stated: "I think the objection is good, and I withdraw the question." Again in connection with the cross-examination of William W. Ashe, called as a character witness for appellant, the following took place:

"Q. Well, you heard, did you, in 1927, that Mr. Sheffield owned an airplane? A. I never knew it until this date, Mr. Dennison.

"Q. You heard it discussed, didn't you, in the Federal Department? A. No, I never did.

"Q. You belong to the Secret Service, don't you? A. Yes sir.

"Q. Didn't you hear it discussed that he was using that airplane for the purpose of bringing narcotics from Mexico?

"Mr. White: Now, just a minute. We object—

"A. No, sir, I did not. We don't handle narcotics in our department.

"Mr. White: Just a minute—

"Q. By Mr. Dennison: I didn't ask you what you handled over there; I asked you if you had heard it discussed over there? A. No, I never did.

"Q. How long have you been over there? A. Been there seven years.

"Mr. White: Now, if the Court please, I desire at this time, first of all, to say that prior to asking the question of the witness as to whether he knew that Sheffield had an airplane which was being used for illegal purposes, that the witness answered Mr. Dennison that he had never heard that discussed; that, thereafter, to get it before the jury Mr. Dennison asked the witness if he had not heard it discussed, that he, Sheffield, had used this airplane for illicit purposes. I assign that as absolutely prejudicial misconduct on the part of the District Attorney; ask the court to admonish the jury to disregard that statement of the District Attorney, in view of the fact that the witness had prior to the District Attorney suggesting it, stated to the District Attorney that he had never heard it discussed.

"Mr. Dennison: I am quite certain that the jury will pass upon the answers of the witness and not the questions of the prosecutor.

"Mr. White: Then I would suggest, if that is the case, that the District Attorney stop thrusting in immaterial stuff such as that, which is highly prejudicial and of no intrinsic legal value, whatever, your Honor.

"Q. By Mr. Dennison: Do you know anything of the—

"Whereupon the court instructed the jury to disregard the questions asked by the District Attorney, and take into consideration the answers only of the witness and qualified its admonition by stating 'The District Attorney has a right, of course, to ask questions of witnesses who are called upon to testify as to the reputation or character of a defendant, but the jury is instructed to disregard the effect of any questions as to rumors or reports unless the District Attorney afterwards connects those reports with the defendant.'

In connection with the witness W. C. Jaffke, a United States secret service agent, the following took place:

"Q. By Mr. White: It is agreed here between us, I think, that that Smoke Shop was closed about August 7, 1929. How did you come to make that investigation? A. Well, I was sitting in front of the station in a police machine, and Sheffield came up to me and asked me if we didn't have—

"Mr. Dennison: Just a moment. We object to what Mr. Sheffield said as calling for hearsay.

"Mr. White: If the Court please, we offer to prove what he said as showing and indicating to the fullest extent that he was responsible for the abating of this nuisance.

"Mr. Dennison: It is hearsay.

"The Court: It is calling for hearsay.

"Mr. White: We accept the challenge of the District Attorney to show that.

"Mr. McKay: By your own witness, you can show that, if you want to. Put your own witness on.

"Mr. Dennison: Put Mr. Sheffield on and give us a chance to cross-examine him.

"Mr. White: If the Court please, we intend to put him on, but the District Attorney has no right to make a suggestion to the defense counsel. I assign it as misconduct and prejudicial. He has no right to comment on that, and he knows it.

"Mr. McKay: We were not commenting on it.

"Mr. White: You said, 'Why don't you put him in the stand?'

"Mr. Dennison: We apologize and ask the Court to instruct the jury to disregard anything I said. It was only addressed to Mr. White; it was not for the jury.

"The Court: The jury is instructed to disregard the remarks of the District Attorney."

Again, in the examination of former Chief of Police Davis the following took place:

"Mr. Dennison: You testified, did you not, that the reputation of Mr. Sheffield for integrity was good? A. Yes.

"Q. And by the integrity of a public officer, you mean a public officer who has held his hand up to the God that created him and sworn to support the Constitution of the United States of America and the State of California don't you?

"Mr. White: Objected to on the ground it is incompetent, irrelevant and immaterial, not cross-examination.

"Mr. Burke: Further, it is argumentative.

"The Court: Overruled.

"Mr. Dennison: Do you mean that by the integrity of a public officer, that he has sworn to uphold the Constitution of the United States and the Constitution of the State of California? A. I believe that Mr. Sheffield has taken an oath to uphold the laws of the State of California.

"Mr. Dennison: That is not the question.

"The Court: That is not the question.

"Mr. Dennison: Just a moment. Your Honor, I move to strike that out. Do you feel that integrity means where a man has taken an oath to uphold the Constitution of the State of California, that he shall be obedient to that oath?

"Mr. White: Object to that on the ground it is incompetent, irrelevant and immaterial, not proper cross-examination.

"Mr. Dennison: I withdraw the question. What do you mean by integrity? A. That the man is honest, conscientious, a faithful public servant who obeys the laws laid down for his guidance."

Further in the examination of Chief Davis the following took place:

"Q. Well, Chief, Officer Randolph—you knew, did you not, that Officer Randolph went upon the stand in the trial of Maceo B. Sheffield and testified that his testimony given before the Grand Jury, in relation to that killing of Sam Faulkner, was false?

"Mr. White: That is objected to on the ground that it is irrelevant and immaterial, not proper cross-examination, and I assign the asking of the question as prejudicial error.

"The Court: Objection sustained. The jury is instructed to disregard any effect of the asking of the question.

"Mr. Dennison: I believe that is all."

Where objection was made to these respective lines of cross-examination, the court erred in overruling the objections, and even though, as occurred in some instances, the deputy district attorney withdrew his questions, we cannot say upon a reading of the

entire record of the case the jury was not influenced by the conduct of the deputy district attorney.

III. Further error is predicated on alleged misconduct of the trial judge in examining witness Ex-Chief of Police Davis on incompetent matters. The record in this case shows a very lengthy interrogation of the witness Davis on immaterial matters, to much of which counsel for appellant failed to object, but finally did enter objections.

[8, 9] Although it is the general rule in California that, before the reviewing court will consider misconduct, a foundation must be laid in the trial court, by objection and a request of the court to admonish the jury to disregard the matters toward which complaint is made, however, there is (as was said in *People v. Stafford* [Cal. App.] 290 P. 920, 921) a well-recognized exception to this general rule: " * * * Where an examination of the entire record fairly shows that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, then the absence of such assignment and request will not preclude the defendant from raising the point in this court. *People v. MacDonald*, 167 Cal. 551, 140 P. 256; *People v. Edgar*, 34 Cal. App. 459, 167 P. 891; *People v. George* [72 Cal. App. 124, 236 P. 934], *supra*; *People v. Frank*, 71 Cal. App. 575, 585, 236 P. 189."

[10-12] The court questioned Chief Davis as to whether police officers who have to do with the arrest of persistent violators of either prostitution, gambling, or liquor laws reported to the district attorney their prior convictions of the same offense; and, after answer given, the following took place:

"The Court: That doesn't answer my question."

After answer by the witness:

"The Court: That is not answering my question at all. My question was whether," etc.

And, after several more questions and answers on the same subject-matter, the court continued:

"Q. I only asked the question preliminary to another one," and then proceeded to interrogate the witness relative to the fact that there was only one police officer who made such reports to the district attorney—the officer assigned to the morals efficiency association.

The trial judge also questioned Chief Davis at length in regard to search warrants, and in particular about a general order of the police commission concerning search warrants in liquor cases. At another time, while the deputy district attorney was interrogating

Chief Davis, the chief finished his answer by stating:

"* * * In other words, he is an officer that, if the liquor had been sold to him, he would have gone directly into the premises, and he has probably kicked in a number of doors to get at the liquor supply without worrying about getting a search warrant. Now if that is done such individuals have civil recourse.

"Q. Well, that is true—

"Q. By the Court: If that is done he is violating the law too, isn't he, Mr. Davis?"

The interrogation continued, and the following questions and answers were had:

"Q. I say the officer; I am referring to the officer; he has violated the criminal law, hasn't he? A. He has not violated any law, that is, any criminal statute for which he can be prosecuted.

"Q. I didn't ask you that. I asked you if he was not violating the law to enter a place without a warrant. A. He has violated the constitutional provision, but that is one thing practiced by peace officers, and such evidence so obtained is admissible in court.

"Q. I don't care about any practice. I am asking you now about the law, under the Constitution, and the law that we have in the United States."

And again the witness was asked:

"Q. (By the Court): You claim the Constitution does not mean anything at all when it says that premises cannot be entered without a warrant?"

After the witness' answer the court said:

"That is not an answer to the question at all. It is a very nice lecture of what officers have been doing and possibly your reasons as to why they have done it, but I am asking you whether, as Chief of Police, you would instruct your officers to violate the Constitution in order to get evidence or to make arrests?"

The foregoing serves to illustrate the nature of the matters to which complaint is directed. To recite at length the voluminous pages to which complaint is directed would not answer any useful purpose. Most of these questions and answers given show that there was a dispute between the court and the witness concerning these immaterial matters upon which the witness was interrogated. Without doubt, questioning by the trial judge on these immaterial matters, coupled with the comments on the testimony, must have had its influence upon the jury as to the attitude of the judge towards the witness Davis, as well as towards appellant. The trial court should never inject his personal views into a trial either directly or in the manner in which he asks questions. As was said in *People v. Soeder*, 150 Cal. 12, at page 18, 87 P. 1016, 1019:

"Under our system, the trial judge is rigorously prohibited from action or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. The determination of questions of fact must be made by the jury free from the influence that knowledge of the trial judge's views thereon might have."

The attitude of the trial judge, so far as can be discerned from the cold record, was one of seeming prejudice against the police department as a whole—against Chief Davis, called as a witness in behalf of appellant, and against appellant, a colored police officer. The record in this case shows a seeming desire on the part of the deputy district attorney and the trial court to convict appellant at any cost, even to the violation of his constitutional right to a fair and impartial trial. It is the duty of the district attorney, not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands on trial, and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented and the constitutional guaranties of a defendant neither violated nor infringed. There is nothing that arouses the conscience of the American public so much as interference with, or deprivation of, constitutional guaranties.

[13, 14] IV. In addition, the court permitted jurors to ask questions of the same witness, Chief Davis, whether the officers of the morals efficiency organization were regular police officers—whether the organization was a legally organized, incorporated institution or just "an association independent of all that"; whether it had any legal standing in court; whether the individuals thereof could be sued; whether they receive their pay through the city or police payroll; whether they dictated to the police department in that particular line in any way, and whether the chief was in the courtroom when a certain witness, Smith, testified, concluding his (this particular juror's) questioning with:

"I want to be fair with you. I want to know myself. I listened to the testimony yesterday. It was testified on the stand they went down to this place down there, they only took one of the employees, without making any effort to find where the liquor was sold; they knew liquor was around there, and they made no effort to find it, no effort to get the proprietor of the place at all, just got one of his runners, that is all. Now frankly, I looked at it, as the testimony came in, as just a grandstand play of your department. Now, is that the case?"

The objection by counsel for appellant was met with:

"The Court: Let the Chief answer the question."

It would seem that, in addition to trying appellant for bribery, fully as much time, if not more, was spent in trying the methods of the police department. The trial court should ever be alert to see that immaterial issues are not injected into the trial of a case.

From an examination of the entire record we cannot say that the instructions given the jury that the police department was not on trial, or the instructions relative to the attitude of the court, cured the misconduct to which complaint is directed. As was said in *People v. Edgar*, 34 Cal. App. 459, at page 471, 167 P. 891, 895, that where the misconduct "is so pronounced and pernicious that it is not in human nature to forget or disregard its prejudicial effect, then manifestly a mere admonition, or any number of admonitions, will not suffice to right the wrong done, and the only remedy remaining is to be found in a reversal of the judgment."

[15] V. From an examination of the very lengthy transcript of the proceedings in the lower court we are unable to determine whether appellant would or would not have been convicted but for the errors of the court and the misconduct set forth. Had the jury acquitted appellant, the verdict would have found abundant support in the evidence. We are of the opinion that the errors complained of have resulted in a miscarriage of justice. It is quite likely that the conviction of appellant was because of the errors and misconduct as shown by the record. Under such circumstances the provisions of section 4½ of article 6 of the Constitution may not be used in order to support a judgment of conviction. *People v. Irby*, 67 Cal. App. 520, 227 P. 920; *People v. Alpine*, 81 Cal. App. 456, 254 P. 281.

VI. Insufficiency of the evidence to warrant or sustain the conviction of appellant under either counts XIII or XXIII is further urged.

[16] As to count XIII this contention is not sustained. There being a conflict in the testimony, it was for the jury to determine the credibility of witnesses and to determine the facts in the case.

Concerning count XXIII, however, we are confronted with a novel situation. Had the jury believed the version of appellant as to the transaction about the diamond pin, it should have acquitted appellant. The jury, therefore, must have convicted upon the story as told by Sebe Hendricks. He was an accomplice. Section 31, Pen. Code; *People v. Coffey*, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704. In addition, the testimony of Sebe Hendricks was a mere conclusion. Count XXIII involved the acceptance of a pin belonging to the complaining witness Sebe Hendricks, which at the time was in pawn, and, as the testimony showed, was redeemed from

the pawn by appellant at an expense of \$147.50 but no note or other papers were executed in connection with the transaction, and the said Sebe Hendricks, according to his own testimony, placed the stickpin in the necktie of appellant. He was then asked by the district attorney:

"Q. He was to hold the pin for a year, and then how much were you to pay? A. \$247.50 with a 7 per cent. interest.

"Q. And what was the extra \$100.00 for? A. It was for the back pay of the protection money which I hadn't paid him.

"Q. These weekly \$25.00 a week payments? A. Right."

—which is substantially all of the testimony connecting appellant with the bribery in so far as count XXIII is concerned.

A reading of all the testimony on this count shows an absolute lack of corroboration of the testimony of Sebe Hendricks, the accomplice, as required by section 1111 of the Penal Code.

The judgment and order appealed from are reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

108 Cal. App. 721

PEOPLE of State of California, Respondent, v.
Maceo B. SHEFFIELD, Appellant.

Cr. 3405.

Supreme Court of California.

Nov. 14, 1930.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Thomas P. White and Martin J. Burke, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and William R. McKay, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

In denying the petition for a hearing in this court in the above-entitled cause (order entered October 30, 1930), after decision and judgment in the District Court of Appeal (*People v. Sheffield*, 293 P. 72), we withhold our approval from that portion of the opinion of the District Court of Appeal which holds that Sebe Hendricks was an accomplice of the defendant Sheffield. See *People v. Davis* (Cal. Sup.) 293 P. 32.

109 Cal. App. 310

DERMER v. PISTORESI et al.

Civ. 4006.

District Court of Appeal, Third District, California.

Nov. 1, 1930.

1. Automobiles ⇨6.

Statute exempting owner or driver of automobile from liability for injury to guest, with certain exceptions, *held* inapplicable to cause of action accruing before effective date of act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

2. Automobiles ⇨240(1).

Plaintiff suing for death of guest riding in automobile *held* not required to plead or prove driver's gross negligence in view of inapplicability of statute (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

3. Trial ⇨108½.

In action for death resulting when defendant's automobile overturned, questioning jurors on voir dire regarding interest in any insurance company *held* not error.

If any of jurors were officers or stockholders in insurance company which carried indemnity insurance on defendant's automobile, or in any other indemnity insurance company, they would not be presumed to be as free from bias as though they were not so interested.

4. Trial ⇨133(6).

In automobile death action, question by plaintiff's attorney regarding juror's free and open mindedness in matter after disclaiming interest in any liability insurance company, though improper, *held* harmless error, where stricken and cautionary instruction given.

Prospective juror on voir dire testified that he was not interested in any company insuring against liability for automobile accidents, whereupon plaintiff's attorney asked following question: "So, therefore, you are free and open-minded in this matter?" To which juror answered affirmatively. Question and answer were stricken on defendant's motion, and court clearly instructed jury that their verdict was to be based solely on merits of cause and that they were to disregard any question of indemnity insurance.

5. Appeal and error ⇨930(2).

Appellate court will not assume jury will deliberately disregard their oaths and explicit cautionary instructions to disregard evidence stricken out.

6. Appeal and error ⇨1031(5).

Appellate court will not presume prejudicial error from mere discovery of insurance company's interest in automobile death action, unless testimony disclosing insurance was unjustifiably elicited in bad faith.

7. Trial ⇨127.

Plaintiff suing for death of guest riding in automobile cannot be deprived of benefit of legitimate rebuttal to pretended defense, even though rebuttal may disclose insurance company interested in result.

8. Trial ⇨127.

In automobile death action, cross-examination of driver to lay foundation for impeachment, disclosing insurance man called after accident, *held* proper where apparently not conducted in bad faith.

Driver of automobile, in which plaintiff's intestate was riding at time he was killed, testified on direct examination that accident was caused by deceased's distracting his attention from highway by pulling at his sleeve to emphasize some point in a story which he was relating. Decedent's contributory negligence was an issue in the case. During course of cross-examination of driver to lay foundation for impeachment, driver testified that insurance man had called on him after accident, to whom he first disclosed that deceased had distracted his attention at time of accident as testified to in direct examination.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Simon Dermer against August Pistoresi and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Barcroft & Barcroft, of Madera, for appellants.

Conley, Conley & Conley, of Fresno, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment rendered upon a verdict of \$3,500 secured as damages on account of the death of plaintiff's son, which resulted from an automobile casualty while the boy was riding in the machine as a guest.

On November 25, 1928, at 7 o'clock p. m., Simon Dermer, Jr., the son of plaintiff, aged 19 years, was riding as a guest with the defendant August Pistoresi along the highway near Madera, in the Chevrolet automobile belonging to the defendant Creuffe Pistoresi. The machine was running at the rate of speed of about 30 miles an hour. It was dark. The

headlights illuminated the highway 150 feet ahead of the car. Reaching a turn in the roadway, which the driver failed to see, the machine ran into the embankment at the side of the highway and overturned. Regarding this inattention and failure to observe the curve in the roadway, the driver testified: "I could have seen it, but I didn't see it. * * * I knew it was there, but I did not know I was there with the car yet." Simon Dermer, Jr., was caught beneath the overturned car and sustained fatal injuries, from which he died two days later. An action for damages was instituted. A jury trial resulted in a judgment of \$3,500 in favor of the plaintiff.

A reversal of the judgment is sought upon two grounds. It is asserted that section 141½ of the California Vehicle Act (St. 1929, p. 1580) is retroactive in its effect and that it, therefore, precludes the recovery of damages from the owner or driver of a machine for death or injury of a guest who was riding therein, except upon proof that the death or injury was sustained as a result of the "intoxication, wilful misconduct or gross negligence" of the owner or driver of the vehicle. It is also claimed the attorney for plaintiff was guilty of prejudicial misconduct by disclosing to the jury in the course of the trial the fact that the defendants were protected against loss from such an accident by indemnity insurance.

[1, 2] It now appears to be the settled law of California that section 141½ of the California Vehicle Act is not retroactive in its application, and that the former doctrine of negligence applies to all actions for damages for death or injury of a guest while riding in an automobile which accident occurred prior to August 14, 1929, when the California Vehicle Act went into effect. It was therefore not necessary to plead or prove gross negligence on the part of the driver of the machine in the present case. *Callet v. Alioto* (Cal. Sup.) 290 P. 438; *Martinelli v. Poley* (Cal. Sup.) 292 P. 451; *Krause v. Rarity* (Cal. App.) 285 P. 879.

There was no prejudicial misconduct on the part of counsel for the plaintiff in referring to an insurance company during the course of the trial, under the circumstances of this case.

[3] In the examination of prospective jurors on the voir dire they were asked if they were stockholders or interested in any insurance company. Some of them were asked if they were so interested in the Royal Indemnity Company. These were competent questions to ascertain the state of mind of the jurors. If any of them were officers or stockholders in the insurance company which carried indemnity insurance on the defendant's automobile, or in any other indemnity insurance company, they would not be presumed to be as free from bias as though they were not so interested. The relationship of any prospective juror to an indemnity insurance company is a fact the plaintiff has a right to elicit

for the purpose of exercising peremptory challenges if he so desires. *Arnold v. California P. C. Co.*, 41 Cal. App. 420, 183 P. 171; *Williamson v. Hardy*, 47 Cal. App. 377, 190 P. 646; *Potter v. Driver*, 97 Cal. App. 311, 275 P. 526; 4 *Blashfield's Cyc. of Auto Law*, p. 1521, § 19.

[4] In answer to a general question propounded to a juror as to whether he was interested in any company insuring against liability for automobile accidents he replied that he was not. Plaintiff's attorney then said: "So, therefore, you are free and open-minded in this matter?" The juror replied, "Yes, sir." On motion this question and answer were stricken from the record. Even though this question did contain a subtle inference that a surety company was indirectly interested in the outcome of the cause, it was harmless. In the course of the examination of the jurors the court made it very clear to the jurors that their verdict was to be based solely on the merits of the cause, and that they were to disregard any question of indemnity insurance. The court said: "There are no outside influences at all of any kind that should have any part in your deliberation in this case, and you are not to speculate as to whether or not the defendants are or are not insured; that has nothing to do with this case, it is just the question, the same as an individual, if the * * * (defendants are) liable under the law they should be assessed damages, and on the other hand, if * * * they are not liable, you cannot figure and say 'well, they must be insured and we will get the insurance company,' for that would be a miscarriage of justice."

[5, 6] An appellate court will not assume that a jury will deliberately disregard their oaths and an instruction so explicit as the foregoing, and presume prejudicial error from the mere discovery of the interest of a surety company in the outcome of the action, unless that information has been unjustifiably elicited by the plaintiff in bad faith.

[7, 8] Finally, it is asserted the most grievous misconduct of the plaintiff's counsel in disclosing the interest of an insurance company occurred as follows: August Pistoresi, who drove the automobile at the time of the accident, was being examined as a witness. For the first time, to the knowledge of plaintiff, he claimed that the accident was caused by Simon Dermer, Jr., distracting his attention from the highway just before they reached the turn in the road, by pulling at his sleeve to emphasize some point in a story which he was relating. Since the alleged contributory negligence of the deceased was an issue in the case this circumstance became of vital importance. The merits of the entire case hinged upon the question as to whether the driver of the machine was guilty of negligence by virtue of his inattention to the high-

way and his careless operation of the automobile. Discrediting this statement, and in order to lay the foundation for impeachment of the witness on this subject, he was asked on cross-examination:

"Q. Who was the first person you told that this boy pulled your shirt? A. I never told anybody. * * *

"Q. You never told anybody? A. The doctor (Ransom). I told the doctor. * * *

"Q. Did you ever tell anybody else? A. No.

"Q. Wasn't there some man in San Francisco that came out to see you, and talked to you about this accident? A. Sure. * * *

"Q. Didn't the suggestion that your shirt had been pulled by this boy come from that man who came to see you from San Francisco? He told you that, didn't he? A. No, he never.

"Q. What did he say to you about it? A. He just asked me some questions, and I answered the way I wanted them. * * *

"Q. You are sure you told Doctor Ransom? Was Doctor Ransom present when that man talked to you? * * * A. No, sir, he was not

"Q. That man from San Francisco told you who he was? A. He told me his name, but I forget.

"Q. Did he tell you why he came to see you? A. Yes, he told me he was an insurance man, but I just didn't want to tell him right away. * * *

"Q. Did you ever tell anybody else? A. No.

"Q. Anybody else that this boy had pulled your shirt? A. No."

It appears from the admission of August Pistoressi that he had never told any one, except the doctor, about this circumstance regarding the pulling of his sleeve, which clearly was intended to relieve him from negligence and place the blame for the accident upon the deceased boy. The doctor was called in rebuttal and virtually contradicted the statement that he had been told of the incident. When he was asked, "Did Pistoressi make that statement to you?" he replied, "I do not remember that he did."

This was a perfectly legitimate cross-examination of the witness. It does not appear to have been conducted in bad faith. It is not unreasonable, under the circumstances of this case, to assume that the plaintiff discredited this belated story regarding the pulling of the driver's sleeve. A plaintiff may not be deprived of the benefit of legitimate rebuttal to a pretended defense against a charge of negligence even though it may disclose the fact that a surety company is interested in the outcome of the action. *Cozad v. Raisch Imp. Co.*, 175 Cal. 619, 166 P. 1000; 4 *Blashfield's Cyc. of Auto. Law*, p. 1521, § 19. In the authority last cited the author says:

"The fact of such insurance may, however, incidentally and unavoidably appear. There are many instances in which it may legitimately be developed in cross-examination, and * * * if it tends to prove any issue in the case or is relevant or material for any purpose, it cannot be excluded on the ground that it may tend to prejudice the defendant."

The judgment is affirmed.

All concur.

109 Cal. App. 393

HODGE v. WEINSTOCK, LUBIN & CO.

Civ. 4045.

District Court of Appeal, Third District,
California.

Nov. 8, 1930.

1. Negligence ⇨44.

Department store must exercise ordinary care to keep aisles and passageways of premises in reasonably safe condition so as not unnecessarily to expose customer to danger.

2. Negligence ⇨136(22).

In action for injuries sustained when plaintiff tripped over movable platform protruding into aisle in department store, defendant's negligence held for jury under evidence.

Evidence tended to show that movable platform, over which plaintiff alleged she tripped, was only six inches high and placed in an area where crowds assembled; that it was in immediate proximity of goods on display on elevated tables which invited elevated glances of people in store; and that crowds surged around it with such difficulty of seeing it as can readily be inferred.

3. Negligence ⇨44, 67.

Department store owes customer, as invitee, a reasonably safe place in which to move about, and customer may assume that it was provided.

4. Negligence ⇨67.

Customer in department store is bound to take reasonable care for her own safety.

5. Negligence ⇨136(27).

In action for personal injuries against department store, plaintiff's contributory negligence in not seeing movable platform, over which she tripped, held for jury under evidence.

6. Trial ⇨285, 295(1), 296(1).

Instruction must be read in its entirety and in connection with other instructions, and in view of evidence in case.

7. Negligence ⇨136(27).

Whether momentary distraction of customer in department store resulting in her tripping over movable platform was neglect of ordinary care under circumstances was question for jury.

8. Negligence ⇨141(4).

In action for injuries sustained when plaintiff tripped over movable platform protruding into aisle of department store, instruction on contributory negligence resulting from momentary distraction *held* not erroneous.

Instruction, among other things, placed it within province of jury to determine whether plaintiff was guilty of contributory negligence, although they might find that, while moving along aisle, plaintiff's "attention was distracted momentarily by something else and she failed to notice the platform placed in one of said main aisles," and although they might find that platform was in such position that ordinarily prudent person would have discovered it. Parts of same instruction and other instructions clearly declared law relating to contributory negligence, precluding any chance of jury having been misled.

9. Trial ⇨253(7).

Instruction authorizing damages if jury found plaintiff's injuries were caused by department store failing to keep premises in reasonably safe condition *held* not erroneous as not embracing sufficient facts.

Plaintiff brought action for damages for personal injuries alleged to have been sustained when she tripped over movable platform protruding into aisle of department store. Instruction complained of told jury that "proprietor of a store must keep the portion of the premises permitted to be used by the prospective buyers in a reasonably safe condition, and if you find in this case that the injury suffered by plaintiff was caused by defendant's neglect to do so, a recovery of damages may be had for the injuries proximately caused thereby."

10. Damages ⇨171.

Evidence showing poverty of plaintiff suing for personal injuries is inadmissible, and, if admitted, constitutes reversible error.

11. Trial ⇨133(6).

In personal injury action, statement by plaintiff's counsel regarding plaintiff's ability

to pay on medical and hospital bills *held* not prejudicial, in view of cautionary instruction.

During course of trial, plaintiff offered certain medical and hospital bills which were marked, "Paid." Defendant objected to bills upon ground that if bills had been paid plaintiff could not recover such sums. During discussion, counsel for plaintiff stated that, "The plaintiff in the action paid all the money she had in the world, on account of these bills." Court, at defendant's request, instructed jury to disregard such statement.

12. Appeal and error ⇨1060(1).

Statement that plaintiff was in needy circumstances does not constitute reversible error, where there is no evidence of poverty.

13. Appeal and error ⇨1066.

Erroneous instruction, in personal injury action, that jury might consider plaintiff's pecuniary position, where there was no sufficient evidence establishing that condition, would not justify reversal.

14. Appeal and error ⇨1060(1).

In personal injury action, argument of plaintiff's counsel giving rise to inference that plaintiff was destitute, though improper, *held* not reversible error, absent evidence of poverty, and in view of cautionary instruction.

During argument plaintiff's counsel stated that plaintiff was required to pay out all the money she had on account of medical and hospital bills resulting from injuries. Court cautioned jury to disregard comments of counsel beyond what was proven in case. There was no evidence, however, in case, showing plaintiff's poverty.

15. Appeal and error ⇨1060(1).

Plaintiff's showing, in personal injury action, that defendant is protected by insurance, constitutes reversible error.

16. Trial ⇨127.

Plaintiff's showing, as incident to proper proof, that defendant in personal injury action is protected by insurance, does not constitute error.

17. Trial ⇨127.

In personal injury action, eliciting information showing defendant was protected by insurance during examination of defendant's witness on admissibility of photograph, though of doubtful propriety, *held* not to warrant reversal.

Defendant introduced photograph which it claimed correctly represented scene and conditions of department store in so far as it related to position of movable plat-

form over which plaintiff alleged that she tripped and fell. Plaintiff's counsel during examination of defendant's witness who identified pictures brought out fact that they were taken by defendant's insurance broker. During course of examination, plaintiff's counsel further asked witness whether witness knew named person of a named insurance company, to which witness answered in the negative. Plaintiff, in apparent good faith, disputed correctness of pictures, contending that circumstances at time pictures were taken were not the same as at time of accident.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by Agnes J. Hodge against Weinstock, Lubin & Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ralph H. Lewis, of Sacramento, for appellant.

Elliott, Atkinson & Sitton, of Sacramento, for respondent.

SHIELDS, Justice pro tem.

The defendant is a corporation which conducts a large department store in the city of Sacramento.

Near the center of the store is a large aisle or passageway, running southerly from the front entrance to the store, to the elevators in the rear or southern end of the store. This aisle is marked or defined on the west, or what we will call the left-hand side, by a series of counters and showcases, running in a practically straight line from the front to back near the rear of the store. On the east or right-hand side of the aisle, beginning at the front of the store, were a number of tables upon which merchandise was placed and displayed. These tables were about twenty-eight inches high and were placed in straight alignment and parallel with the showcases and counters on the left-hand side of the aisle. These tables extended about half-way back or southerly from the front of the store. Southerly from the tables, and along the right-hand side of the aisle, was placed a platform which was a little over five feet wide and seven feet long. It was six inches high. This platform was movable, and at the time in question had been placed about two feet southerly from the southern end of the tables on the right-hand side of the aisle and in line with, or parallel with, such tables, and with them completing the right-hand border of the aisle. South of this platform was a wide open space running to the elevators, and to the east from such elevators, to another or eastern entrance to the store. On the day in question in this case the plaintiff, with her sister, sister-in-

law, and niece, entered the store by the eastern entrance, and together moved along westerly to about in front of the elevators, where they turned northerly and started up the main central aisle above described. Plaintiff moved up along the left side of the aisle, which was crowded with people.

Her sister and sister-in-law were five or six feet ahead of her. At a certain point in their progress the sister stepped over to one of the tables or counters on the right-hand side of the aisle. This sister shortly held up some article there on display and called to the plaintiff to come and see it. Plaintiff started to cross the aisle, through the crowd, to go to her sister when she tripped and fell heavily, breaking her hip and suffering the injuries for which this suit was brought. At the trial the jury found for the plaintiff, giving her a judgment for \$5,000, from which this appeal is taken. Defendant's first contention is that there is no evidence from which the jury could find the defendant guilty of negligence.

On behalf of the plaintiff there was evidence that the platform extended out as much as a foot into the aisle and beyond the line made on the right by the series of tables running from the platform to the front of the store. There was no rail or guard around the platform. There was a small molding running around the edge of the platform and extending beyond the level of its sides. When plaintiff started across the aisle to her sister, there were people passing between her and the platform. Her sister was on the same level as herself, and the way across seemed unobstructed, except for the crowd through which she was making her way. Looking at the goods on display, seeking her sister, she tripped over the corner of this platform and fell, suffering her injury. Defendant contends that there is no evidence from which it could have been found that plaintiff tripped on or over the platform. Her niece testified that she fell over the "corner of the platform."

It is true that this witness on cross-examination stated that she did not see the platform at the time of the accident, and not until after the plaintiff had fallen. But she saw it then, she saw the location of the platform, she knew the position in which her aunt had fallen and the spot upon which she fell. From these she could see whether or not she had fallen over the "corner of the platform."

[1, 2] The plaintiff herself did not see the platform until after she had fallen, but she knew that she had tripped on something, and there was nothing else upon which she could have tripped except the foot of some one about the platform, and she testified that the thing upon which she tripped "was something more solid than a foot." It was the defend-

ant's duty, when it invited the public into its store, to exercise ordinary care and prudence to keep the aisles and passageways of the premises in and through which, by their location and arrangement, a customer in making purchases is induced to go, in a reasonably safe condition so as not unnecessarily to expose the customer to danger or accident. From the evidence in this case the court cannot say, as a matter of law, that the defendant performed this duty. There was evidence that this flat platform, only six inches high, was placed in an area where crowds assembled; that it was along the right-hand side of the aisle, but that it encroached as much as a foot out into the aisle; that around it, and particularly north of it, goods were on display, on elevated tables which invited the elevated glances of the people in the store; and that crowds surged around it with such difficulty of seeing it as can readily be inferred. Upon this evidence the question of the negligence of the defendant was properly submitted to the jury, and their finding supported by it will not be disturbed.

[3-5] Defendant further contends that, admitting the negligence of the defendant, the plaintiff was guilty of contributory negligence, as a matter of law, and that the implied finding of the jury that plaintiff was not so guilty, was without support in the evidence. It will be recalled that the plaintiff had not seen the platform, nor did she see it at the time of the accident. She entered the store in the usual way and went around the south end of the platform, at what distance, nor through such crowds as does not appear, and went over to the left-hand side of the aisle, and moved north on that side; the aisle was "crowded" with people. Later she worked her way through the crowd, to the right, and while looking at her sister, a short distance away, stumbled upon the platform and fell.

She was not looking for the platform, and did not see it. The defendant owed to her as an invitee upon the premises a reasonably safe place in which to move about, and she had a right to assume that it had provided it. She was, however, bound to take reasonable care for her own safety and it was a question for the jury to decide whether under all the circumstances in this case she should have seen the platform, or could by the exercise of ordinary care have avoided the accident. Their implied finding in her favor on this issue has ample support in the evidence.

[6-8] Defendant occupies stronger ground when it objects to an instruction given at the request of the plaintiff and which we must set forth at some length. By this instruction the jury was told that if plaintiff entered the store as a customer, she had a right to

assume that the main aisles and passageways of the store were reasonably safe, and that she was only obliged to exercise the care of a reasonably prudent person for her own safety. The instruction then provided that "although you may find from the evidence that while moving along such passageway the plaintiff Agnes Hodge's attention was distracted momentarily by something else and she failed to notice the platform placed in one of said main aisles by the defendant, and although you may find from the evidence that said platform was in such position that an ordinarily prudent person would have discovered it, yet you are further instructed that it is the province of the jury to say whether she was guilty of contributory negligence in that behalf; at all times bearing in mind that a customer in such store has only to use ordinary care for her own safety, that is the care that ordinarily prudent persons exercise under the same or similar circumstances, and if you find from the evidence in this case, that at the time plaintiff was injured she was using ordinary care, and that such injury resulted from, or was caused by defendant's negligence in that behalf, then your verdict should be for the plaintiff." The objection, of course, is to the part italicized. This instruction is clumsily drawn, and if part of it was read narrowly it would be erroneous. But this instruction must be read in its entirety and in connection with other instructions; it is only a part of the charge. It must be read, too, in view of the evidence in the case. And the only time that the plaintiff's "attention was distracted," so far as appears from the evidence, was when her sister called to her from across the aisle and held up a piece of goods for her to examine. In view of this fact, the instruction seems clearly to mean that it was for the jury to say whether or not the fact that the plaintiff, through permitting her attention to be "distracted momentarily," by which she failed to see the platform which otherwise "was in such position that an ordinarily prudent person would have discovered it," constituted contributory negligence. In other words, whether or not the "distraction" which was shown in this case was under the circumstances a want of ordinary care. The jury were specifically told this in the portion of the instruction immediately following the italicized portion where the court said that it was "the province of the jury to say whether she was guilty of contributory negligence in that behalf."

As thus read, the instruction is a correct statement of the law. Whether or not a mere momentary distraction, under the circumstances of plaintiff's case, and in the surroundings in which she was placed, was a neglect of ordinary care, was clearly a question for the jury to answer. "Mere abstrac-

tion * * * does not constitute contributory negligence." *Wise v. Maxwell Hardware Co.*, 94 Cal. App. 765, 271 P. 918; *Meindersee v. Meyers*, 188 Cal. 498, 205 P. 1078. The facts in this case do not bring it within the rule of those decisions which hold that momentary *forgetfulness* of a known danger, which forgetfulness is not induced by some sudden and adequate disturbing cause, is itself, as a matter of law, contributory negligence. *Meindersee v. Meyers*, 188 Cal. 498, 205 P. 1078. Read in its entirety, this instruction can mean nothing else. Otherwise the portion of the instruction relating to "distraction" would have no meaning or relevance. This view is strengthened by the fact that immediately below the part objected to, and as part of the same instruction the jury are told that the plaintiff was required to "use ordinary care for her own safety, that is, the care that ordinarily prudent persons exercise under the same or similar circumstances." Disregarding this view, and giving the instruction the interpretation of a critical judgment, the most that can be said of it is that it is confusing and uncertain. But the law upon the point to which it relates is elsewhere set forth so clearly, and the instruction is followed by others which so plainly declare the law relating to contributory negligence that we are satisfied the jury was not misled by it.

[9] Defendant next objects to an instruction which reads as follows: "The proprietor of a store must keep the portion of the premises permitted to be used by the prospective buyer in a reasonably safe condition, and if you find in this case that the injury suffered by plaintiff was caused by defendant's neglect to do so, a recovery of damages may be had for the injuries proximately caused thereby." He contends that this instruction violates the well-established rule that "where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that the plaintiff is entitled to a verdict." *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 201 P. 599, 602. Appellant's whole objection might be dismissed with the statement that the instruction does not direct, or advise a verdict for the plaintiff. It goes little if any further than the usual instruction in negligence cases that where one is shown to have been guilty of negligence, he is liable in damages for the injuries proximately occasioned thereby. In a proper case, as here, other and qualifying instructions follow. But reading the instruction as appellant reads it, this rule has never been carried so far as to hold the giving of such an instruction as the one in question to be a reversible error. The first case in which the above rule was announced in this state was *Killelea v. California Horseshoe Co.*, 140 Cal.

602, 74 P. 157, 158. Here the court instructed the jury that if they found certain facts, the "plaintiff is entitled to a verdict." It will be noted that the direction was that, in such an event the plaintiff was "entitled" to a verdict. No mention is made of any other or qualifying instructions. In *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 P. 700, 703, where this question next comes before the court, the direction to the jury was that they "should render a verdict for plaintiff" if they found certain facts to be true. The facts referred to did not include all necessary to justify the verdict referred to, and it will be observed that upon the theory stated, a verdict was definitely directed. The latest case dealing with this question is *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 201 P. 599, 601. Here the court told the jury with specific positiveness that if they found certain facts, they were "instructed to bring in a verdict for this plaintiff." The instruction in this case omitted many elements necessary to a legal recovery, and was erroneous in other particulars. It will be noted that in all of the above cases a verdict upon the two narrow statements of fact was definitely directed by the court. In one case the jury were told that the plaintiff was "entitled" to a verdict, in another that the jury "should" give him a verdict, and in the third they were "instructed" to do so. The instruction in this case simply states that in certain circumstances stated "a recovery of damages may be had for the injuries proximately caused thereby." This instruction is far from a direction to find for the plaintiff upon the facts stated. It simply says that upon such facts you "may" find a verdict. Other instructions fully setting forth the defenses of defendant tell the jury with equal clarity the conditions upon which they "may not" find for the plaintiff. Read all together, the charge properly states the law, and the instruction in question does not conflict with other, and qualifying ones. In any event the instructions are not so "flatly contradictory * * * [that they] must be held to be conflicting and prejudicial." *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 201 P. 599, 603.

Other objections to other instructions seem to be without substantial foundation.

[10, 11] Defendant's next objections are based upon what it contends was the misconduct of counsel for plaintiff. The first objection grew out of statements of counsel which tended to inform or suggest to the jury that the plaintiff was impoverished and without means. The statements criticized were made under these conditions. During the course of the trial when counsel for plaintiff offered certain bills or charges against plaintiff, for hospital services, and for physician's fees, it appeared that these bills were marked paid. Counsel for defendant objects to the bills upon the ground that if the bills had been paid by some one other than plaintiff and gratuitously

in her behalf, that she could not recover sums which she had not been compelled to pay. Mr. Atkinson, of counsel for plaintiff, then said, "the plaintiff is liable for the bills no matter who paid them, the plaintiff had no money." Counsel for defendant still contended that plaintiff could not recover if she did not pay the bills. During the discussion of this question Mr. Atkinson stated: "The plaintiff in the action paid all the money she had in the world, on account of these bills." Counsel for defendant objected to this statement, assigned it as error, and requested the court to instruct the jury to disregard it. This the court did. A witness was then called who testified that of the total charges the plaintiff paid \$550, the plaintiff's sister-in-law paid \$390, and the witness herself, the plaintiff's niece, borrowed \$200 and paid the balance. Asked as to whether there was an understanding that the plaintiff was to pay these bills when she could, the witness answered, "yes, she was to pay them when she could." Later, when the case was being argued to the jury, Mr. Elliott, of counsel for plaintiff, among other things, said, "and the plaintiff was forced to pay out all the money she had." Counsel for defendant assigned this as misconduct, whereupon Mr. Atkinson, interrupting, said, "she testified she paid out all the money she had." This again was assigned as error. The court thereupon admonished the jury that if counsel in their zeal "go beyond what has been proven * * * you will disregard that * * * you will form your judgment on what has been testified to."

It is well settled that evidence of poverty is not admissible in cases such as this, and that its admission is reversible error. *Ensign v. Southern Pacific Company*, 193 Cal. 311, 223 P. 953, and many cases cited. In the present case no evidence was offered to this effect. The first statement of Mr. Atkinson was made to the court in the discussion of a legal question. There was nothing in the case to support it, and the court promptly told the jury to disregard it. We think that this disposed of the matter so far as that statement was concerned.

[12-14] Following this the plaintiff's niece testified that she and her mother paid part of the bills. No reference was made to the plaintiff's property or possessions. Later she testified that the plaintiff was to repay her "when she could," and that she had not done so. All this was admitted without objection. We do not think that this was evidence of poverty. It was given of necessity to overcome defendant's objection. An inference might be drawn from it that the plaintiff was destitute. But her inability to pay at the time might have been caused through the possession of assets upon which she could not realize. The inference of poverty in such a case is no stronger than if the bills had been

offered, unpaid, with no comment or explanation. The remarks of counsel during the argument should not have been made. If there had been any evidence in the record of the plaintiff's poverty, whether objected to or not, it would have been wholly irrelevant, and the references to it might have necessitated a reversal of the judgment.

But where, as here, there is no evidence of poverty, a statement that the plaintiff was needy does not constitute reversible error. Even an erroneous instruction by the court that the jury had a right to consider the pecuniary condition of the plaintiff, when there was no sufficient evidence in the case of such a condition, will not justify a reversal. *Lawrence v. Southern Pacific Company*, 189 Cal. 434, 208 P. 966.

[15-17] The remaining assignment of error is the claim that counsel for plaintiff tried to tell the jury or to lead them to believe that the defendant was protected by indemnity insurance. Too frequently this is done, and the courts are confronted with the close and difficult question of determining whether or not the methods used were designedly employed for the purpose of influencing the jury, or whether or not they were successful in doing so. In this case the question arises upon this state of facts as disclosed by the record. Defendant had two photographs which it claimed correctly represented the scene and conditions of the premises in so far as related to the position of the platform and the arrangement of other furnishings as they were at the time of the accident. One of defendant's witnesses identified the pictures and they were offered in evidence. Counsel for plaintiff then interrogated the witness with reference to when and by whom the pictures had been taken. He replied that they had been taken about three days after the accident and by a Mr. Thielen. He was then asked, "Who is Mr. Thielen?" Upon objection being made, counsel for plaintiff stated that the facts sought to be discovered went to the authenticity of the picture, and the court overruled the objection.

Counsel for plaintiff then further asked, "What connection did he have with the accident, if any?" To which the witness answered, "He is our insurance broker." After answering that he did not know at whose request the picture was taken, but that Thielen arranged for it, the witness was further asked, "It was taken by him as your insurance broker; and is that same statement true as to the other time and place and circumstances under which the picture known as defendant's exhibit B for identification was taken?" The witness answered that he presumed so, that he did not see the picture taken, that he was present when they started, but did not stay.

Later, and while still inquiring into the conditions under which the pictures were taken, the witness replied that there were present at the taking Mr. Thielen, the photographer and, he thought, Mr. Norton. Counsel for plaintiff then asked, "Do you know Mr. Hallinan?" And upon an unimportant reply of the witness repeated, "Do you know Mr. Hallinan, of the Eagle Indemnity Company?" To which the witness answered that he did not. Later, counsel, further addressing the witness, said, "Then as I understand you, Mr. Hails, you were not there, but when you left, a Mr. Thielen, your broker, insurance broker, was there, and the photographer, Mr. Hodson, and you are not positive as to anybody else being there, at the time these pictures were taken?" To which the witness replied that he had not stayed until the pictures were taken. There is no rule better settled than that if a party introduces evidence that the defendant in such a case as this is insured, or by deliberate purpose or by successful tactics purposefully suggests this fact to the jury, it constitutes reversible error. This rule is stated and the authorities collected in the case of *Perez v. Crocker*, 86 Cal. App. 288, 260 P. 838. But the evidence must have been brought out, and the statements made needlessly, or with some evidence of deliberate purpose, as in the case of *Citti v. Bava*, 204 Cal. 136, 266 P. 954, 955, where the court speaks of and penalizes the "avowed purpose and successful attempt" of counsel to get such facts before the jury. It must have been brought to the jury "by questions designed solely for that purpose." *Nichols v. Nelson*, 80 Cal. App. 590, 252 P. 739, 742; *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 188, 118 P. 700; *Eldridge v. Clark & Henery*, 75 Cal. App. 516, 243 P. 43. In the case before us, the pictures were offered as showing the physical conditions of the premises where the accident occurred, as of the time of the accident. The party who took them, and the party who arranged to have them taken, were not before the court. The plaintiff had not been present when the pictures were taken. Plaintiff, apparently in entire good faith, disputed the correctness of the pictures, contending that the articles upon the platform, as shown in the picture, were not as they were at the time of the accident, and that the position of the platform, as shown in the picture, was also different. Plaintiff had a right to make critical inquiry into all facts relating to the picture's correctness. To this end, she had a right to show when it was taken, by whom, and whether or not such person held an adverse interest. Her questions seem reasonably designed to bringing out this information. And if the evidence, or suggestion of insurance is brought out as an incident to the proof of some other fact properly involved, it is without error. *Nichols v. Nelson*, 80 Cal. App. 590, 252 P. 739; *Potter*

v. Driver, 97 Cal. App. 311, 275 P. 526. The rule in such cases is more fully stated in *Dermer v. Pistorosi* (Cal. App.) 293 P. 78. The repetition by counsel in his question where he said, "Mr. Thielen, your broker, insurance broker," was improper. But the fact that Thielen was defendant's "insurance broker" was already before the jury, through the testimony of a witness for the defendant, and this repetition could not have been productive of injury. Likewise the reference by counsel to the absent Mr. Hallinan as being "of the Eagle Indemnity Co.," was of doubtful propriety, dependent upon whether or not it was made in good faith, for the purpose of identifying the party referred to. Giving counsel the benefit of the consideration, these two instances of questionable statement do not warrant the reversal of a judgment otherwise free from error, and apparently fair and just.

The judgment is affirmed.

All concur.

109 Cal. App. 295
LEPORI v. HILSON.
Civ. 7282.

District Court of Appeal, First District,
Division 2, California.
Nov. 1, 1930.

As Modified on Denial of Rehearing Dec. 1,
1930.

Hearing Denied by Supreme Court Dec. 29,
1930.

1. Bills and notes ⇨348.

Payee's demanding payment, while being owner of demand note, fixed date of maturity for purpose of transfer (Civ. Code, §§ 3082, 3088, 3266b).

2. Bills and notes ⇨129(3).

Note, payable on demand, was payable within reasonable time (Civ. Code, §§ 3082, 3088, 3266b).

3. Bills and notes ⇨537(1).

Reasonable time, within which demand note is payable, is mixed question of law and fact (Civ. Code, §§ 3082, 3088, 3266b).

4. Bills and notes ⇨537(1).

In action involving demand note, payable within reasonable time, whether circumstances show unreasonable time is question of fact for fact-finding body (Civ. Code, §§ 3082, 3088, 3266b).

5. Bills and notes ⇨537(1).

In action involving demand note, payable within reasonable time, whether, if true, cir-

circumstances amount to unreasonable time, is question of law for court (Civ. Code, §§ 3082, 3088, 3266b).

6. Appeal and error ⇨931(4).

Notwithstanding absence of express finding, it must be assumed, in support of judgment denying recovery against accommodation maker of demand note, that trial court believed note was transferred after maturity.

7. Bills and notes ⇨525.

Evidence *held* to show demand note was transferred after maturity; note being dated November 15, 1923, and transferred on October 17, 1924, after maker had refused payment (Civ. Code, §§ 3082, 3088, 3266b).

Evidence showed that plaintiff was president of certain bank; that both plaintiff and defendant were members of board of directors; that plaintiff's son, who was cashier, made unauthorized loan exceeding amount allowed by Rev. St. U. S. § 5200 (12 USCA § 84); that in view of expected visit of bank examiner, plaintiff suggested that if directors would accommodate him by executing notes, he would hold them harmless, and would personally pay such notes; that bank, after unsuccessfully demanding payment, sold notes to plaintiff; that nearly all of directors resided in small town, in which bank was located; and that defendant resided in another town only short distance away.

8. Bills and notes ⇨98.

Alleged accommodation maker of demand note for bank to cover illegal loan to third person *held* not estopped, when sued by president who purchased note after maturity, to set up contemporaneous agreement that president would pay note (Civ. Code, §§ 3082, 3088, 3266b).

9. Bills and notes ⇨351.

In action by purchaser after maturity against maker, evidence that note was for accommodation, and without consideration, *held* competent (Civ. Code, §§ 3082, 3088, 3266b).

10. Bills and notes ⇨49.

Person for whose accommodation note is given is not entitled to sue accommodation maker.

11. Bills and notes ⇨518(2).

Evidence supported finding that bank director, who gave note to bank to accommodate president whose son, as cashier, made unauthorized illegal loan, received no consideration; contention consideration was director's statutory liability for illegal loan not being proved (12 USCA § 84).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Constantino Lepori against D. L. Hilson. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. Walter Allen, of San Francisco, for appellant.

A. A. Rogers, of Oakland (J. W. O'Neill, of Oakland, for counsel), for respondent.

STURTEVANT, J.

This action was brought to recover on a demand promissory note. The complainant pleaded in the ordinary form his cause of action. The defendant admitted the making of the note but denied all liability thereon, and alleged that he executed the note as an accommodation to the plaintiff and on the promise that the plaintiff would hold the defendant harmless thereon and that there was no consideration for the note. The trial court made findings in favor of the defendant. The plaintiff has appealed and has brought up typewritten transcripts.

On November 15, 1923, the date the note was executed, C. Lepori, Jr., was cashier of the First National Bank of Pittsburg, Cal. His father, C. Lepori, Sr., was president. Seven men, including plaintiff and defendant, constituted the board of directors. On the afternoon and evening of the date last mentioned a special meeting of the board of directors of the bank was held. Before that meeting adjourned, each director executed to the bank his promissory note in the sum of \$2,500. All of the notes aggregated the total sum of \$20,000. While the bank held the notes, Mr. Ellis, who had become its cashier, demanded payment from this defendant, but defendant refused payment. Thereafter, on October 17, 1924, the bank sold to C. Lepori, Sr., all of said notes and the purchaser sued this defendant on one of the notes so signed by him.

On the trial the defendant introduced parol evidence to prove his defenses. The plaintiff contends that such evidence, not related to consideration, should have been excluded. The defendant claims that it was properly introduced.

[1-7] As stated above, the payee, the First National Bank of Pittsburg, demanded payment on the note while it was the owner thereof. For the purpose of transfer, that fact fixed the date of the maturity. 8 C. J. 408. The note was assigned to plaintiff after the making of that demand. Moreover, as the note was made payable on demand, it was payable within a reasonable time. Civ. Code, §§ 3082, 3088, 3266b. As to what is a reasonable time is a mixed question of law and fact. Whether the circumstances show an

unreasonable length of time is a question of fact to be found by the fact-finding body. Whether, if true, such circumstances amount to an unreasonable length of time is a question of law for the court. *Franklin Bank v. St. Louis Car Co.* (Mo. Sup.) 9 S.W.(2d) 901, 902, 60 A. L. R. 639, 646. On these matters the pleadings in the instant case made no issue and the court made no express finding. But in support of the judgment we must assume that the trial court was of the opinion the note was transferred after its maturity. If so, we may not say the court erred in the determination of that question. Bearing in mind that Pittsburg is a small town, that nearly all of the directors resided at Pittsburg, and that this defendant resided only a short distance away, at Oakland, and, bearing in mind, also, the admitted facts surrounding the execution of the several notes each in the sum of \$2,500, we think it is clear that the note sued on was transferred to the plaintiff after the maturity thereof. 8 C. J. 408, note 93, and cases cited; *Franklin Bank v. St. Louis Car. Co.* (Mo. Sup.) 9 S.W.(2d) 901, 60 A. L. R. 639, 641, and note. In the case of *Pacific-Southwest Trust & Sav. Bank v. Valley Finance Corp.*, 99 Cal. App. 728, 279 P. 222, 280 P. 134, similar questions being involved, this court held that in an action against an alleged accommodation maker of a note by a purchaser for value after maturity evidence as to contemporary agreements between the parties to the note is admissible.

[8-10] The defendant introduced evidence to the effect that the bank had made certain legal loans to W. H. Paul. Later, without any action by the board of directors authorizing him so to do, the cashier, C. Lepori, Jr., made other loans to W. H. Paul in such sums that the total, \$29,000, was in excess of the sum which the bank might legally loan to one borrower. U. S. Rev. Stats, § 5200 (12 USCA § 84). That is so because the bank had a paid-up capital of only \$75,000 and \$13,000 in surplus. There was evidence that the bank examiner was expected to arrive at Pittsburg within a very short time; that the board of directors was especially called upon to meet November 15, 1923; that at that meeting this plaintiff stated the dilemma confronting the bank, and admitted the dilemma was brought about by the unauthorized acts of his son in making the additional loans; that at the same time the plaintiff also stated that his properties were such that he could not at once make the necessary advancements to the bank to

tide it over; and, continuing, he suggested that if each director would accommodate him by each executing a promissory note in the sum of \$2,500 he would hold the makers harmless and that he would personally pay the notes. The defendant testified that acting on the promise so made to him, and not otherwise, he executed the note pleaded in the complaint. The plaintiff claims that such an agreement was *contra bonos mores*, and when that rule was called to the attention of the trial court it was the duty of the trial court not to enforce the agreement. It has not done so. By its judgment, it has merely left the parties where it found them. Hence it did not violate that rule. Moreover, under the facts the defendant was not estopped from setting up the defense which he pleaded. *First Nat. Bank v. Reed*, 198 Cal. 252, 261, 244 P. 368. In so far as the evidence showed that the note was an accommodation note and that it was not supported by any consideration, the evidence was properly admitted. *Pacific-Southwest Trust & Savings Bank v. Valley Finance Corp.*, 99 Cal. App. 728, 279 P. 222, 280 P. 134; *Wilhoit v. Seavall*, 121 Kan. 239, 246 P. 1013, 48 A. L. R. 1273, 1285. As to both of those subjects there was considerable conflict in the evidence. But, if the trial court believed the evidence introduced by the defendant, and from its findings we must assume it did, the note in suit was an accommodation note and this plaintiff was not entitled to sue the defendant on said note. *Williams v. Hasshagen*, 166 Cal. 386, 390, 137 P. 9.

[11] In what we have said regarding accommodation notes we have not overlooked the fact that the plaintiff earnestly contends that the defendant received a consideration—the amount of his liability under the Banking Act for an illegal excess loan. Rev. Stats. U. S. § 5200. But the defendant answers he had nothing to do with making the excess loans and did not incur any liability thereon. The plaintiff introduced the minutes of the board of directors as evidence. The defendant introduced oral evidence, supporting his contentions. Moreover, so far as the record discloses, the Paul notes were retained by the bank. We cannot say the finding is not supported by legal evidence.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

109 Cal. App. 349

PLATH v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7533.

District Court of Appeal, First District,
Division 2, California.

Nov. 5, 1930.

Rehearing Denied Dec. 5, 1930. Hearing Denied by Supreme Court Dec. 29, 1930.

1. Master and servant ⇨405(5).

Evidence sustained finding that wife wrongfully deserted employee, as regards her right to compensation for his death (Civ. Code, § 175; St. 1917, p. 844, § 14, as amended by St. 1919, p. 917, § 5).

Evidence showed that wife left home while husband was away, telling neighbor she was leaving her husband for good and was not going back to him, and that wife never again lived with husband, who never contributed further to her support. There was evidence of quarrel within week preceding wife's desertion of husband, but no evidence justifying inference that husband was at fault.

2. Master and servant ⇨405(5).

Finding that wife deserted husband did not require negative showing that leaving was without cause (Civ. Code, § 175).

Civ. Code, § 175, provides that husband abandoned by wife is not liable for her support until she offers to return, unless she was justified, by husband's misconduct, in abandoning husband.

3. Master and servant ⇨388.

Husband is liable for support of insane wife only where liability existed at time wife became insane (Pol. Code, § 2176).

Pol. Code, § 2176, provided that husband of insane person must cause insane person to be suitably cared for and shall be liable for care, support, and maintenance of insane person.

4. Master and servant ⇨388.

Where deceased employee was relieved of liability for support of wife over year before wife became insane, wife was not entitled to recover compensation for employee's death because insane at that time (Pol. Code, § 2176; St. 1917, p. 844, § 14, as amended by St. 1919, p. 917, § 5).

5. Master and servant ⇨403.

Presumption that wife's abandonment of husband continued *held* not rebutted at time when wife was subsequently declared insane so as to revive husband's liability for support of wife (Civ. Code, § 175; Pol. Code, § 2176).

Proceedings under the Workmen's Compensation Act by Lucy Plath, by her guardian, Leroy R. Bruce, for the death of an employee, her husband, claimant, opposed by the Union Rock Company, employer, and the Federal Mutual Liability Insurance Company, insurance carrier. To review an award of the Industrial Accident Commission denying compensation, claimant brings certiorari.

Award affirmed.

Emery F. Mitchell and W. R. Augustine, both of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

R. P. Wisecarver, of San Francisco, for certain other respondents.

SPENCE, J.

Petitioner, an insane person confined in a state hospital, by her guardian, seeks to annul an award of the Industrial Accident Commission made against petitioner and in favor of the employer of her deceased husband and the employer's insurance carrier.

The deceased employee and the petitioner were married in 1923 and thereafter moved to Kern county, where they resided together until their separation in February, 1925. In May, 1926, in San Francisco petitioner was adjudged insane and committed to the state hospital. In November, 1928, the deceased, while employed as a truck driver by the respondent employer, sustained injuries which resulted in his death.

The Commission found: "That in and about the month of February, 1925, the said defendant, Lucy Plath, being then competent and in possession of her faculties, wilfully and wrongfully deserted the said employee, and then and thereafter continued to live separate and apart from him, and the said employee then and thereafter for good and sufficient cause refused to contribute and did not contribute to her support or to any part thereof, and was not legally liable for her support, and said defendant was not dependent upon him at the time of the injury for her support, nor for any part thereof."

[1, 2] The petitioner contends that the evidence was insufficient to sustain the foregoing findings. It may be noted that these "findings" contain both findings of fact and conclusions of law. The conclusions of law are based upon section 175 of the Civil Code, which reads as follows: "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him. * * *" Petitioner's claim of insufficiency of the evidence to sustain the findings of fact is directed solely at the finding relating to desertion. The Commission, of course, did not

have the benefit of the testimony of the petitioner or of the deceased regarding the circumstances immediately surrounding their separation, but the evidence showed that one evening in February, 1925, while the deceased had gone to see a doctor regarding an injury to his hand, the petitioner left their home and was gone upon deceased's return; that she had told a neighbor that she was leaving deceased for good and that she was not going back to him again; that petitioner was driven in an automobile by a neighbor to the home of another man with whom she thereafter lived; that petitioner never again lived with deceased and deceased never contributed further to her support. There was no evidence that petitioner ever offered to return to the deceased. From the above it appears that there was direct testimony showing that petitioner left the home of deceased with the intent to remain away from him and to never return to him. It was not necessary to show negatively that such leaving was without cause. As was said in *Morrison v. Morrison*, 20 Cal. 431, at page 432, "The plaintiff is not required to show negatively that no cause existed, for none appearing, the law will not presume one." Counsel for petitioner calls our attention to certain testimony relating to a quarrel or altercation between petitioner and deceased within a week before petitioner left deceased and apparently takes the position that the Commission was bound to infer that such quarrel or altercation constituted misconduct upon the part of the deceased which justified petitioner in leaving. The Commission was not bound to so infer, and it is doubtful whether the evidence would justify any such inference. There was no evidence regarding the subject of the dispute, who was at fault in causing the quarrel, or who was the aggressor in the altercation. Upon the unsatisfactory state of the record, it would be pure speculation to attempt to say whether such quarrel or altercation constituted misconduct on the part of the deceased or upon the part of the petitioner. We believe that the evidence was sufficient to sustain the findings of fact referred to and that the Commission properly concluded, under said section 175, that deceased was not liable for the support of the petitioner.

Petitioner contends, however, that the Commission should have made a finding that at the time of the death of deceased petitioner was insane and an inmate of the state hospital and that an award should have been made in her favor by virtue of the provisions of section 14 of the Workmen's Compensation Act (St. 1917, p. 844, § 14, as amended by St. 1919, p. 917, § 5), and section 2176 of the Political Code. Said section 14 reads: "The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee; * * * (1) A wife upon a husband

with whom she was living at the time of his injury, or for whose support such husband was legally liable at the time of his injury." Said section 2176 read at that time: "The husband, * * * of an insane person * * * must cause him to be properly and suitably cared for and maintained, and must pay the costs and charges of his commitment and transportation to a state hospital for the insane. * * * The husband, * * * of an insane person * * * shall be liable for the care, support and maintenance of any insane person * * * in a state hospital to which he has been or may hereafter be committed or transferred, and it is hereby made the duty of the commission to make collections of all of the aforesaid costs and charges, and charges for the care, support and maintenance of any insane person * * * in a state hospital, or to see that they are collected."

[3, 4] It is argued that the question of actual dependency is immaterial in the case of the surviving wife where the husband is legally liable for her support at the time of the injury and that section 2176 creates that liability when the wife is insane. There would be merit in this contention if section 2176 is to be construed as imposing a new liability upon the husband in those cases where prior to the insanity of the wife the husband has been relieved of liability for support under section 175 of the Civil Code. We believe, however, that properly construed section 2176 imposes such liability in favor of the state only in those cases in which liability existed in favor of the wife at the time she became insane. Upon the facts as found by the Commission the deceased had been relieved of liability for the support of petitioner more than a year before she became insane, and a finding that at the time of the injury to deceased petitioner was insane and an inmate of the state hospital would have been an immaterial finding not affecting petitioner's rights under the act.

[5] It is further contended that even conceding that the evidence established desertion upon the part of petitioner, the presumption that such desertion continued was rebutted at the time when she was declared insane as she could not thereafter willingly continue to remain away nor offer to return. We cannot follow this line of reasoning. Petitioner abandoned the deceased in February, 1925, and made no offer to return. Assuming that an offer to return in May, 1926, would have been timely so as to revive the liability of the deceased for petitioner's support under section 175, we cannot conclude that adjudging petitioner insane would be equivalent to such offer or have a like effect.

The Commission made findings on all material issues, which findings supported the

award and were sustained by the evidence, and the award is therefore affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

Porter & Sutton, of Los Angeles, and Fred L. Hamblin, of Riverside, for appellant.

Halverson & Price, of Los Angeles, for respondent.

WARMER, Justice pro tem.

This is an action by which a tenant seeks to recover damages for eviction by the landlord. The facts are as follows:

May 1, 1925, the plaintiff herein entered into a lease for an orange and lemon grove consisting of 28 acres, approximately one-half oranges and one-half lemons. The term of said lease was five years. The rental provided for in said lease was one-half of the crop. The tenant agreed to cultivate, irrigate, prune, etc., the trees in said grove and to pick the crop and deliver to the landlord his portion of the fruit on the premises or at the railroad station or at a packing house, at the option of the landlord. The defendant purchased said grove some time in April, 1926, with knowledge of said lease. That at some time during his negotiations for said premises he told the plaintiff that when he secured title to the said property he was going to take possession of the premises, that plaintiff had already ruined the grove, and that he would have nothing more to do with him. On May 6, 1926, after having secured title to said premises he (defendant) actually entered upon said premises and took possession thereof, claiming to have done so under a provision in said lease giving him the right so to do in case of the failure of the plaintiff to properly irrigate, cultivate, prune, etc., the said grove. The evidence is sharply conflicting as to the condition of the grove, quantity of the fruit on the trees, and as to the value of the fruit. The cause was tried by the court sitting without a jury. Appellant contends that the evidence is insufficient to support the findings.

[1, 2] The intendments are in favor of the judgment, and, if evidence in support of the findings be substantial, either with or without conflict, the findings are sufficiently supported. *Hind v. Oriental Products Co.*, 195 Cal. 655, 235 P. 438; *Shannon v. Tooker et al.*, 167 Cal. 484, 140 P. 10.

[3] In examining the sufficiency of the questioned finding, this court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. *Delaney v. Quetu*, 73 Cal. App. 627, 239 P. 71; *Menotti v. Marchesi*, 63 Cal. App. 49, 218 P. 439.

[4] The court found that the defendant (appellant herein) wrongfully and unlawfully entered upon said premises and wrongfully and unlawfully excluded the plaintiff from said

109 Cal. App. 274

CAPPUCCIO v. TUFTS et al.

Civ. 136.

District Court of Appeal, Fourth District,
California.

Oct. 31, 1930.

1. Appeal and error ☞931(1).

Intendments on appeal are in favor of judgment.

2. Appeal and error ☞1010(1).

If evidence be substantial, either with or without conflict, findings are sufficiently supported.

3. Appeal and error ☞931(1).

In examining sufficiency of finding, court must accept as true all evidence tending to establish finding, with inferences which might reasonably have been thought by trial court to justify finding.

4. Landlord and tenant ☞331(1).

Evidence *held* sufficient to support finding that landlord took possession of orange and lemon grove and excluded tenant, justifying recovery for eviction.

5. Landlord and tenant ☞180(1).

Tenant who, being lawfully in possession, is evicted, may recover any damage sustained.

6. Landlord and tenant ☞331(2).

Evidence *held* sufficient to support finding of \$600 damages to tenant in possession of orange and lemon grove, whose eviction by landlord proximately caused loss of value of fruit then on trees.

7. Landlord and tenant ☞331(2).

Tenant's damage, when evicted by landlord, who was entitled to one-half of crop, amounted to one-half of crop less cost of maturing, harvesting, and delivering according to lease.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by S. Cappuccio against Emily G. Tufts, O. M. Tufts, and another. Judgment for plaintiff, and defendant last named appeals.

Affirmed.

premises to his damage in the sum of \$600. The court's finding being adverse to the contention of the defendant as to the condition of the grove being such that he had a right to enter said premises under the terms of the lease and take possession thereof, it must be taken as conclusive that the condition of the grove was not such as to warrant the defendant in taking possession of the said premises and excluding the plaintiff therefrom. The evidence is sufficient to support the finding of the court that the plaintiff was excluded from said premises. It is necessary to point out only sufficient of the evidence to support such finding. *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157.

The plaintiff testified that between the 5th and 8th of May, 1926, he found the defendant on said premises, at which time the following conversation took place: "I (plaintiff) said 'What do you mean, you got no business here.' He said he had business here. He said 'I own this property.' * * * I said 'You don't own this property.' * * * 'You were not here the other day when I come down here and there was nobody here and I took the chance of going ahead and picking the fruit.' * * * I said 'It was my money; it don't take your money to do all that work.' He said he didn't know anything about that. The place was his and nobody was to be there but himself. * * * It didn't belong to me any more he said. * * * He said 'No, this is all mine. It don't belong to you. You will keep away from here,' etc.

Joe Cappuccio, a son of the plaintiff, testified in that connection: "Yes, my father said to him 'This crop there was raised by myself and at my expense and it belongs to me' and if he would allow my father to take this crop, if father would withdraw his lease and he says 'No, this belongs to me,' etc.

The defendant himself testified that shortly prior to the time that he secured title he told the plaintiff: "I told him I would take possession of it as soon as I got title and I did not expect him to have anything further to do with it as it appeared that he had practically ruined it."

From the testimony quoted, if believed by the trial court, it was apparent that the defendant had inspected the said premises and arrived at the conclusion that, owing to what he saw there, he would enter upon said premises and take possession thereof, and, from the admitted fact that he did so almost immediately after he became the owner thereof, it clearly appears that the defendant chose to do that which he told the plaintiff he intended to do. Such evidence is sufficient to support the finding that the defendant took possession of the property and excluded the plaintiff therefrom. The next finding to which the appellant urges insufficiency of evidence is that the evidence is insufficient to

support the finding of damage in the sum of \$600.

[5] Where a tenant who is lawfully in possession of the premises is evicted therefrom he may recover damages.

In *Klein v. Lewis*, 41 Cal. App. 463, 182 P. 789, 790, the court said: "When the lessor by an illegal act materially disturbs the possession of his tenant, which he should protect and defend, the latter may abandon the premises leased and recover damages. [Citing cases.]"

In *Saferian v. Baer* (Cal. App.) 287 P. 142, 143, the court said: "Where a tenant who is lawfully in possession of the premises is evicted from them, he may recover damages."

An eviction entitles a tenant to recover any damage he may have sustained. *Schumann v. Karrer*, 184 Cal. 50, 192 P. 849; *Hamer v. Ellis*, 40 Cal. App. 57, 180 P. 30.

[6, 7] We think the evidence is sufficient to support the finding of the damage as found by the trial court, if the same proximately resulted from the eviction. When a tenant on an orange ranch cares for the same, irrigates, cultivates, prunes, and does such other things as are necessary for the proper care of a grove, and matures a crop of fruit on orange and lemon trees in a grove, he does so with the expectation that he will receive as compensation for his labor and expenditure in the production of said fruit the reward that is evidenced by the value of the fruit. Where one comes in and takes possession of the premises and takes the crop of fruit, it would hardly be contended that the loss of the crop to the plaintiff was not proximately caused by his eviction from the premises, and, where one wrongfully takes a crop so produced, certainly it is to the damage of the person from whom the crop is taken. Of course, the quantum of the damage does not run as to the whole crop, because in the instant case the landlord was entitled to one-half of the crop under the terms of the lease. The damage would therefore run only as to the value of one-half of the crop, from which must be taken the cost of maturing (in this instance nothing) and harvesting and delivering the said crop as in the lease provided. The loss of the value of the crop being proximately caused by the wrongful eviction, it becomes necessary to determine what was the value of the crop of fruit at the moment of eviction. At that time the fruit was on the trees, and we think the evidence is sufficient to sustain the finding of a damage of \$600.

The plaintiff testified that he had been a rancher over a number of years; that the fruit was in first-class condition in April, 1926, set heavy on the trees. He estimated the trees would produce at least one box each; that there were 2,400 trees, including both oranges and lemons.

Joe Cappuccio, his son, testified that he was familiar with the handling of orange and lemon properties, and that he had worked on this property for a considerable length of time shortly prior to the eviction, that he had observed the orange and lemon trees and was able to judge the quantity of fruit thereon, and that in his opinion the oranges would average better than a box to the tree, while the lemons would average two boxes to a tree.

A witness, Montgomery, testified that he lived about a mile from the premises in question, was acquainted with the property, had been for a number of years; that he was an experienced man in orange culture, both as an owner and a worker, over a period of about 18 years, and was acquainted with the condition of the trees on this grove in the spring of 1926. He estimated the yield at about a couple of boxes at least, per tree.

Another witness, Raymond, testified that he was in the fruit buying and selling business with 13 years' experience; that he examined the orchard; had not estimated it exactly, but would figure it about a box to a tree or maybe a box and a half; the quality was not first class but was marketable; as to the lemons, that they were not first class but were marketable; that he was familiar with the market price of oranges per box in April, May, June, and July, 1926; that they ran all the way from \$3 to \$4 per box; that the quality was not very fancy, but they would be second grade; that the market price of the second grade fruit was about \$3 per box; that the cost of picking, 6 cents to 10 cents a box, cost of hauling, 15 cents a box, and cost of packing, 75 cents a box for oranges; that the net to the grower of such oranges on this grove would be approximately \$1.90 a box.

The grove being approximately equally set to oranges and lemons, there would be 1,200 orange trees. Under the evidence, each tree would produce one box of oranges; there would be 600 boxes of oranges to be delivered to the lessor and 600 boxes for the lessee. However, under the terms of the lease, it was the duty of the lessee to pick, haul, and pack ready for delivery to the lessor his portion of the crop. Under the evidence, such picking, packing and hauling charge was 90 cents per box, or \$540 for 600 boxes. Under the evidence the net to the grower was \$1.90 per box, or \$1,140 for 600 boxes. Hence the plaintiff would receive \$1,140 for his portion of the crop of oranges, but such sum would be charged with \$540, which would be the cost to him under the terms of the lease, for picking, hauling, and packing the one-half of the crop of oranges that was to go to the lessor as rent. The balance would be the net of the whole transaction to the lessee or the

sum of \$600 found by the court. This does not take into consideration the evidence that the lemons were marketable. The evidence sufficiently supports the finding.

There was no evidence offered as to any other or further damage as a result of the eviction. The evidence being sufficient to support the findings, the judgment must be affirmed.

Judgment affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

PALMER v. WELLS FARGO BANK & UNION TRUST CO. *

Civ. 7323.

District Court of Appeal, First District,
Division 2, California.

Nov. 3, 1930.

Rehearing Denied Dec. 3, 1930.

Hearing Granted by Supreme Court Dec. 29, 1930.

1. Banks and banking ☞315(3).

Whether depositary of bonds was negligent in surrendering bonds on forged assignment *held* question of fact.

2. Estoppel ☞118.

Evidence *held* to support finding that trust company, in surrendering, on forged assignment, bonds deposited with it, was negligent and hence required to suffer loss (Civ. Code, § 3543).

Civ. Code, § 3543, provides that, "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Florence Elizabeth Palmer against the Wells Fargo Bank & Union Trust Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Redman, Alexander & Bacon, of San Francisco, for appellant.

Sullivan & Barry and Theo. J. Roche and Walter H. Linforth, all of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for the market value and accrued dividends of certain stocks and bonds which had been deposited with the Union Trust Company prior to its consolidation un-

der the name now used by defendant. The cause was tried before the court sitting without a jury, and resulted in a judgment for the plaintiff in the sum of \$17,967.47. The defendant appeals on a bill of exceptions.

[1, 2] On December 1, 1916, plaintiff's mother deposited with the Union Trust Company thirty-nine \$1,000 bonds of the United Railroads of San Francisco, subject to the terms of a reorganization agreement. The trust company issued to her a certificate or receipt for the bonds which provided that the interest of the depositor was assignable by transfer on the books by the holder in person or by agent upon surrender of the certificate properly indorsed. On October 31, 1917, plaintiff's mother, through her attorney in fact, Theodore Gray, sold and transferred her interest in this certificate to the plaintiff, and in 1919 said attorney in fact presented the assigned certificate to the trust company and made demand for delivery of the bonds. The company refused to make delivery when it learned that plaintiff's mother died on February 12, 1918; the contention of the trust company being that the assignment by Gray was made after death of his principal and for the purpose of avoiding the administration of her estate and the payment of inheritance taxes. Some time between this date and March 3, 1926, the trust company received in exchange for the thirty-nine bonds of the United Railroads other securities as it was authorized to do under the reorganization agreement.

Numerous demands were made on the trust company by Gray that it honor the assignment of October 31, 1917, and deliver to him these new securities under the power of attorney which he held from the plaintiff, who was a resident of London, England. Each demand was refused on the ground that the trust company believed that the property belonged to the estate of plaintiff's mother and that administration of that estate should first be had.

Letters of administration were not taken out as requested by the trust company, and nothing further was done until October, 1925, when Gray delivered the certificate unindorsed to one James R. Ewing, Jr., who promised to obtain the securities through the Equitable Trust Company of New York which was jointly named in the reorganization agreement as a depository. Ewing presented the certificate to the defendant with an assignment and indorsement to him. The signatures of plaintiff upon these documents were forgeries, but the defendant delivered the securities to Ewing on the strength of a guaranty of signature made by the American Bank. This guaranty was obtained by Ewing in the following manner: He signed his own name upon the certificate and presented it to an officer of the American Bank, where he was known and where he was a depositor. This official

made the imprint of a rubber stamp directly under Ewing's name, reading "signature guaranteed. The American Bank of San Francisco," and signed his name. When the assignment was presented to defendant, it bore the name of plaintiff written directly above that of Ewing with three crosses inclosed in pencilled circles—one in front of plaintiff's name, one in front of Ewing's name, and one in front of the stamped impression "The American Bank." The word "signature" of the rubber stamp was changed to "signatures" so that the clerk of the defendant was led to believe that the American Bank guaranteed both signatures. Whether plaintiff's name appeared on the assignment when it was presented to the American Bank is not clear, and the party guilty of the forgery of plaintiff's name was not identified, but the certificate and the assignment were presented to the defendant by Ewing, the securities were delivered to him, and he disappeared. A year or so thereafter Gray discovered the fraud, made demand upon the defendant for the securities, and, the demand being refused, commenced this action in the name of plaintiff. The judgment covers the market value of the securities at the time of demand plus the accrued dividends which were collected by Ewing.

Stripped of all the byplay, the single issue involved is whether the appellant was negligent in delivering the securities to Ewing upon the forged assignment. We may therefore disregard all the lengthy discussions in the briefs upon the weight of the evidence and address ourselves solely to this issue. The appellant invokes the doctrine of section 3543 of the Civil Code, which provides that, "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Appellant argues that the loss was occasioned by the negligence of respondent in intrusting the certificate to Ewing through her attorney in fact Gray, but the trial court impliedly found that it was appellant's negligence that caused the loss. In support of the judgment, the respondent points out that no administration had been had of the estate of her mother, and hence there was no reason for appellant to depart from its original position in refusing to deliver to any one other than a representative of the estate. It is also pointed out that respondent was a depositor with the trust company, that her signature card was on file at the time the certificate was presented, and that a mere inspection of the signature would have readily disclosed the palpable forgery of her name on the assignment. The issue is purely one of fact, and, as the evidence of such negligence is sufficient to support the finding of the trial court, there is nothing left for discussion on this appeal.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

PONCINO v. REID-MURDOCH & CO. et al.*
Civ. 7178.

District Court of Appeal, First District,
Division 2, California.
Nov. 6, 1930.

Rehearing Denied Dec. 6, 1930.

Hearing Granted by Supreme Court Jan. 5,
1931.

1. Trial ⇨139(1).

Directed verdict is proper whenever, upon whole evidence, judge would be compelled to set contrary verdict aside as unsupported.

To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one.

2. Automobiles ⇨245(30).

Directing verdict for defendant, there being insufficient evidence to show employee driving defendant's automobile was acting within employment at time of accident, *held* not abuse of discretion.

Evidence disclosed that employee drove automobile to his home over week-end with other employee as guest, that he was returning to office of employer on Monday morning at time of accident, and that from 2 o'clock on Saturday afternoon until time of accident employee had transacted no business for employer.

3. Appeal and error ⇨973.

Where appellate court cannot say that in granting motion for directed verdict trial court abused discretion, judgment must be affirmed.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Alinda Poncino, administratrix of the estate of Eugenio Poncino, deceased, against Reid-Murdoch & Company and others. From a judgment upon a directed verdict in favor of defendant named, plaintiff appeals.

Affirmed.

Superseding opinion in 290 P. 510.

Edwin H. Williams and Jewel Alexander, both of San Francisco, for appellant.

George L. Stewart and Jesse H. Miller, both of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff, as administratrix of the estate of her deceased husband, commenced an action against the defendants to recover damages for injuries suffered by her husband in an automobile collision. The defendants appeared and answered and a trial was had

before the trial court sitting with a jury. The trial court granted a motion for a nonsuit in favor of Mr. Bodwin, from which order no appeal was taken. It directed the verdict in favor of the defendant corporation, and judgment was entered in favor of the corporation. From that judgment the plaintiff has appealed and has brought up an abbreviated bill of exceptions.

[1-3] The record shows that Reid-Murdoch & Company is a corporation which has its main office in Chicago and another office at 101 Mission street, San Francisco. As to what is the nature of its business the record does not inform us. On the 16th day of April, 1928, and for some time prior thereto, the San Francisco office was divided into three departments. Mr. Bodwin was head of the sales department. Mr. Walker was head of the purchasing department. Another was in charge of the office.

On Saturday afternoon, April 14, 1928, Mr. Walker, accompanied by Mr. Bodwin as his guest, entered an automobile owned by the defendant corporation and drove to Burlingame, where Mr. Walker resided. They remained there until Monday morning, and at about 7 a. m. they started for the San Francisco office, where they were due at 8 a. m. Before reaching the office the accident occurred which gave rise to this action. Mr. Walker was driving the automobile at the time of the accident, and there is no contention that he did not have the right to do so or that the defendant corporation had not authorized him to do so.

One of the grounds of the motion for a directed verdict was "that it affirmatively appeared from the uncontradicted facts that at the time and place of the happening of the accident the defendant Frank E. Walker was driving the automobile of the said defendant corporation * * * upon a mission of his own, and that * * * the said defendant corporation was not liable for his acts." In the case entitled *Estate of Baldwin*, 162 Cal. 471, 123 P. 267, the court was considering an order directing a verdict. On page 473 of 162 Cal., 123 P. 267, the court said: "The conditions under which the course pursued by the court in this instance is held to be proper are defined by a series of uniform decisions of this court, to which it will be sufficient to make reference. The doctrine of scintilla of evidence is rejected, as it is by the courts of the United States. (*Commissioners of Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59.) A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set

a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one." Applying that rule to the instant case it is sufficient to state that both Mr. Walker and Mr. Bodwin testified directly and positively that from 2 o'clock on Saturday until the time of the accident neither one had transacted any business for the defendant corporation. Under these circumstances, the defendant cites and relies on *Kish v. California State Automobile Ass'n*, 190 Cal. 246, 212 P. 27, and contends that before it could be held liable it was necessary that the evidence disclose that the act of the servant must be connected directly or indirectly with the business of the employer and be in furtherance of the object for which the servant was employed. We do not understand the plaintiff to controvert that proposition. However, the plaintiff calls to our attention the fact that the automobile was the property of the defendant corporation. It then claims that where it is shown that the automobile which struck the injured person belonged to the defendant employer and that the person driving it was his employee, a presumption arises that such person was acting within the general scope of his authority. *Wagnitz v. Scharetz*, 89 Cal. App. 511, 517, 265 P. 318. The case is not helpful. No question of authority is involved. Mr. Walker testified flatly that he had authority to use the car on Saturdays, Sundays, mornings, and evenings. But there was no evidence that his duties were such that at any time he used the car in the transaction, directly or indirectly, of his master's business. The evidence adduced was to the effect that at the time of the accident the master's business was not being transacted. Furthermore, the plaintiff calls attention to certain questions and answers all of which we will not attempt to quote. Some of Mr. Walker's evidence is as follows:

"Q. But in your capacity as salesman you are working under him? A. Correct.

"Q. And you were at that time (the time of the accident)? A. Correct."

Some of Mr. Bodwin's evidence was as follows:

"Q. What was his (Mr. Walker's) relation to the sales department? A. He was not working as a salesman right then. He was going to the office attending to his duties as a buyer right then.

"Q. He was attending to the duties of his employment? A. Yes."

The plaintiff lays much stress on the words so used and asserts that the foregoing were

statements to the effect that the employees were at work when the accident happened. The statements of the witnesses just mentioned are readily reconciled. In an altogether proper sense both Mr. Bodwin and Mr. Walker were employed by the defendant corporation on April 16, 1928. It is equally clear from the evidence that their day's work on that date had not commenced at the time the accident occurred. Most assuredly we are unable to say that in granting the defendants' motion the trial court abused its discretion. That being so, the judgment of the trial court should not be disturbed, and it is therefore affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

109 Cal. App. 363

Ex parte ROBBINS.*

Cr. 1603.

District Court of Appeal, First District,
Division 2, California.

Nov. 6, 1930.

Divorce ☞ 269(2).

Court, upon dismissal of divorce action, did not lose jurisdiction to punish plaintiff husband for contempt upon pending order to show cause for failure to pay alimony pendente lite and attorney's fees.

Divorce action was filed in November, 1922, and in November, 1923, court made order directing plaintiff husband to pay to wife alimony pendente lite and attorney's fees in a certain amount. In August, 1929, court issued an order requiring plaintiff to show cause why he should not be punished for contempt for failure to comply with foregoing order. Plaintiff was adjudged guilty of contempt and committed in September, 1930, but in the meantime, in October, 1929, he had filed a dismissal of the divorce action. The order for alimony pendente lite was in full force and effect up to the time of the dismissal, and no payments were made in compliance therewith.

Application by Julius Robbins for a writ of habeas corpus prayed to be directed to the sheriff of the city and county of San Francisco to secure the release of petitioner from custody on a commitment for contempt for failure to pay alimony pendente lite and attorney's fees in a divorce action.

Writ discharged, and petitioner remanded to custody.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 299 P. 51.

Max Schleimer, of Los Angeles, for petitioner.

J. J. Lermen and G. K. Burgren, both of San Francisco, for respondent.

SPENCE, J.

Petitioner herein was adjudged guilty of contempt for failure to pay alimony pendente lite and attorney's fees in a divorce action, and was committed to the county jail for five days. He seeks his release upon habeas corpus.

It appears that on November 16, 1922, petitioner filed a complaint for divorce and on February 14, 1923, the defendant in that action filed a demurrer to the complaint. On November 1, 1923, the court made an order directing petitioner to pay to the defendant \$75 per month alimony pendente lite and \$150 on account of attorney's fees. On August 31, 1929, an order to show cause was duly issued by the court requiring petitioner to show cause why he should not be punished for contempt for failure to comply with said order. The order to show cause was returnable on September 20, 1929, and was served on petitioner on September 3, 1929. Several continuances were had upon the hearing of said order to show cause, and petitioner was finally adjudged guilty of contempt and committed on September 3, 1930. In the meantime petitioner, on October 3, 1929, filed a dismissal of the divorce action, and on October 13, 1929, filed an amended dismissal.

It is conceded that the order for alimony pendente lite was in full force and effect up to the time of the dismissal of the action and that no payments were made in compliance therewith. No question is raised concerning the sufficiency of the evidence to show petitioner's ability to make the payments required. It is further conceded that the petitioner was adjudged guilty of contempt for failure to make payments which by the terms of the order had become due prior to the issuance of the order to show cause, which order to show cause was issued more than one month prior to the time that petitioner filed his dismissal.

Petitioner raises several points regarding the nature of the order for alimony pendente lite and the effect of the dismissal. Most of these have been answered adversely to petitioner's contentions in two proceedings heretofore decided involving this same order. *Biltmore Drugstore v. Superior Court*, 101 Cal. App. 363, 281 P. 710; *Robbins v. Mulcrevy*, 101 Cal. App. 300, 281 P. 668. Petitioner's main contention is that upon his dismissal of the divorce action the court lost jurisdiction to punish him for contempt upon the pending order to show cause for failure to make payments which had accrued prior to the dismissal. We find no merit in this con-

tention. Petitioner cites no authority in this state in support of this proposition. The authorities in other jurisdictions are not in accord. The case of *Hayes v. Hayes*, 150 App. Div. 842, 135 N. Y. S. 225, affirmed in 208 N. Y. 600, 102 N. E. 1104, is quoted at length by petitioner. It is apparent from reading that opinion that the New York decisions are not harmonious, and the court there reluctantly followed the rule laid down in an earlier case which had been approved by the Court of Appeals. In the absence of more persuasive authority than that which has been called to our attention, we are unwilling to subscribe to a doctrine holding that under the circumstances here involved the court may be deprived of jurisdiction to proceed with a pending order to show cause and the defaulting party relieved of the consequences of his contempt by the filing of a voluntary dismissal of the action.

The writ is discharged, and the petitioner remanded to custody.

We concur: NOURSE, P. J.; STURTEVANT, J.

109 Cal. App. 325

WAKEFIELD v. HORN et ux. (ATLAS ASSUR. CO., LIMITED, OF LONDON, Intervener).
Civ. 4145.

District Court of Appeal, Third District,
California.

Nov. 1, 1930.

Automobiles ☞ 167(3).

Where truck, being 255 feet away, entered from private road, statute *held* not to give right of way to automobile on highway (St. 1923, p. 560, § 131(b), as amended by St. 1925, p. 412, § 15(b)).

At time of accident involved, St. 1923, p. 560, § 131(b), as amended by St. 1925, p. 412, § 15(b), provided that driver of vehicle entering public highway from private road shall yield right of way to all vehicles approaching on highway.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Action by Arthur Wakefield against Walter Horn and wife, with a cross-complaint by defendants and a complaint in intervention by the Atlas Assurance Company, Limited, of London. Judgment for plaintiff, and defendants appeal.

Affirmed.

George W. Howe, of Crescent City, for appellants.

John L. Childs, of Crescent City, and J. F. Coonan, of Eureka, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment for damages to a truck owned by him, resulting from a collision with an automobile driven by the defendant Mary Horn. From this judgment, the defendants Horn appeal.

The record shows that just preceding the collision the plaintiff was driving a truck from a private road onto the highway known as and called the "Roosevelt Highway," leading to Crescent City. At the time the plaintiff drove onto the highway in question and turned to the right, facing Crescent City, the defendant was driving her car in the direction of Crescent City, and was, at said instant of time, about 255 feet distant from the private road just referred to. The defendant was driving on the Roosevelt highway, as stated, in the direction of Crescent City. At the time of the impact of the two cars, the record shows that the right-hand wheels of the plaintiff's truck were within a foot of the extreme right-hand side of the improved highway. While the truck was in this position, it appears that the defendant Mary Horn drove her car so close to the plaintiff's truck as to come in contact with the left fore wheel thereof, damaging the truck to the extent found by the trial court. The record shows that, at the time the truck was driven upon the highway, the defendant's car, then traveling on the right-hand side of the highway, turned to the left side thereof. Measurements were made of these tracks, and thus the distance was shown as above stated.

The cause was tried without a jury, findings were waived, and judgment entered by the court, assessing damages in the sum of \$695.75. The defendants filed a cross-complaint, and the insurance company filed a complaint in intervention. There are no specifications of error; no argument is made by appellants that the testimony is insufficient, and the only point made is that, at the time the truck emerged from the private road to the highway, the defendant Mary Horn, driving her car as aforesaid, had the right of way. This is based upon the provisions of subdivision b of section 131 of the California Vehicle Act of 1923 (St. 1923, p. 560, § 131, subd. b, as amended by St. 1925, p. 412, § 15, subd. b), which then read: "The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on said public highway." The argument is made that, irrespective of the distance between the approaching car driven by the defendant Mary Horn and

the private highway on which the truck was emerging, it gave the defendant the right of way. The subdivision of the section, however, is not susceptible of any such interpretation. If interpreted literally as the subdivision reads, or as it then read, no one could ever drive from a private road upon a public highway if any one were approaching upon such highway, irrespective of the distance. The subdivision must be construed to give effect to the intent of the Legislature, which was to prevent automobile drivers on private roads from entering a public highway when a car was approaching upon such highway so near as to constitute an immediate hazard, and not that no one should enter upon a public highway from a private road or driveway so long as the public highway was in use. The subdivision of the California Vehicle Act has been amended so that its language conforms to the construction which we have here given. At the time the plaintiff's truck was driven upon the highway, the automobile belonging to the defendants was distant 255 feet. No question is raised but that the automobile was sufficiently distant to enable the speed of the automobile to be slackened, the testimony showing that it was running between 35 and 40 miles an hour. Likewise, the testimony is clear that there was ample space for the defendant's car to have been driven to the left of the plaintiff's truck without coming in contact therewith.

Under these circumstances this appeal appears to be wholly without merit, and the judgment is affirmed.

109 Cal. App. 370

SOMMER et al. v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N.
Civ. 7087.

District Court of Appeal, First District,
Division 2, California.
Nov. 7, 1930.

1. Banks and banking ⇨154(8).

Evidence showing payment by bank of forged checks and refusal to pay balance represented by forged check made *prima facie* case for recovery by depositor.

2. Account stated ⇨6(3).

Notice of forgeries given in middle of September *held* not unreasonably delayed so as to make account relating to August transaction an account stated.

Evidence showed that bank sent depositor statement covering August transactions some time in September before Sep-

tember 10; that depositor notified bank that some checks were forged about middle of September.

3. Banks and banking ⇨148(4).

Provision on bank statement that account is correct if no error is reported in ten days cannot be relied on unless called to depositor's attention.

4. Banks and banking ⇨154(9).

Whether depositor receiving bank statement August 3 was negligent in not examining statement before end of month and reporting forgeries *held* question of fact.

5. Banks and banking ⇨148(4).

Depositor could recover money paid on forged check, though negligent in not sooner examining bank statement, in absence of evidence that negligence proximately caused successful negotiation of forged checks.

6. Banks and banking ⇨148(3).

Bank sued for money paid on forged checks can avail itself of depositor's negligence only where free from negligence.

7. Negligence ⇨122(1).

Defense of negligence is affirmative defense.

8. Banks and banking ⇨154(6).

When depositor makes prima facie case for recovery of money paid on forged checks, bank has burden of showing freedom from negligence and depositor's negligence.

9. Banks and banking ⇨148(3).

Rule that party employing dishonest agent should bear loss *held* inapplicable to bank, sued for money paid on forged checks, not shown free from negligence.

10. Banks and banking ⇨148(3).

Re-employment of employee forging checks and acceptance of partial restitution from employee *held* not ratification precluding employer from recovering money paid by bank on forged checks.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. H. Sommer and another, as copartners doing business under the firm name and style of the San Francisco Container Company against the Bank of Italy National Trust & Savings Association. Judgment for defendant, and plaintiffs appeal.

Reversed.

Rudolph J. Scholz, of San Francisco, for appellants.

Louis Ferrari and J. J. Posner, both of San Francisco, for respondent.

SPENCE, J.

Plaintiffs brought an action to recover sums deposited with the defendant bank and paid out on checks forged by an employee of plaintiffs. Upon a trial by jury, judgment of nonsuit was entered in favor of the defendant bank at the close of plaintiffs' case, and from this judgment plaintiffs appeal.

Plaintiffs opened their account with the bank in the early part of 1928. The signatures of the copartnership and plaintiff Sommer were forged by their employee to a series of checks in the months of July, August, and September, 1928. These forged checks totaled \$1,550. The bank reimbursed plaintiffs in the sum of \$365 for the checks forged prior to the month of August, but refused to reimburse plaintiffs for the checks subsequently forged. Upon discovery of the forgeries, the employee was arrested on September 17, and thereafter placed on probation. The employee had made partial restitution through the probation officer to the extent of \$443.50 after being re-employed by plaintiffs. On the trial, plaintiffs sought judgment against defendant bank for the unpaid balance of \$741.50 on the checks forged during the month of August.

[1] The testimony offered in the trial court was brief and rather unsatisfactory in its details as hereinafter pointed out, but neither in the trial court nor on this appeal has the respondent bank questioned the sufficiency of the evidence to show the payment by the bank from appellants' account of a number of forged checks and the bank's refusal upon demand to pay to appellants the unpaid balance of \$741.50 represented by the forged checks. We believe such evidence was sufficient to make a prima facie case. Respondent at all times relied upon certain defenses set forth in its answer. In support of the ruling of the trial court in granting the motion for nonsuit, respondent apparently takes the position that such defenses were established as a matter of law by the testimony adduced during the examination of the witnesses for appellants.

Before discussing respondent's contentions upon which it urges that the judgment should be affirmed, certain further observations should be made regarding the state of the evidence bearing upon these contentions. It appears that on August 3 the bank delivered to plaintiffs a monthly statement purporting to cover the July transactions and accompanied by checks for July. Neither this statement nor any other statement of account between the parties was introduced in evidence, and we are unable to ascertain the contents of the statements. Again, confusion

exists in the transcript where reference is made to the monthly statements. For example, we are unable to ascertain in many instances whether the words "August statement" refer to the statement delivered in August purporting to cover July transactions or to the statement subsequently delivered in September purporting to cover August transactions. In any event, a statement was delivered to plaintiffs on August 3, and another statement was delivered in September. The exact time of delivery of the statement in September does not appear, but it was conceded that the statement was delivered before September 10. What was referred to as the "August statement" was exhibited to plaintiff Sommer upon cross-examination, and counsel purported to read the following notice from the statement: "Please examine at once. If no error is reported in ten days the account will be considered correct." The witness, in response to questions, replied that he had never noticed this provision on any of the monthly statements. It is questionable whether there is any evidence in the record to prove that this provision was contained on any of the monthly statements, but counsel on both sides assume in their briefs that the "August statement" above referred to was the statement delivered on August 3, and that this statement contained such a provision. Plaintiffs did not examine this statement until the latter part of August, at which time they notified the bank that there was something wrong with the statement. After receiving the statement in September, plaintiffs examined both statements and ascertained that there were fewer checks than there were debit items and notified the bank that checks had been forged. This notice was given about the middle of September, near the time of the arrest of the employee on September 17. It does not affirmatively appear, but respondent assumes that the forged checks were destroyed by the employee guilty of the forgeries. Upon discovering that the checks had been forged, plaintiffs employed a bookkeeper and later a certified public accountant for the purpose of ascertaining the exact amount of the shortage due to the forgeries, and thereafter gave the bank a definite statement. None of the forged checks were introduced in evidence and the record does not disclose the dates upon which the checks were forged or paid by the bank.

[2, 3] Respondent's first contention is that "the account became an account stated weeks before the bank was notified of the forgeries." Passing the question of the insufficiency of the evidence to show the contents of the monthly statements of account, we will assume that such statements showed all debit and credit items for the previous months including debits of the forged checks and that the balance shown was incorrect in the amount represented by the forged checks. In

support of its contention, respondent calls attention to the general rule that it is the duty of the depositor to examine his statements and vouchers and report any error within a reasonable time failing in which duty the account as rendered becomes an account stated as between the bank and the depositor. We are of the opinion, however, that the account in controversy had not become an account stated under the facts in the present case. The account in controversy is the account relating to the August transactions, the statement of which account was received some time in September, and it cannot be said that plaintiffs failed to report the forgeries to the bank within a reasonable time after a receipt of this statement. Respondent further calls attention to the "ten-day provision" contained in the statement delivered to plaintiffs on August 3. This statement covering the July transactions cannot be made the basis of an account stated with respect to the August transactions. Furthermore, such a provision in a bank statement cannot be relied upon unless it appears that such provision has been called to the attention of the depositor. *Los Angeles Investment Company v. Home Savings Bank of Los Angeles*, 180 Cal. 601, 614, 182 P. 293, 5 A. L. R. 1193.

[4-6] Respondent next contends that "the plaintiff partners failed in their duty of inspection of the cancelled vouchers and statement furnished on August 3, 1928, and their negligence proximately caused the successful negotiation of the checks forged in August and sued upon herein, they in reality approving and ratifying the acts of their agent, the forger." There are several answers to this contention. Under the circumstances disclosed by the evidence, we believe that the questions of whether plaintiffs were negligent in not sooner examining the statement of August 3, and reporting the forgeries was a question of fact to be determined by the jury under proper instructions and not a question of law. Even assuming that plaintiffs were negligent in this regard, there was no evidence from which it appeared that such negligence proximately caused the successful negotiation of the checks cashed in the month of August. No evidence is found in the record to show when the August checks were cashed, and, for aught that appears, all the August checks may have been cashed prior to the receipt of the statement of August 3. A further answer to this contention is that the defense of negligence on the part of a depositor is available to the bank only where it appears the bank itself is free from negligence. *Glassell Development Company v. Citizens' National Bank of Los Angeles*, 191 Cal. 375, 216 P. 1012, 28 A. L. R. 1427; *Union Tool Company v. Farmers' & Merchants' National Bank of Los Angeles*, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417. The authorities on this subject are very extensive-

ly discussed in the foregoing cases. In the case of Glassell Development Company v. Citizens' National Bank of Los Angeles, supra, the court said, on page 380 of 191 Cal., 216 P. 1012, 1014, of the opinion:

"And the weight of authority, and perhaps of reason, supports the view that when a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time, and if they disclose forgeries or alterations to report them to the bank, failing in which he cannot, if his failure results in detriment to the bank, dispute the correctness of payments thereafter made by it on similar checks. * * *

"This rule, however, assumes that the bank itself has not been guilty of negligence in making the payment, for when by the exercise of proper care it could have discovered the alteration or forgery, it must bear the loss notwithstanding that the depositor failed in his duty to examine the accounts."

In the *Union Tool Company v. Farmers' & Merchants' National Bank of Los Angeles*, supra, the court said, on page 48 of 192 Cal., 218 P. 424, 427: "In *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 29 L. Ed. 811, 6 S. Ct. 657 [see, also, *Rose's U. S. Notes*], it is said that—'Of course, if the defendant's officers, * * * could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account.' In another case (*Morgan v. United States Mortgage & Trust Co.*, 208 N. Y. 218, Ann. Cas. 1914D, 462, L. R. A. 1915D, 741, 101 N. E. 871) it is said: 'It is, however, permitted to a bank to escape liability for repayment of amounts paid out on forged checks by establishing that the depositor has been guilty of negligence which contributed to such payments and that it has been free from any negligence.'"

[7, 8] The defense of negligence is an affirmative defense. When the depositor makes out a prima facie case by showing that the bank has made payment from his account on forged checks and has refused upon demand to pay the sum represented by the forged checks, the burden is not upon the depositor to show that the bank was negligent in cashing the

checks and that he was free from negligence. The burden is then upon the bank to show by way of defense that the depositor was negligent and that the bank was free from negligence. It is conceivable that under certain circumstances both elements of such defense might appear as a matter of law from the testimony at the close of plaintiff's case, but that was not the situation here.

[9] Respondent further contends that "where one of two innocent parties must suffer, the principal employing a dishonest agent, should bear the loss rather than an equally innocent third party, in this instance, a bank." In this contention respondent proceeds upon the theory that the bank was an innocent party. Reliance is placed upon *Otis Elevator Co. v. First National Bank*, 163 Cal. 31, 124 P. 704, 41 L. R. A. (N. S.) 529. It is repeatedly pointed out in that decision that, under the circumstances disclosed by the evidence, the bank was an innocent party entirely free from negligence in the cashing of the checks involved. We do not believe that the principle laid down in that case should be extended to any case where it is not made to appear that the bank was free from negligence.

[10] From the defenses set forth in the pleadings and the grounds stated upon the motion for nonsuit in the trial court, it appeared that defendant placed reliance upon an alleged ratification of the forgeries by plaintiffs. This ratification is claimed upon the evidence which showed that plaintiffs had re-employed the employee after he was placed on probation and had accepted partial restitution from him through the probation office. Our attention has not been directed to any authority to sustain the proposition that such re-employment and acceptance of partial restitution would constitute a ratification precluding a claim by the depositor against the bank for the unpaid balance, and we find no reason for so holding.

As plaintiffs had made a prima facie case, and as it cannot be said as a matter of law that any defense had been established at the close of plaintiffs' case, the court erred in granting the motion for nonsuit.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

WILLIAMS v. SILVERSTEIN et al. *

Civ. 7350.

District Court of Appeal, First District,
Division 1, California.

Nov. 5, 1930.

Rehearing Denied Dec. 5, 1930.

Hearing Granted by Supreme Court Dec. 29,
1930.**1. Bills and notes ⇨519.**

Evidence held insufficient to sustain finding that signers executed note as joint makers.

2. Bills and notes ⇨539.

Finding to effect that signers on note entered into written agreement with payee to purchase lease on apartment and furniture held without support, where no such issue was before court.

The verified complaint alleged that payee of note entered into contract to sell apartment house and furniture to others, which allegation was admitted in the answer, so that there was no issue before court as to the parties to agreement of sale.

3. Bills and notes ⇨165.

Negotiable instrument may be rendered nonnegotiable, where it is intended to incorporate terms of separate agreement if terms of whole agreement are incompatible with negotiability.

4. Bills and notes ⇨144.

Negotiability of note will not be affected by agreement written upon same paper, evidently not intended to be incorporated within note.

5. Bills and notes ⇨165.

Notes given as partial consideration for transfer of lease and furniture were not rendered nonnegotiable because of escrow agreement not referred to therein.

Considering the notes and escrow agreement as constituting one transaction, nevertheless there was no intent to make payment dependent upon any contingency; the escrow agreement being in no way incompatible with terms of note and not purporting to change, limit, or modify provisions, but rather providing that payment was to be made in accordance with notes.

6. Bills and notes ⇨416.

Notice of dishonor, sent to indorser five or six days after due date, was too late (Civ. Code, §§ 3170, 3184).

7. Evidence ⇨441(11).

Admission of oral evidence of conversations taking place prior to and contemporane-

ous with execution of note and escrow agreement was erroneous.

8. Evidence ⇨441(11).

General rule respecting proof of contemporaneous parol declarations is applicable to attempt to prove prior or contemporaneous parol agreement affecting terms of unambiguous bill or note.

9. Bills and notes ⇨241.

That note contained words "We promise to pay" had no significance as respected liability of indorsers thereon.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Joseph Williams against Louis Silverstein and another. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

Edward J. Lynch, of San Francisco, for appellants.

E. B. Mering, of San Francisco, for respondents.

JORGENSEN, Justice pro tem.

This is an action on a complaint in six counts, based upon two promissory notes given to plaintiff as part of the purchase price of a lease to and furniture in an apartment house in the city of San Francisco. The notes are both negotiable in form, are for \$500 each, and are identical, excepting that one was payable June 10, 1926, and the other September 10, 1926.

The first and second counts appeared to charge the defendants as joint makers with one Huber on the two notes. The third and fourth counts appear to charge them as accommodation indorsers for Huber, while the fifth and sixth counts seek to hold them as indorsers. Each of the notes contained a clause "we promise to pay," etc. (the "we" being written in with a typewriter), and were signed at the end by Lee Huber only and underneath his signature are two blank lines. On the back of each note appears the signature of:

"Louis Silverstein

"Louis Sanders."

The first paragraph of each count alleges that on the 10th day of March, 1926, the plaintiff entered into an agreement to sell to one Lee Huber and Isadore Silverstein a certain lease and furniture of an apartment house on Ellis street in San Francisco for \$4,850; that, on the day the sale was to be consummated, this contract was modified "by agreeing to accept \$1,200.00 in cash and the balance of \$1,000.00 to be paid by a promissory note

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 2 P.2d 165.

executed by Lee Huber, Louis Sanders and Louis Silverstein."

It appears from the evidence that Isadore Silverstein and Lee Huber, two taxicab drivers, were desirous of acquiring an apartment house as a side line. The defendant Louis Silverstein, who was a real estate agent and builder, was a brother of Isadore Silverstein. Defendant Sanders was engaged in farming and buying and selling country lands, with headquarters at Sacramento. Defendants, Louis Silverstein and Sanders, negotiated with plaintiff, who was in the real estate business and selling leases and apartment house furniture, and who owned an apartment house lease and furniture on Ellis street in San Francisco, for the sale of said lease and furniture, and agreed to pay the defendants a commission for making a sale.

On March 10, 1926, the date of the notes, the plaintiff met in the office of Judge Tyrrell, plaintiff's attorney, with Lee Huber and Isadore Silverstein, the alleged purchasers, together with the defendants, Louis Sanders and Louis Silverstein, who contended that they were acting merely as brokers in the transaction, and the note was signed by Lee Huber. Plaintiff's own testimony as to what transpired in the office of his attorney is highly illuminating, in view of his contention that defendants were makers.

He testified: "Sanders and Silverstein signed on the back of the notes. I said to Judge Tyrrell, 'How about these notes? Shouldn't these be comakers?' He said that they were just as responsible on the back of the note as if they were on the front of it. I took his word for it. He said, 'Whether they are makers or comakers or endorsers, they guarantee the payment of the note and what is on the back of it is the same as the ones on the front of it.' I said, 'He ought to be a comaker.'"

He testified further: "I said, 'Tyrrell, wouldn't it be possible to have a comaker on there—an endorser?' He said, 'It doesn't make any difference one is the same as the other.' He said, 'Don't put my brother on there and I won't go on there, and we will go on the back of it.' That is what he said, 'I don't want my brother to go on the front of it on the face of the note, but let Huber go on the face of it.' That is just exactly the remark he made. I saw the notes signed and endorsed and accepted them under the advice of my attorney. My attorney, Mr. Tyrrell, said, 'The notes or the endorsements on these notes, will hold these men and make them pay if the notes are properly endorsed.' Silverstein said 'We will endorse them on the back.' I said, 'All right,' so he put Huber on the face and he and Sanders went on the back."

The attorney also drew up an escrow agreement under which plaintiff's attorney, John R.

Tyrrell, was made an escrow holder, which reads as follows:

"San Francisco, March 10th, 1926.

"John R. Tyrrell, No. 995 Market Street, San Francisco.

"My Dear Sir: Enclosed herewith we hand you agreement for the sale of the rooming house, designated as No. 1622-1664 Ellis Street, San Francisco, which agreement was executed between Theodore Kupper, as the party of the first part, and A. G. Rehnstrom and A. Johansson as party of the second part, and thereafter assigned by the latter to Joseph Williams, and thereafter by the said Joseph Williams assigned to Lee Huber.

"The condition of the agreement calls for a payment of forty-eight hundred and fifty (\$4,850) dollars, less an incumbrance of twenty-five hundred (\$2,500.00) dollars. Of this amount thirteen hundred and fifty (\$1,350.00) dollars has been paid, receipt of which is hereby acknowledged, and the further sum of one thousand (\$1,000) dollars is to be paid as follows: Five hundred (\$500) dollars on or before the 10th day of June, 1926, and five hundred (\$500.00) dollars on or before the 10th day of September, 1926, according to the terms of the promissory note, covering said sum.

"There is also deposited with you a lease upon the said premises covering a period of five (5) years from April 1st, 1926, running in favor of Lee Huber.

"These documents you are instructed to hold as escrow holder until Lee Huber shall have paid to you the sum of ten hundred (\$1,000) dollars and interest, according to the terms of the promissory note, and when such sum has been paid in full with interest you are authorized and directed to deliver to him the said lease and your services as escrow holder will then be terminated.

"Lee Huber,

"Louis Silverstein,

"Jos. Williams."

The taxicab drivers lost money in the apartment house business. The notes were not paid, and plaintiff brought a previous action seeking to hold Huber as maker and these defendants as indorsers, but these defendants were granted a nonsuit in that action because plaintiff had not made proper presentment of the notes and notice of dishonor had not been given to these defendants as indorsers.

The findings in the case were to the effect that defendants executed said note as joint makers and that plaintiff had agreed to sell the apartment house lease and furniture to defendants, Louis Sanders and Louis Silverstein. Neither of these findings are supported by the evidence.

[1] The evidence affirmatively shows that the defendants signed as indorsers and that the plaintiff accepted the notes with that un-

derstanding on the advice of his attorney. Not only his own testimony, but the testimony of the defendants are all to that effect. The plaintiff by his own acts subsequent to the execution of the notes showed that was his understanding by causing a notice of dishonor to be sent on one of the notes to one of the defendants as indorser and by instituting his first suit against them as indorsers, and there is no evidence in the record worthy of the name to show that the defendants ever signed in any other capacity.

[2] The finding to the effect that plaintiff entered into a written agreement with both the defendants, Louis Sanders and Louis Silverstein, to sell this apartment house and furniture cannot be sustained on any theory. The verified complaint alleges that plaintiff entered into a contract to sell this apartment house and furniture to Lee Huber and Isadore Silverstein. The answer admits this allegation. There was, therefore, no issue before the court as to the parties to the agreement of sale. No amendment of the complaint was even suggested. There is no written agreement between the parties in evidence to this effect or even suggesting it. The only thing upon which the court could possibly base such a finding is the escrow agreement set forth above. It certainly cannot be sustained as such an agreement. It was not signed at all by the defendant Sanders, and was signed by Silverstein, as he testified, as a matter of form as the broker in the transaction, or, as plaintiff's attorney testified, he signed more as a guarantor than as a principal. The escrow agreement shows on its face that the sale was made to Huber, and provided that the notes were to be signed by Huber and the lease was to be made out to Huber, and referred to an assignment of sale contract from the plaintiff to Huber.

[3-5] Respondents contend that the notes were nonnegotiable, and therefore defendant became liable as guarantors. At the time the notes were executed, the escrow agreement was also executed, and provided that the lease should be delivered upon the payment of the notes. It is true that a negotiable instrument may be rendered nonnegotiable where it is intended to incorporate the terms of a separate agreement with the instrument itself if the terms of the whole agreement are incompatible with negotiability. 19 Cal. Jur. p. 811. But even though the agreement be written upon the same paper that the note is written on, where it is evident that it was not intended to incorporate the terms of the agreement within the note itself, the transferability and negotiability of the note will not be affected by the agreement. Pitman v. Walker, 187 Cal. at page 671, 203 P. 739. The notes here do not refer to the escrow agreement, but contain an absolute and unconditional promise to pay at a certain time. But,

considering together the notes and the escrow agreement as constituting one transaction, we do not discover an intention to make the payment dependent upon any contingency. The escrow agreement is in no way incompatible with the terms of the notes, nor does it purport to change, limit, or modify the provisions of the notes. On the other hand, it provides that the payment is to be made in accordance with the notes.

[6] The evidence in this case clearly shows, and the fact is undisputed, that proper presentment of the notes had not been made and notice of dishonor had not been given so as to hold defendants as indorsers of negotiable paper. It is true that notice of dishonor was sent to the defendant Sanders as indorser of the first note, but was sent five or six days after it became due, and it was therefore too late. Sections 3170 and 3184, Civ. Code.

[7] The court, over the objections of defendants, admitted oral evidence of conversations between certain of the parties which took place prior to and contemporaneous with the execution of these notes and the escrow agreement, and which tended to vary, modify, and change the terms thereof. This was prejudicial error.

[8] The general rule that proof of contemporaneous parol declarations and agreements is inadmissible to contradict, vary, or alter the terms of a written contract is applicable to an attempt to prove a prior or contemporaneous parol agreement or declaration to affect the terms of a bill or note where the bill or note is not uncertain, doubtful, or ambiguous. Uniform Laws, Annotated, vol. 5, p. 28; Citizens' Bank of Los Angeles v. Jones, 121 Cal. 32, 53 P. 354; Quatman v. Superior Court, 64 Cal. App. at page 208, 221 P. 666. If the defendants in this case had signed the note on its face below the signature of Huber, could it be said that they might show by parol evidence they signed as indorsers only? The answer is obvious. Such evidence is not admissible, whether the note be negotiable or nonnegotiable. Lindemann v. Coryell, 59 Cal. App. 788, 212 P. 47. If this were not the rule, it would lead to chaos in all business transactions.

[9] The mere fact that the notes contained the words "we promise to pay" has no significance, even though signed by only one maker, with two blank lines below his signature, in view of the state of the record in this case. The words "we promise to pay" cannot be held to include indorsers or other parties whose names are not signed as makers. Hobson v. Hassett, 76 Cal. 203, 18 P. 320, 9 Am. St. Rep. 193; Bean v. Pioneer Mining Co., 66 Cal. 451, 6 P. 86, 56 Am. Rep. 106; Farmers', etc., Bank v. Colby, 64 Cal. 352, 28 P. 118; Whitmore v. Nickerson et al., 125 Mass. 496, 28 Am. Rep. 257.

We have considered the other points urged by appellants in their brief, but, in view of the foregoing opinion, it is unnecessary to discuss them.

In view of the fact that defendants can only be held as indorsers, and proper notice of dishonor has not been given them as such, and there can be no possibility of holding defendants liable on another trial, the judgment is reversed with direction to the lower court to enter judgment in favor of defendants.

We concur: TYLER, P. J.; CASHIN, J.

PACIFIC FRUIT EXCHANGE v. BARKHAUS et ux.*
Civ. 4049.

District Court of Appeal, Third District,
California.

Nov. 8, 1930.

Rehearing Denied Dec. 8, 1930.

Hearing Granted by Supreme Court Jan. 5,
1931.

Agriculture ⇌6.

Sale and assignment of leases on fruit lands held not "cancellation" of leases with-in mortgage marketing contracts.

Mortgage marketing contracts between landowner and fruit exchange which made advances to landowner provided that, on sale of property or cancellation of leases and payment of proportionate amount of indebtedness for advances, exchange would release its mortgage lien on acreage sold or leases canceled. The word "cancellation" is a common and ordinary one having plain and well-defined meaning, and there was no evidence that it was used in any other than usual sense. To "cancel" a contract means doing away with it; to blot out or obliterate; to annul; to revoke.

[Ed. Note.—For other definitions of "Cancel; Cancellation," see Words and Phrases.]

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by the Pacific Fruit Exchange, a corporation, against F. W. Barkhaus and wife. From an adverse judgment, plaintiff appeals.

Reversed with directions.

Athearn, Chandler & Farmer, Frank R. Devlin, and Walter Hoffman, all of San Francisco, and T. L. Chamberlain, of Auburn, for appellant.

H. W. Zagoren, of Sacramento, and K. D. Robinson, of Auburn, for respondents.

SHIELDS, Justice pro tem.

On and before the 8th day of February, 1927, F. W. Barkhaus and his wife, Amanda, were farmers in Placer county, owning a large orchard and holding under lease from three different parties additional orchard tracts. They were engaged in the business of growing and selling fruits of various kinds on and from these orchards. The Pacific Fruit Exchange was a corporation engaged, among other things, in loaning money to fruit growers, and in the sale of fruits upon commission. On this date the above parties entered into an agreement by which the Pacific Fruit Exchange was to advance large sums of money to F. W. Barkhaus and his wife, Amanda A. Barkhaus, hereafter referred to as the defendants, to enable them to care for and cultivate their orchards and to prepare the crops of fruit grown thereon for market. These advances were to apply to the crops of 1927, 1928, and 1929, for each of which years certain sums of money were to be advanced. In consideration of these advances, defendants, among other things, agreed to market all of their fruit to be grown upon all of the land owned by them and upon the three pieces of land held by them under lease, through the Pacific Fruit Exchange, and to pay them for making such sales certain commissions provided for in the agreement. To secure the repayment of the sums advanced and to further set out the agreement between the parties, they at that time and as part of the first agreement entered into a "mortgage marketing contract" to which further reference seems to be unnecessary.

The agreement first mentioned provided "that should the first parties (defendants) sell all or any portion of the orchards owned by them, hereinbefore mentioned, or cancel any of the leases on the orchards now farmed by the first parties, then and in that event, upon payment by first parties (defendants) to second parties of a proportionate amount of the indebtedness then owing from first parties to second party, second party agrees to release its mortgage lien on any of said acreage sold or lease cancelled." The parties proceeded under these agreements during the season of 1927 and for a portion of 1928, when on March 20, 1928, defendants notified plaintiff that they had sold their property and desired to pay their indebtedness and be released from their mortgage and marketing contract. It developed as a fact that the defendants had sold all of the land owned by them, and that they had assigned the leases covering the acreage mentioned in the marketing contract to the same purchaser. Plaintiff contended that while defendants were entitled to a release as to all lands owned by them, because such lands had been "sold" as provided in the

contract, that they were not entitled to such discharge as to the lands held by them under lease, because none of such leases had been "cancelled," as was required by the contract. This is the only question in the case. Defendants paid the full amount of their indebtedness to the plaintiff, and plaintiff released them from their mortgage, reserving, however, their right to enforce the contracts in so far as they gave plaintiff the right to market the fruits grown on the leased property and obligated the defendants to purchase certain supplies from them. Defendants refused to recognize the further existence of the contracts, and upon their failure to permit the plaintiff to sell their fruit for the year 1928, and thus to earn a commission, or to purchase materials from plaintiff, or to engage plaintiff to load the fruit for transportation, all as provided in the contract, this action was begun.

It was stipulated that should the contract be held to be in effect, that the plaintiff would be entitled to recover \$986.49 as damages for defendants' breach. At the trial the court held that the sale of the leases, and their assignment to the purchasers, constituted a "cancellation" of the leases as provided for in the contract and as is expressed in the portion of the contract above quoted. Judgment accordingly went for the defendants. This conclusion of the court we deem to have been erroneous.

It will be noted that the contract provided that upon the sale of the property owned by the defendants, or the cancellation of the leases held by them, and upon the payment of a proportionate amount of the indebtedness then owed by the defendants, the plaintiff was to "release its mortgage lien upon any of said acreage sold or lease cancelled."

It does not say that such sale, or cancellation and payment, should have any other effect. Specifically it does not provide that other portions of the marketing agreement should terminate, or that plaintiff's right to market the fruit, to load it, or to sell to the defendants necessary shipping materials should cease or end.

But the case was tried on the theory that the whole claim of the plaintiffs depended upon whether or not the leases held by defendants had been cancelled. We will so consider it. We do not think that they were canceled; canceled in fact, or as that term is used in the contract. Plausible theories may be advanced as to why the parties might have used the word "cancel" in some special or different sense. But such theories are merely speculative. The word is a common and ordinary one, having a plain and well-defined meaning. There was no evidence before the court to show that it was used in any other than its usual sense. None would

have been permissible. There was nothing in the context which suggests an unusual meaning.

To "cancel" a contract means "doing away with" it. *Winton v. Spring*, 18 Cal. 451. "To 'cancel' a contract means to abrogate so much of it as remains unperformed." *Young v. Flickinger*, 75 Cal. App. 171, 242 P. 516, 517. To cancel is defined "to blot out or obliterate * * * to annul, * * * to revoke, to do away with." 9 Corpus Juris. 1153. "The words used by the parties 'canceled as of June 28, 1923,' are not ambiguous, and should be given their ordinary and common meaning. 'Cancel' means to annul or destroy; to make void; to set aside; as to cancel a debt or engagement." *Irwin v. State Brokerage Co.*, 82 Ind. App. 687, 147 N. E. 531, 532; *Toland v. Toland*, 123 Cal. 140, 55 P. 681. In this case the leases were not terminated, set aside, made void, or annulled. They were in full force and effect. They were sold as living things, rather than blotted out and ended. Their sale and assignment by the defendants who still remained parties to them, with a subsisting contingent liability under them, did not amount to their cancellation, as provided for in the agreement. As a consequence the agreement in the particulars sued upon remained in force, and the plaintiff was entitled to recover.

The judgment is reversed, and the trial court directed to enter judgment in favor of the plaintiff for the amount of the stipulated damages.

All concur.

109 Cal. App. 345
**ROTHSCHILD V. SUPERIOR COURT IN
AND FOR CITY AND COUNTY OF
SAN FRANCISCO et al.**

Civ. 7644.

District Court of Appeal, First District,
Division 2, California.

Nov. 5, 1930.

Rehearing Denied Dec. 5, 1930.

Hearing Denied by Supreme Court Dec. 29,
1930.

1. Witnesses $\S$ 52(1, 2).

Wife, if husband is sole party in interest in action, may not be called to testify without his consent (Code Civ. Proc. $\S$ 1881, subd. 1).

2. Depositions $\S$ 17.

Wife of plaintiff husband suing for personal injuries held "person for whose immediate benefit" action is prosecuted, authorizing taking of her deposition. (Code Civ. Proc. $\S$ 2021, 2055).

3. Witnesses ⇨55.

Wife in husband's suit for personal injuries, where recovery, if any, becomes community property, is competent witness (Code Civ. Proc. §§ 2021, 2055; Civ. Code, § 161a).

4. Witnesses ⇨52(1, 2).

Statute exempting wife from being compelled to testify against husband is special and exception to general rules relating to competency of witnesses (Code Civ. Proc. § 1881, subd. 1).

5. Witnesses ⇨52(1, 2).

Wife, when called as witness in husband's suit, may not be examined without his consent in any matter for or against him (Code Civ. Proc. § 1881, subd. 1).

6. Witnesses ⇨55.

Where husband is merely nominal party to action in which wife is real party, husband's consent to wife's testifying against him is not necessary (Code Civ. Proc. § 1881, subd. 1).

7. Witnesses ⇨54.

Testimony of either husband or wife, if confined to his or her own interest, would not be "for or against" other, and therefore competent without other's consent (Code Civ. Proc. § 1881, subd. 1).

[Ed. Note.—For other definitions of "Against" and "For," see Words and Phrases.]

8. Statutes ⇨228.

When Legislature has made exceptions to general rule, it must be deemed to have included therein all that it intended to except.

Original application by J. B. Rothschild for a writ of mandate prayed to be directed to the Superior Court in and for the City and County of San Francisco, Isidore Harris, Judge, to compel a witness to testify.

Writ denied, and proceedings dismissed.

Robert B. Gaylord, of San Francisco, for petitioner.

William S. Bayless, of San Francisco, for respondents.

NOURSE, P. J.

Petitioner seeks an original writ of mandamus to compel Naomi Roloff to be sworn and to testify as a witness upon the taking of her deposition in an action pending in said court.

Arnold R. Roloff sued petitioner for damages for personal injuries resulting from a fall from a ladder on premises leased from petitioner. Pending the trial of the action petitioner sought to take the deposition of plain-

tiff's wife, Naomi Roloff. She refused to testify on the ground that she was excused under the provisions of subdivision 1 of section 1881, Code of Civil Procedure. The material provisions of this section read: "A husband can not be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined, as to any communication made by one to the other during the marriage."
* * *

[1] Under the plain wording of the section it is manifest that if the husband is the sole party in interest in an action his wife may not be called to testify for or against him without his consent. Petitioner seeks to avoid this exemption on the ground that in the action here pending the wife has a present and existing interest because any judgment recovered by the husband would be the community property of the two spouses, and the wife, therefore, becomes a "person for whose immediate benefit" the action is prosecuted and hence one whose deposition may be taken under section 2021, Code of Civil Procedure.

[2] It may be conceded that, since the addition of section 161a, Civil Code, the wife has a "present, existing, and equal interest" in the community property with the husband. It may also be conceded that any recovery for personal injuries to either spouse sustained during coverture, as well as the chose in action to enforce recovery, is community property. *McFadden v. Santa Ana, etc., Ry. Co.*, 87 Cal. 464, 468, 25 P. 681, 11 L. R. A. 252. Therefore, under the provisions of section 2021, Code of Civil Procedure, the wife is a "person for whose immediate benefit" the action is prosecuted when that action is one to enforce this community right to damages.

[3-7] Thus, under the general provisions of section 2021, Code of Civil Procedure, relating to depositions, and under the general provisions of section 2055, Code of Civil Procedure, relating to the calling of adverse witnesses, the wife, in a suit of this character, is a proper and competent witness. But the provisions of section 1881, Code of Civil Procedure, above quoted, are special and must be read as exceptions to these general rules relating to the competency of witnesses. When, therefore, a wife is called as a witness, she may not be examined without the consent of her husband in any matter which is "for or against" him. This does not mean that the consent of the husband must be had if he is, merely a nominal party plaintiff or defendant in an action in which in truth and fact the wife is the real party. *Johnston v. St. Sure*, 50 Cal. App. 735, 737, 195 P. 947. But in a suit involving community property the

husband, as well as the wife, is a real party in interest, and, unless these interests are capable of segregation so that the testimony can be confined to the separate interest of the spouse called, the provisions of section 1881, Code of Civil Procedure, apply. It is difficult to conceive of a case involving the community property of both spouses where the testimony of one spouse would not be "for or against" the other; but we do not wish to be understood as holding that, if a case should arise where the testimony of one spouse could be confined to his or her own interest in the litigation, and would not be "for or against" the other spouse, such testimony would not be competent without the consent of the other spouse.

[8] We may add that we reach the views herein announced the more readily because we find that the remaining portions of section 1881, Code of Civil Procedure, contain many exceptions to this rule of privilege as between husband and wife, but do not include a case involving the community interests. Bearing in mind that the competency of witnesses in legal proceedings is a matter of legislative control, we must conclude that, if the Legislature had intended to except actions of this character, it would have included them with the proceedings listed in section 1881, Code of Civil Procedure, as exceptions to the general rule affecting the competency of husband and wife to testify. And we cannot overlook the well-settled principle that when the Legislature has made exceptions to a general rule it must be deemed to have included in its exceptions all that it intended to except.

The writ is denied, and proceedings dismissed.

We concur: STURTEVANT, J.; SPENCE, J.

109 Cal. App. 497

UNITED STATES OF MEXICO v. RASK.
Civ. 471.

District Court of Appeal, Fourth District,
California.

Nov. 10, 1930.

1. Attorney and client ☞71.

Authority of attorney to take an appeal may be questioned by respondent.

2. Attorney and client ☞70.

Presumption that attorney of record has authority to take an appeal prevails in absence of satisfactory showing that authority is lacking.

3. Attorney and client ☞72.

Evidence showing attorney's lack of authority to appeal in suit by foreign government *held* not of such satisfactory nature as to warrant dismissal.

4. Attorney and client ☞71.

Respondent cannot rely upon attorney's authority to file action, in support of judgment in his favor, and attack same authority to appeal, absent clear showing that change in authority has taken place.

Appeal from Superior Court, San Diego County; H. G. Ames, Judge.

Action by the United States of Mexico against Peter Rask. From the judgment, plaintiff appeals. On motion to dismiss the appeal.

Motion denied.

Frank H. Heskett and Stearns, Luce & Forward, all of San Diego, for the United States of Mexico.

Ward, Ward & Ward, of San Diego, and Sawyer & Cluff, of San Francisco, for respondent.

BARNARD, J.

This was an action for the recovery of the possession of a certain patrol boat then in the possession of the defendant. The action was filed by Heskett, Weinberger & Miller, attorneys, purportedly on behalf of the United States of Mexico, a sovereign nation, as plaintiff. Delivery of the patrol boat was claimed, and upon the giving of an undertaking in the usual form, executed by Independent Indemnity Company, a corporation, the boat was taken by the sheriff of San Diego county and delivered to the plaintiff. After a trial, judgment was ordered in favor of the defendant for the return of the boat, or, if the same could not be had, for the sum of \$12,961.61 (the value thereof), plus \$463.62 as damages for its taking, and costs of suit. Motion for a new trial was denied on June 23, 1930, and on July 2, 1930, notice of appeal was filed, signed by Frank H. Heskett, one of the attorneys representing the plaintiff at the trial.

Notice of a motion to dismiss this appeal was filed by the respondent upon the grounds that the notice of appeal was filed without the consent, authority, direction, or approval of the plaintiff, and that no appeal was in fact taken within the time allowed by law. In support of the motion is filed the affidavit of one of the attorneys for respondent, in which he deposes upon information and belief that the appeal was taken without the consent, authority, direction, or approval of the plaintiff; that the said Frank H. Heskett is conducting said purported appeal at the request of the Independent Indemnity Company; that the source-

es of his information and belief are certain statements alleged to have been made by one of the attorneys for the indemnity company to another one of the attorneys for respondent, and by him related to the affiant; that when the action came on for trial, the said Heskett, expressed doubt of his authority to proceed, and requested time in which to communicate with Mexican government officials in regard thereto, which request was refused by the court; and that when the motion for a new trial came on for hearing, the affiant's informant asked Heskett if he had received authority from the Mexican government, to which Heskett replied: "Well, I am here, am I not?" It is then alleged on information and belief that said reply of Heskett was evasive, and that, in truth, and in fact, the said Heskett had been informed by officials of the Mexican government that he had no such authority. As the source of this last information and belief, there is set forth a copy of a letter which, on June 21, 1930, was filed in the office of the clerk of the trial court, purporting to be signed by one E. Ferreira, as consul of Mexico at San Diego, Cal., protesting against the execution of the judgment in this action, for the reason "that such litigation was not authorized by the proper authorities of Mexico, and the further reason that, as I am informed, under international law, a sovereign government may not be condemned by judicial authority of a state." Another affidavit was filed by one of the other attorneys for the respondent, setting forth a conversation with an agent for the Independent Indemnity Company, in which this agent stated he understood the Mexican government intended to appeal the case, and, if it did not do so, someone else would; and, further, a conversation with Heskett, in which Heskett, upon being asked as to his authority, replied that he was not sure of his authority, but that Edgar Luce, one of the attorneys for the Indemnity Company, had told him to proceed with the appeal. On behalf of the appellant was filed an affidavit by Frank H. Heskett, stating he was retained and authorized to bring this action by J. L. Sepulveda, who, according to his information and belief, was at that time fish and game commissioner of the Pacific for the United States of Mexico, under the department of agriculture of that country; that as such fish and game commissioner and sole representative of said department of agriculture at San Diego, the said Sepulveda had authority to institute the action; that the said J. L. Sepulveda, in verifying the complaint, set forth therein that he was authorized so to do; that after the complaint was filed there was a change of administration in the United States of Mexico, by virtue of which the said Sepulveda was superseded by another as said fish and game commissioner; that there was also a change in the personnel of the office of secretary of agriculture of

Mexico; that the successor of Sepulveda neither withdrew from affiant any authority theretofore given, nor gave him any instructions or directions whatsoever; that after judgment adverse to the plaintiff was entered, affiant communicated that fact to the new fish and game commissioner and to the Mexican consul in San Diego, Mr. Ferreira, and that the said Mexican consul referred affiant to Fred W. Noon, an attorney of San Diego, as the representative of the Mexican government in connection with the said case; that at the suggestion of said Fred W. Noon affiant filed a motion for a new trial in said action; that later the said Fred W. Noon authorized and directed affiant to take the necessary steps to effect an appeal in the action, and that this action was taken immediately thereafter; that the said J. L. Sepulveda at the time he authorized affiant to bring this action, authorized him to take all necessary proceedings to protect the interests of the United States of Mexico and to prevent any final judgment being rendered against said government; that affiant has received no authority or directions to withdraw from said case or to permit the said judgment to become final; and that he has not been directed by any person to refrain from filing a notice of appeal. Further affidavits were filed in behalf of appellant, which it is not necessary to consider here.

The earlier cases in California seem to hold that the authority of an attorney to take an appeal may not be questioned by a respondent. In *Board of Commissioners v. Younger*, 29 Cal. 147, 87 Am. Dec. 164, it is stated that, so long as an attorney remains the attorney of record, his right to manage and control the action cannot be questioned, and that whether he has exceeded his authority in taking an appeal is a question between him and his clients, which is no concern of the defendant.

In *Woodbury v. Nevada, etc.*, Ry. Co., 120 Cal. 367, 52 P. 650, the court said: "When the notice of appeal from a judgment is signed by an attorney of this court, he will be presumed to have had authority from the appellant; and, unless the appellant himself objects to the prosecution of the appeal, it will not be dismissed at the motion of the respondent, upon the ground that it is prosecuted against the will of the appellant. The court will not pass upon the weight or sufficiency of conflicting affidavits for the purpose of determining whether the appellant desires the appeal to be dismissed." In that case the court refers to certain remarks by Mr. Justice McFarland on a previous hearing of the same case, as reported in 115 Cal. at page 87, 46 P. 862, as follows: "The motions were submitted here upon ex parte affidavits, which is a very unsatisfactory method of presenting issues which involve important rights and large property interests. If these motions should be granted, some of the parties would be forever preclud-

ed from raising in any form questions which they seek to have decided on the appeal sought to be dismissed, and which involve large sums of money. Evidently, therefore, the motions should not be granted unless the showing made by the moving parties is strong and clear, and the showing made is not of that character. There are a number of affidavits made on behalf of each of the contesting parties, and they are sharply conflicting. It would be useless to state here the contents of the various affidavits. It is sufficient to say that the evidence which they furnish, considered as a whole, does not affirmatively establish the alleged facts upon which the motions are based. * * *

In all cases since that time the decision has rested upon the sufficiency of the showing made to overcome the presumption of authority, rather than upon the inability of the respondent to raise the point. In *Parkside Realty Co. v. MacDonald*, 167 Cal. 342, 139 P. 805, it was held that, while it is presumed that an attorney appearing and acting for a party has been authorized so to do, the question whether or not such attorney was, in fact, authorized to take an appeal, is one to be determined by the court to which the appeal was taken.

In *Title Ins., etc., Co. v. California, etc., Co.*, 168 Cal. 397, 143 P. 723, 724, the court used the following language: "The fact that an attorney appears on behalf of a party raises a presumption of 'authority upon his part to do so.' *Garrison v. McGowan*, 48 Cal. 592. But this presumption is disputable, and where it is clearly shown, as it is here, that the attorney was not authorized, the party whom he assumed to represent can found no rights upon the unauthorized act." In that particular case the facts showed clearly that the attorneys purporting to take the appeal had no such authority, which fact was not even questioned by the attorneys then representing the appellant. Practically the same language is again used in the case of *Sullivan v. Dunne*, 198 Cal. at page 190, 244 P. 343. In that case it was clearly shown that the attorney attempting to take an appeal had no authority to act in the case at all, the affidavits filed in his behalf not even creating a conflict in this regard.

[1, 2] While, as held in the later cases, the authority of an attorney to take an appeal may be questioned by a respondent, the rule is firmly established that the presumption that an attorney of record has authority to take an appeal will prevail in the absence of a clear and satisfactory showing that such authority is lacking.

[3] This being the rule, we think the showing here made is not sufficiently clear and satisfactory to overcome the presumption referred to. Not only are the affidavits conflicting, but the principal affidavit for respondent was

made upon information and belief, and is largely hearsay. While the other affidavit states that the agent and attorney for the indemnity company interested themselves in the appeal, that fact is not conclusive. While the letter from the consul of Mexico at San Diego stated that the litigation was not authorized by the proper authorities, the other official of Mexico at San Diego stated in his verification that he had such authority. The affidavit of Heskett shows an original authority to bring the action which has not been discredited, except by surmise and doubt. He was authorized to bring the suit by an official of the Mexican government. While the authority of this official, in turn, has been questioned, it has not been clearly shown that he acted beyond his power. And nothing appears to show that any authority originally given to the attorney has been withdrawn. The proof relied upon by respondent is not of such a satisfactory and clear nature as to warrant a dismissal of the appeal.

A further consideration is that the real attack of the respondent is not merely upon the authority of this attorney to appeal from the judgment entered in this action, but is upon his original authority to file the action. It would appear from the showing made on this motion that the question as to the original authority of this attorney may be one of the questions to be determined upon a hearing of this appeal on its merits, and that the same goes more to the merits of the appeal than to the decision of this preliminary motion. It would appear from respondent's affidavits that, if he is correct in his contention, the judgment should be reversed, as, in that event, the plaintiff, a sovereign foreign government, has never submitted itself to the jurisdiction of the trial court.

[4] A still further consideration is that the record, presented by respondent in support of his motion, conclusively shows that the facts argued as showing lack of authority on the part of appellant's attorney go to the proposition that he never had authority to file the action or prosecute the same in the trial court, while the respondent desires to maintain the judgment against the plaintiff there obtained. Even though a respondent may question the authority of an attorney to take an appeal, we think he may not at the same time rely upon an original authority to file the action, in support of a judgment in his favor, and attack that same authority to proceed with an appeal, unless there be a clear and satisfactory showing that a change in authority has taken place after the entry of judgment.

For the reasons given, the motion to dismiss the appeal is denied.

We concur: MARKS, Acting P. J.;
WARNER, Justice pro tem.

109 Cal. App. 390

WESSEL v. CAZARETTO.

Civ. 7019.

District Court of Appeal, First District,
Division 2, California.

Nov. 8, 1930.

1. Appeal and error ⇨1010(1).

Findings of trial court, if supported by any substantial evidence, will not be disturbed.

2. Animals ⇨74(5).

In action for personal injuries from alleged vicious horse, evidence held to support finding that defendant's horse was not at large and did not injure plaintiff.

3. Appeal and error ⇨981.

New trial ⇨99.

Granting of new trial on ground of newly discovered evidence is largely discretionary and determination will not be disturbed except for abuse of discretion.

4. New trial ⇨144.

Denying new trial in action for injuries to child from vicious horse for newly discovered evidence held not abuse of discretion, in view of counter affidavits.

Affidavits in opposition to motion for new trial on ground of newly discovered evidence denied every material allegation of affidavits in support of motion.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Charles Wessel, a minor, by his father as his guardian ad litem, against Joseph Cazaretto. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. Thaddeus Cline, of San Francisco, for appellant.

J. J. Bullock, of Redwood City, for respondent.

BURROUGHS, Justice pro tem.

[1] This is an action for personal injuries. The cause was tried by the court without a jury. Judgment was entered in favor of the defendant, and the plaintiff appeals therefrom. At the time of the accident out of which this cause arose, the plaintiff was a boy of 7 years of age. The action is brought by his father, who was appointed his guardian ad litem. Complaint is made that the findings of the court are not sustained by the evidence. It is alleged in the second amended complaint that on January 2, 1927, the defendant was the owner of a vicious horse

which he knew to be vicious and ferocious and which he carelessly and negligently permitted to run at large in the city of San Carlos; that on said day while so at large said horse kicked the plaintiff in the face, inflicting serious injuries. These allegations are denied by the answer. The court found that the defendant was not the owner of a vicious horse, or that the horse mentioned in the said complaint was or is a vicious animal; that it is not true that defendant negligently or otherwise permitted said horse to go at large without being securely guarded or otherwise; that it is not true that on January 2, 1927, said horse was at large and not securely guarded and confined; that it is not true that said horse on the last-mentioned day or at any time, kicked or wounded or inflicted any injuries upon plaintiff as set forth in the complaint or otherwise, or that plaintiff was damaged in any sum whatever through any fault or act of the defendant. Counsel for plaintiff sets forth in his brief such evidence as he believes sustains the allegations of the complaint. However, if there is any substantial evidence to sustain the findings of the trial court, this court may not interfere. Estate of Wall, 183 Cal. 431, 191 P. 687; 20 Cal. Jur. p. 27, § 13.

[2] There is no evidence that the horse was vicious. The evidence of defendant and other witnesses was to the effect that the horse was about 25 years old, "broken down," and one with whom children had frequently played, "lifted his feet," and "pulled his tail." The court also found that it was not true that on January 2, 1927, said horse was at large and not securely confined; that it was not true that said horse on the day last mentioned, or at any other time, kicked or wounded the plaintiff. There was no evidence of any eyewitness to the accident; even the child did not undertake to identify the horse. He kept repeating that it was "the horse." The defendant testified that he did not allow the horse to run at large; that on the day of the accident he put his horse in his own pasture about 7 a. m. and tied the gate to the pasture with a rope he kept for that purpose, tying it with a knot that he always used; that about 5 p. m. he took the horse from the pasture and the gate was still tied as he had left it in the morning. The evidence also discloses that the fence was well built. It also appears from the evidence that at different times there were other horses at large in the vicinity of the accident, although there was no one who testified that there were any other horses there the day of the accident. We think that the foregoing evidence sustains the findings of the trial court.

[3, 4] It is next contended that the court erred in denying plaintiff's motion for a new trial. The motion was made on the ground

of newly discovered evidence which could not with reasonable diligence have been produced at the trial. Counsel for the appellant admits that the granting of a new trial on the ground above stated rests largely in the discretion of the trial court, and may only be disturbed for an abuse of such discretion. 20 Cal. Jur. § 58, p. 81, and cases there cited. Three affidavits were presented in support of the motion for a new trial—that of one John Marks, whose principal statement is to the effect that he had seen the horse owned by the defendant running at large on the day of the accident between the hours of 10 a. m. and 12 m.; the affidavit of Thomas Carlisle, who says he saw the horse belonging to the defendant kick the child in the face; the affidavit of Frank J. Appel, that he was told by Louis Hess, one of the witnesses for defendant, that the testimony he gave in favor of defendant was false and that he had been paid for it by the defendant. We have read all the affidavits in opposition to the motion, and every material allegation of the affidavits of said Marks, Carlisle, and Appel is denied by said counter affidavits. The rule that the decision of a motion for a new trial rests largely in the sound discretion of the trial court applies with full force to a motion on the ground of newly discovered evidence. 20 Cal. Jur. § 58, p. 81; *Waer v. Waer*, 189 Cal. 178, 207 P. 891. The principal reason for this is that the trial judge is generally in a much better position to determine the value and effect of the evidence. Accordingly, the decision of a lower court on motion for a new trial on the ground of newly discovered evidence is rarely interfered with, or where every material fact is contradicted by counter affidavits. 20 Cal. Jur. § 58, pp. 81, 82, and 83. We are of the opinion that there is no merit in either question raised by the appellant.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

109 Cal. App. 337

LINDNER v. BARKLEY.

Civ. 3926.

District Court of Appeal, Third District,
California.

Nov. 3, 1930.

1. Damages ⇨132(3).

\$2,000 to man 56 years old, for injuries to nose, upper lip, eyes, ninth rib, right index finger, sprained wrist, and shock to nervous system, *held* not excessive.

2. Damages ⇨158(2).

In personal injury action, testimony showing plaintiff's blood pressure *held* admissible under allegation of "severe shock to entire system."

3. Appeal and error ⇨1064(2).

Instruction authorizing jury to consider speed of automobiles when colliding, weight and size, plaintiff's position, and other circumstances in determining damage, *held* not prejudicial as assuming facts.

Instruction authorized jury in determining extent of plaintiff's damage to consider speed of automobiles at moment of impact, weight and size of each, position in which plaintiff was sitting, and in fact every relevant circumstance concerning collision for purpose of showing force and manner in which plaintiff was struck and the injuries, together with the shock to his physical and nervous system, resulting therefrom. Undisputed evidence showed that plaintiff sustained injuries and shock.

4. Appeal and error ⇨1064(1).

Instruction authorizing jury, in determining plaintiff's damages in automobile collision, to consider plaintiff's age and condition of life, *held* not prejudicial.

5. Appeal and error ⇨1064(1).

Instruction on measure of future damages as result of automobile collision, though improper, *held* not prejudicial (Civ. Code, § 3283).

Instruction, in substance, authorized jury to award damages for injuries sustained at time of collision, if any, together with the injuries sustained, if any, which would be sustained in the future as the direct effect of such injuries, if any. Civ. Code, § 3283, limits future damages to such as are reasonably certain to result in the future.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by John W. Lindner against Jack Barkley. Judgment for plaintiff, and defendant appeals.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Albert E. Sheets and J. Q. Brown, both of Sacramento, for respondent.

Mr. Presiding Justice FINCH delivered the opinion of the court.

This is an action for damages on account of injuries received by the plaintiff in a col-

lision between his automobile and that of the defendant. The defendant expressly admitted negligence, and the only question left for the jury to determine was the amount of damages to be awarded the plaintiff. The jury returned a verdict in favor of the plaintiff for \$2,000, and the defendant has appealed.

[1] The first point made by the appellant is that the verdict is so grossly excessive as to require this court to set it aside.

The plaintiff was rendered unconscious for a time from his injuries; he was 56 years old at the time; his attending physician testified that the plaintiff's physical condition before the accident was good; that in the accident he suffered a bruised condition of the nose and a tear in the skin thereof, although the bridge of the nose was not broken; that his upper lip was lacerated requiring two stitches; that both eyes were blackened and swollen; that the conditions named lasted for 10 or 12 days; that plaintiff's ninth rib on the right side was broken; that "it takes a broken rib about eight weeks to get over the pain"; that the plaintiff still suffers some pain from the broken rib when he stoops over; that he suffered a small tear in the right index finger, a piece of the skin being "torn clear off"; that he had a sprained wrist; that his left shin bone was bruised, leaving a permanent thickness of the bone; that the impact on the shin "might have destroyed the sense of the skin nerves"; that the plaintiff was suffering from shock and injury to the nervous system; that a "nervous condition persists for a long time"; that the plaintiff still complains of being nervous; that nervousness would be a normal result from the shock.

The plaintiff testified that he has no feeling at the place of injury to his shin; that he could stick a pin in that place without feeling it, that the bone there is sore; that the broken rib is still painful in certain positions; that he feels pain and soreness in lifting; that the injury caused him to be away from his business for two weeks and partially incapacitated him for four weeks additional. He further testified: "My nerves are all gone * * * every now and again. * * * I am just all to pieces. * * * I will go home lots of times at night and I am all just to pieces * * * it seems as if every nerve in the pit of my stomach is just going like that (indicating with hands); it just kind of tears me to pieces * * * and I have headaches." It appears that the plaintiff paid out \$74 for medical services and other expenses due to the accident. He testified that his services were worth \$300 a month.

In view of the wide discretion given a jury in cases such as this, especially in the amount to be awarded for pain and suffering, it cannot be said as a matter of law that the amount of the verdict is grossly excessive.

[2] Appellant contends that it was error to admit testimony as to the plaintiff's blood pressure, on the ground that his blood pressure was not relevant to any issue made by the pleadings. However, it was alleged in the complaint that the plaintiff suffered "severe shock to entire system." Medical experts testified that such a shock may cause high blood pressure. It appears, therefore, that appellant's objection to the testimony was properly overruled.

[3] It is urged that the court committed prejudicial error in instructing the jury that "solely for the purpose of determining the extent of plaintiff's injuries and damage * * * you may consider the speed of the two cars at the moment of impact, the weight and size of each, the position in which plaintiff was sitting, and in fact every relevant circumstance concerning the collision, for the purpose of showing the force with which and the manner in which plaintiff was struck, and the injuries to plaintiff together with the shock to his physical and nervous system resulting therefrom."

It is complained that the instruction assumes that the plaintiff suffered injuries and shock. Ordinarily, such an instruction should not be given where the facts are in dispute, but, in this case, the uncontradicted evidence shows that the plaintiff did suffer injuries and shock. It appears, therefore, that no prejudice was suffered by the giving of the instruction.

[4] Another instruction of which appellant complains is as follows: "The defendant has admitted liability in this case, and you will, in assessing the damages of such plaintiff, if any you find, take into consideration his age and condition of life, the injuries sustained at the time, if any, together with the injuries sustained, if any, which you may believe from the evidence will be sustained in the future as the direct effect of such injuries, if any, together with all actual expenses to which plaintiff has been put and assess his damages at such sum as from the evidence you may deem proper, not exceeding in this case the sum of \$5,333."

Appellant's first objection is to the statement in the instruction that the jury might take into consideration plaintiff's age and condition of life. Appellant contends that the term condition of life may have been understood by the jury to mean financial condition. From the connection in which the term is used, it reasonably appears that physical and not financial condition was meant, and the jury doubtless so understood it.

[5] It is also contended that the instruction is erroneous as to the question of future injuries, it being the rule that damages for injuries to be sustained in the future must be such as are certain to result. It may be

conceded that the instruction is not accurate in the respect last mentioned, section 3283 of the Civil Code limiting future damages to such as are reasonably "certain to result in the future." For reasons, however, similar to those stated in *Burk v. Extrafine Bread Bakery*, 208 Cal. 105, 112, 280 P. 522, it is highly improbable that the defendant suffered any prejudice from the error in the instruction.

The judgment is affirmed.

109 Cal. App. 333

RIGHETTI v. MONROE, LYON & MILLER, Inc.

Civ. 7364.

District Court of Appeal, First District,
Division 2, California.

Nov. 3, 1930.

1. Bills and notes ⇨129(2).

Holder's acceptance of delinquent installments and interest on note *held* not waiver of strict performance and right to accelerate maturity without notice demanding strict performance.

Note contained provision entitling holder at his election to accelerate maturity of note after demand therefor within period of ten days after default in payment of interest or in payment of any installments. Most of previous payments of installments and interest were accepted by holder after their maturity.

2. Bills and notes ⇨109.

Provision in note for acceleration of maturity is not penalty or forfeiture, but simply agreement regarding maturity of debt, and therefore valid.

3. Bills and notes ⇨129(2).

"Demand" within acceleration clause of note *held* not to require a formal presentment of note.

[Ed. Note.—For other definitions of "Demand," see Words and Phrases.]

4. Bills and notes ⇨516.

Evidence *held* to establish holder of note suing thereon made demand for payment of installment and interest under acceleration clause before electing to declare balance due.

Evidence showed that note had been placed with bank for collection of monthly installments and that each month a notice was sent to maker notifying it that installment was due; that written notice was sent to maker regarding payment due

and on which acceleration was based; that manager of collection department of bank had several telephone conversations with representative of maker corporation regarding overdue payment; and that during course of conversation demand for payment was made and attention called to fact that acceleration clause was applicable.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by A. A. Righetti against Monroe, Lyon & Miller, Incorporated. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 289 P. 650.

Arnold C. Lackenbach, of San Francisco, for appellant.

Roy L. Daily, of San Francisco, for respondent.

SPENCE, J.

The plaintiff brought this action upon a promissory note executed in his favor by the defendant corporation. Plaintiff obtained judgment upon a trial by the court sitting without a jury, and defendant appeals.

The note in the sum of \$10,000 was executed in 1926. Interest on the note was payable monthly, together with installments of not less than \$200 on the principal. The note contained the following provision: "And it is further agreed that in case of default in the payment of said interest for a period of ten days after the same shall become due, and demand having been made therefor, then such interest so in default shall be added to and become a part of the principal and thereafter bear the same rate of interest; and at any time during default in the payment of said interest, or in the payment of any instalment of principal in the manner aforesaid, for a period of ten days and after demand having been made therefor, the entire unpaid balance of said principal and the interest thereon, shall forthwith become due and payable at the election of the holder of this note, without notice." Defendant failed to pay the interest and installment due upon December 15, 1928, and plaintiff elected on December 31, 1928, to exercise his rights under the foregoing acceleration clause. On that day he caused the note to be presented and demand was made for payment of the entire balance of the principal amounting to \$5,000. Defendant failed and refused to pay said unpaid balance, but thereafter endeavored to tender the interest and installment of principal which became due on December 15, which tender was refused. Plaintiff thereupon filed his complaint.

In the trial court defendant relied upon an alleged waiver by plaintiff of strict performance of defendant's obligations under the note by showing that defendant had not previously paid the interest and installments promptly as they became due and that plaintiff had accepted such delinquent payments. It was stipulated that most of the previous payments were made after they became due, and the trial court found upon that stipulation "that most of the payments up to and including November 15, 1928, were accepted by plaintiff after their maturity." The trial court, however, found in substance that plaintiff had not waived strict performance of the note; that defendant was in default; that plaintiff elected to declare the entire unpaid balance due; and that said balance of \$5,000, together with interest, was due, owing, and unpaid. Judgment therefor was entered in favor of plaintiff.

[1, 2] Upon this appeal it is contended that the findings are erroneous and unsupported by the evidence and that the judgment is against law. These contentions are based upon the claim that the undisputed evidence and stipulation of the parties showed the acceptance by the plaintiff of previous payments after they became due and that as a matter of law plaintiff thereby waived strict performance of the obligations of the defendant and waived his right to exercise the accelerated maturity clause of the note without first notifying the defendant that he would require strict performance. Appellant relies upon a line of cases where the doctrine of waiver or estoppel has been applied to prevent a forfeiture under a contract of sale. These cases are not in point. *Young v. Burchill*, 96 Cal. App. 341, 274 P. 379, 380; *Jump v. Barr*, 46 Cal. App. 338, 189 P. 334; *Dunn v. Barry*, 35 Cal. App. 325, 169 P. 910. In distinguishing the cases relied upon by appellant, the court in *Young v. Burchill*, supra, said: "While the principle declared in the cases relied upon may properly be applied to vendor and purchaser contracts involving and authorizing forfeitures for breach of covenants as to time payments, it has no application to a case of the character here involved. *Jump v. Barr*, 46 Cal. App. 338, 189 P. 334. A provision for such accelerated maturity is not in the nature of a penalty or forfeiture, but simply an agreement as to the time when a debt shall become due and enforceable according to its terms, and is valid. *Dunn v. Barry*, 35 Cal. App. 325, 169 P. 910."

[3, 4] It is further contended that the evidence is insufficient to show a demand. The acceleration clause above set forth provides "and at any time during default in the payment of said interest, or in the payment of any instalment of principal in the manner aforesaid; for a period of ten days and after

demand having been made therefor. * * *". Appellant concedes that presentment is not ordinarily necessary to charge the person primarily liable, yet he urges that presentment was necessary in the present case as a demand was required by the terms of the note before plaintiff could exercise his right under the acceleration clause. We do not, however, construe the word "demand" as so used to require a formal presentment of the note. The evidence showed that the note had been placed in the possession of a bank for collection of the monthly installments and that thereafter all payments had been made through the bank; that each month a notice was sent to defendant notifying it that the installment was due; that a written notice was sent to defendant regarding the payment due on December 15; that thereafter Mr. Desmond, the manager of the collection department of the bank, had several telephone conversations with Mr. Stewart of the defendant corporation regarding the overdue payment; that in one of these conversations after the ten days had elapsed Mr. Desmond demanded payment and called attention to the fact that the "ten days clause was applicable right then and there"; that Mr. Stewart said on that occasion that he would investigate and mail a check as soon as possible. There was further testimony concerning the demand, but the foregoing is ample to sustain the finding that demand had been made.

We find no error in the record, and the judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

109 Cal. App. 365
ACKERMAN v. GRIGGS et al.
Civ. 7380.

District Court of Appeal, First District,
Division 2, California.
Nov. 7, 1930.

Rehearing Denied Dec. 6, 1930. Hearing Denied by Supreme Court Jan. 5, 1931.

1. Automobiles ⇨201(1).

Where north-bound motorists, entering highway and attempting left turn, blocked southern half while waiting for west-bound traffic, negligence of east-bound motorist, who skidded nearly 100 feet before collision, was sole cause of accident, precluding passenger's recovery.

2. Trial ⇨252(1).

Refusing instruction unsupported by evidence was proper.

3. Automobiles ⇨246(60).

Giving commonplace instruction that law presumes motorists, entering highway and attempting left turn, acted as reasonable and prudent persons, was proper.

4. Trial ⇨228(1).

Instruction on motorists' right of way, strictly following statute, and correct so far as it went, was not objectionable as omitting other elements in relations of parties.

5. Trial ⇨251(8).

Refusing instruction on issue of contributory negligence of minor injured in automobile accident, which was not pleaded or raised, was proper.

6. Trial ⇨112.

Refusing to permit argument beyond allotted time of one hour is wholly within judge's discretion.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Nora Ackerman, guardian ad litem of Eva Ackerman, a minor child, against S. M. Griggs and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Edwin H. Williams, of San Francisco, and Chester Monette, for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondents.

NOURSE, P. J.

Plaintiff, a minor, sued through her guardian for personal injuries received when a motor vehicle, driven by her father and in which she was riding as a passenger, collided with a motor vehicle driven by defendants. The cause was tried with a jury, which returned a verdict for defendants. The plaintiff appeals on typewritten transcripts.

Plaintiff was riding east on the main highway from Oakland to San Jose. Defendants were driving north on the Dumbarton road. As defendants approached this highway at Machado Corners, they stopped for traffic to pass. They then started in low gear into the southerly half of the highway with the purpose of turning to the left and into the highway in the direction of Oakland. As defendants thus entered the highway, they observed plaintiff's car approaching from the left at a distance of 200 feet. Because of the west-bound traffic on the highway, the defendants were unable to complete the turn immediately, and thus blocked the southern half; their machine standing directly across the plaintiff's line of traffic. While in this position, the plaintiff's father applied the brakes to his

car, swerved off the paved portion of the highway, and "skidded" into the rear of the defendants' car, causing the injuries to the minor child. The evidence disclosed that when plaintiff's father applied the brakes to his machine "skid" marks were made upon the highway for nearly 100 feet.

[1] The cause was tried on plaintiff's theory that the defendants were negligent in driving into the southern portion of the highway and stopping before crossing or turning into the northern half. The case was defended on the theory that the defendants were without negligence—that they did just as an ordinarily prudent man would have done under the same circumstances. It must be conceded that the evidence unmistakably supports the jury's verdict for the defendants, and that the sole and proximate cause of the accident was the negligent and reckless driving of plaintiff's father. Under such circumstances the judgment must be affirmed, unless the errors assigned are found to be prejudicial.

[2] Appellant first complains of the action of the trial court in refusing to give the proposed instruction found on page 246 of the typewritten transcript. There was no error, as the proposed instruction was one on the facts which were not supported by any evidence. The uncontradicted evidence was that, when respondents entered the highway, appellant's car was so far away that an accident could not have happened unless it was driven with reckless disregard of the right of others.

[3] Complaint is made of the giving of the commonplace instruction that the law presumes that the respondents acted as reasonable and prudent persons in the operation of their machine. The instruction was correct, and the authorities are so numerous that our only difficulty is to choose what to cite. *Olsen v. Standard Oil Co.*, 188 Cal. 20, 25, 204 P. 393.

[4] Error is assigned in the giving of an instruction on the respective rights of way of the two drivers. The instruction followed the terms of the statute strictly, and is free from objection as far as it went. That the court did not cover other elements in the relations of the parties at the time is not an objection to be made to this instruction. If the plaintiff had desired additional instructions covering the matters of stopping and turning while in the intersection, she could have requested them. There is no similarity in this case to *Ekwall v. Los Angeles Hat Co.* (Cal. App.) 287 P. 545, where the plaintiff, after entering an intersection, made a left turn across the traffic approaching him on his right. The same may be said of *Donat v. Dillon*, 192 Cal. 426, 221 P. 193, where the left-hand turn was directly across right-hand traffic and was the

direct proximate cause of the collision. Here the respondents entered the intersection when the appellant was approaching on their left at a distance of 200 feet, and they paused to permit the right-hand traffic to pass so that they could proceed in that direction. It is plain from the evidence that their intention to make a left-hand turn had no possible connection with the collision. If a driver under such circumstances cannot claim the right of way to either cross the highway or to turn into it, then it would be difficult to conceive of a case where such right would exist.

[5] The appellant complains of the refusal of the trial judge to give her proposed instruction that the minor child was not responsible for the negligence of the parents. It is now argued that this proposed instruction was meant to inform the jury that, if they found that the accident was caused by the contributory negligence of the father in his operation of his machine, that fact would not bar recovery on the part of the minor suing in her own right. If this was what was meant, we are at a loss to understand why the proposed instruction should be so involved. If the respondents had pleaded contributory negligence as a defense, or if that issue had been raised in any manner, an instruction that it would not bar recovery by the minor under those circumstances would have been proper. But the issue was not raised, hence the proposed instruction would have been foreign to the issues before the jury.

Further criticism is directed to the action of the trial judge in reading to the jury portions of the complaint and answer and in instructing them that the burden was on the pleader to prove these allegations. There was no error in the instructions as they appear in the record, but the appellant insists that the trial judge in this connection read a portion of her complaint alleging that "said carelessness and negligence of said defendants was the sole and proximate cause of the collision," etc. The record shows that this portion was not read to the jury and the appellant now moves for a diminution of the record to include it. A similar motion was made in the court below, and, after a full hearing in which the notes of the court reporter were referred to, the motion was denied. The appellant presents no reason why her motion should be granted other than the recollection of her counsel as opposed to that of the trial judge and the court reporter's notes.

[6] Similar criticism is directed to the refusal of the trial judge to permit appellant's counsel to continue his argument to the jury beyond the one hour set aside for him. This is a matter wholly within the discretion of the trial judge.

The motion for diminution of the record is denied.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

JARDINE v. SUPERIOR COURT OF LOS ANGELES COUNTY et al., and three other cases.

Civ. 7316-7318, 7375.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1930.

Rehearing Denied Dec. 5, 1930. Hearing Granted by Supreme Court Dec. 29, 1930.

1. Prohibition ⇨28.

Determination of contested facts by trial court on motion to quash is not subject to collateral attack by writ of prohibition.

2. Process ⇨158.

Fact alleged in complaint requiring finding thereon in order to support judgment cannot be made an issue on motion to quash service of summons.

3. Process ⇨158.

Motion to quash service of summons goes only to jurisdictional facts of service and not to merits of case.

4. Process ⇨158.

Members of unincorporated association made party to action could not, by motion to quash, have determined in advance of trial any issues of fact including that of respective liabilities.

5. Process ⇨158.

Court must determine whether method prescribed by Legislature actually brings person before court.

6. Associations ⇨2.

Constitutional law ⇨82, 205(1), 309(1).

Law relating to service on unincorporated association held not unconstitutional in so far as association as entity was concerned (Code Civ. Proc. § 388; Const. Cal. art. 1, §§ 1, 21; Const. U. S. Amend. 14, § 1).

Code Civ. Proc. § 388, provides that, when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases

being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon on their joint liability.

7. Associations ◊2.

Constitutional law ◊82, 205(1), 309(1).

Statute relating to service of summons on unincorporated association *held* constitutional as applied to members named defendants (Code Civ. Proc. § 388; Const. Cal. art. 1, §§ 1, 21; Const. U. S. Amend. 14, § 1).

8. Associations ◊2.

Constitutional law ◊82, 205(1), 309(1).

Statute relating to service of summons as against unincorporated association *held* unconstitutional in so far as permitting judgment to be rendered against members not named in summons or complaint (Code Civ. Proc. § 388; Const. Cal. art. 1, §§ 1, 21; Const. U. S. Amend. 14, § 1).

Separate applications by J. Earl Jardine, by F. S. Baer and others, by W. R. Bacon and others, and by Robert E. Burns and others, for writs of prohibition prayed to be directed to the Superior Court of Los Angeles County.

Writs denied in part, and in part granted.

Loeb, Walker & Loeb and O'Melveny, Tuller & Myers, all of Los Angeles, for petitioners Jardine, Baer, Bacon, and others.

Bauer, Wright & Macdonald and Lyon, Fleming & Robbins, all of Los Angeles, Sloss & Ackerman, of San Francisco, and Hickcox & Thomson, of Los Angeles, for petitioners Burns and others.

Hewitt, McCormick & Crump and Joseph L. Lewinson, all of Los Angeles, for respondents.

SCHMIDT, Justice pro tem.

One Arthur M. Loeb and others, as stockholders of Sunset Pacific Corporation, filed in the superior court of Los Angeles county an action, which will hereafter be referred to as the action, against one Jacob Berman, sometimes known as Jack Bennet, and many other defendants, including "Los Angeles Stock Exchange, a nonprofit and unincorporated association," which will hereafter be referred to as the exchange, which action was brought on behalf of Sunset Pacific Corporation as the assignee of the Julian Petroleum Corporation.

Except for a few members and ex-members of the Los Angeles Stock Exchange, who were

joined as defendants to enforce against them a liability alleged to arise out of their individual participation in the acts forming the cause of action, not any of the members of the exchange were named as defendants either in the complaint or in the summons in said action. Following the commencement of the action, copies of summons and complaint were served upon the exchange and upon members and ex-members of the exchange. Thereupon the exchange, as such, and each of its members and ex-members upon whom service of summons had been had, including those who had been specifically named in the complaint, appeared specially in the respondent court for the sole purpose of moving that court for an order quashing such service. The hearing on said motions to quash were had in the respondent court upon affidavits and upon the constitution and by-laws of the exchange. Each of said motions were denied, whereupon petitions for writs of prohibition were filed in this court. To each of these petitions respondent court has filed a general demurrer in addition to filing an answer to the petition. By stipulation the four cases are consolidated in this court.

Whether liability of any character exists in favor of the plaintiffs in the action or any of them against the exchange or against any of the defendants actually named in the complaint and summons, or what the rights and duties between the members of the exchange and the exchange itself are, and, by reason thereof, whether there is any individual liability against the members, and like questions, must necessarily be matters of fact, and as such are to be determined by the trial court upon trial on the merits. We cannot in advance anticipate what facts will be found nor what judgment will be rendered.

The real question to be determined is: Did the respondent court obtain jurisdiction over the exchange as well as jurisdiction over the respective individuals? If so, then each petition should be dismissed, and, if not, then the writs should issue.

I. The motion to quash on behalf of the exchange was made upon the following ground and separately upon each of them: Said purported service was and is null and void, and of no force or effect; respondent court had no jurisdiction over the person of said defendant; that said exchange is not now and never has been an association engaged in the transaction of business under a common name or any name whatever within the meaning of section 388 of the Code of Civil Procedure; said exchange is not now and never has been an association composed of two or more individuals transacting business under a common name within the meaning of said section 388; that said section 388 is in violation of and obnoxious to sec-

tion 1 of article 1 of the Constitution of the state of California, and of section 21 of article 1 of the Constitution of the state of California, and of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Substantially the same grounds were set forth by the respective individuals in their respective motions to quash.

[1] For the purpose of the motion to quash, if the affidavits show a conflict in evidentiary facts, then this court cannot disturb the finding of the lower court upon such contested facts. The determination of such contested facts by the respondent court is not subject to collateral attack by writ of prohibition. *Lumas Film Corp. v. Superior Court*, 89 Cal. App. 384, 264 P. 792.

The section 388 involved reads as follows: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

[2, 3] In paragraph XXI of the complaint it is alleged: "Defendant Los Angeles Stock Exchange is now, and at all times as to it herein mentioned was, a voluntary and unincorporated association of sixty or more individuals, who were and are associated together in business and who transact and transacted such business under a common name." By the motion to quash, supported by affidavits, the exchange virtually asked the respondent court to determine that this allegation of fact so contained in the complaint was not true. A fact alleged in a complaint requiring a finding thereon in order to support a judgment cannot be made an issue upon a motion to quash service of summons. Such motion goes only to the jurisdictional fact of service; that is, whether the court has acquired jurisdiction of the person, and not to the merits of the case. *Felton Water Company v. Superior Court*, 82 Cal. App. 382, 256 P. 255. To ask a court to determine in advance such issue of fact merely because the particular case, as is claimed in this instance, is apt to be a protracted one and expensive to defend, is not sufficient reason for this court to interfere with a writ of prohibition. If same were to be permitted in this case, why not try any issue of fact upon a like motion to quash?

II. The individuals applying for writs fall into three groups: (a) Those sued in their individual capacity and so named in the com-

plaint whether or not they were members of the exchange at the time of the alleged transactions; (b) those who were members of the exchange at the time of the transactions involved in the complaint who were not named as individual defendants either in the complaint or in the summons; and (c) those who were present members of the exchange, but not members at the time of the alleged transactions, and who were not named as defendants either in the complaint or in the summons.

[4] As to those members who were made parties to the action by the allegations of the complaint, they are charged with the matters set forth in the complaint, and cannot as such defendants by a motion to quash have determined in advance of a trial on the merits any of the issues of fact, including that of their respective liabilities, if any.

[5] The defendants in the other two groups are in a different situation. Although it is the peculiar province of the Legislature to determine procedure, it is nevertheless for the courts to determine whether the method prescribed by the Legislature actually brings a person before the court. There can be no doubt that by the amendment of 1907 to section 388 it was the intention of the Legislature to provide a method for the enforcement of a judgment had against an association where there was also individual liability of a member by reason of being such member of the association, to the end that the property of such member might be taken to satisfy such liability of such member. It is contended that, because section 416, Code of Civil Procedure, provides that, from the time of the service of summons and a copy of the complaint in a civil action, the court is deemed to have acquired jurisdiction of the parties and to have control over all the subsequent proceedings, by the service of a copy of summons and complaint against an association upon a supposed member that such member of the association thereby is made a party to the action and by such service acquires all the rights and duties given by section 430, Code of Civil Procedure, and other sections of the Code, to demur or answer as if he were actually named a defendant in the action. On the other hand, petitioners contend that such a procedure is violative of the constitutional provision prohibiting the taking of property without due process of law. In *City of Los Angeles v. Oliver* (Cal. App.) 283 P. 298, commencing at the bottom of page 308, we read:

"As applied to judicial proceedings, the phrase 'due process of law' imports an orderly proceeding adapted to the nature of the case in which a person is accorded an opportunity to be heard and to defend, enforce, and protect his rights. *County of Santa Clara v. Southern Pacific Ry. Co.* (C. C.) 18 F.

385. * * * It means a process which, 'following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.' *Hagar v. Reclamation District*, 111 U. S. 701, 4 S. Ct. 663, 667, 28 L. Ed. 569. It was undoubtedly the purpose of the framers of both constitutional guaranties to secure to every person a judicial trial according to the established rules of law, before he could be deprived of either life, liberty, or property. *Cohen v. Wright*, 22 Cal. 293, 318."

Section 407, Code of Civil Procedure, provides:

"The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court, and must contain:

"1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed;

"2. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within thirty days, if served elsewhere;

"3. A notice that, unless the defendant so appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint."

By the amendment of 1907 to section 388, under attack, a summons and complaint served upon individuals not named in the summons or complaint is not in harmony with subdivision 1 of section 407, Code of Civil Procedure, in that it does not name the parties to the action. Neither is it in harmony with subdivision 2 of said section, in that there is no direction whatsoever to the person so served to appear and answer, nor is he apprised what judgment, if any, is sought against him. The most that can be said is that he is informed that an action is pending against an association of which he may or may not in fact be a member at the time of the service of the summons. As was said in *Coe v. Armour Fertilizer Works*, 237 U. S. 421, 35 S. Ct. 625, 59 L. Ed. 1027, extra official or casual notice is not sufficient; the law must require notice to them and an opportunity to be heard.

[6-8] It necessarily follows that the procedure thus provided by section 388 does not provide for any notice that is either real or reasonable.

After a careful examination of the authorities presented and in view of the matters

herein expressed we find that, in so far as an association as an entity is concerned, section 388 is not in violation of section 1, article 1, or section 21 of article 1, of the Constitution of the state of California, or of section 1 of the Fourteenth Amendment of the Constitution of the United States. We are of a like opinion that the provisions of the section as applying to individuals named as defendants likewise is not unconstitutional. We are, however, equally satisfied that the provisions of section 388 in so far as a judgment may be rendered against a person not named in the summons or complaint, but merely by serving him with a copy of the summons and complaint, is unconstitutional.

In so far as the Los Angeles Stock Exchange and the respective individuals named in the complaint and summons are concerned, the writ is denied; and, in so far as the individuals not named in the complaint or summons are concerned, the writ is granted.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

109 Cal. App. 331

W. H. MARSTON CO. v. KOCHRITZ et al.
Civ. 7193.

District Court of Appeal, First District,
Division 2, California.

Nov. 3, 1930.

Rehearing Denied Dec. 3, 1930. Hearing Denied by Supreme Court Dec. 29, 1930.

1. Principal and surety ⇨185.

One guaranteeing payment of corporation's note at its request and for its use and benefit held "surety," and, upon payment by him, entitled against corporation and stockholders to rights of surety who has discharged principal's obligation.

[Ed. Note.—For other denitions of "Surety," see Words and Phrases.]

2. Limitation of actions ⇨58(4).

Statute limiting surety's right to enforce stockholders' liability commenced to run when surety's right to reimbursement arose.

3. Guaranty ⇨100.

Principal and surety ⇨185.

Negotiable Instruments Law held not to change rule that guarantor or surety paying principal obligation has action upon implied obligation of reimbursement, regardless of rights in equity by subrogation or otherwise (Civ. Code, § 3202).

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the W. H. Marston Company against F. J. Kochritz and others. From a judgment in favor of plaintiff, May H. Brady and other defendants appeal.

Affirmed.

B. D. Marx Greene, of San Francisco, E. J. Sinclair, of Berkeley, for appellants Wm. S. Mancke, A. W. Moore, Martha M. and F. A. Mueller, M. Gasper, Robt. Hector, N. B. Bailey, and W. E. Mitchell.

John L. McNab and Byron Coleman, both of San Francisco, for appellant H. A. Hess.

Andrew F. Burke and B. D. Marx Greene, both of San Francisco, for appellant James Smith.

Delger Trowbridge and B. D. Marx Greene, both of San Francisco, for appellant H. A. Brush.

Keyes & Erskine, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued as assignee of W. H. Marston to enforce the stockholders' liability of the defendants, all of whom were stockholders of the Central Alaska Fisheries, Inc. Plaintiff had judgment against the defendants in accordance with their respective liability. Eleven of these defendants have appealed on typewritten transcripts.

In all the appeals but one point is raised which requires consideration, and that is the application of the statute of limitations. The original indebtedness was evidenced by promissory notes executed by the corporation amounting to \$128,000. Payment of these notes was guaranteed by W. H. Marston. They were dated over a period from August 6, 1920, to September 30 of the same year. The banks which held the notes were paid by Marston over a period from January 23, 1921, to October 15 of the same year. Marston assigned his claim to the corporation plaintiff, which commenced this action on September 23, 1923. Thus, if the statute of limitations commenced to run from the date of the original obligation of the Fisheries Company, the greater portion of plaintiff's claim would be barred.

[1] Appellants argue that Marston's contract was one of guaranty and not one of surety, that his satisfaction of the indebtedness did not extinguish the obligations, and that his causes of action are thus barred. The trial court found that Marston guaranteed payment of the notes at the request of the corporation and for its use and benefit. The evidence supports the finding and brings the relation of Marston and the corporation within the definition of a surety as found in section 2831 of the Civil Code. His rights against the corporation and its stockholders are therefore such as belong to a surety who has paid the debt and discharged the obligation of his principal. *Yule v. Bishop*, 133 Cal. 574, 578, 62 P. 68, 65 P. 1094.

[2] This obligation of the principal to the surety arose when the surety paid the original obligation, and the statute limiting his right to enforce the liability of the stockholders of his principal commenced to run when this new obligation between principal and surety arose. *Ryland v. Com.*, etc., Bank, 127 Cal. 525, 527, 59 P. 989; *Yule v. Bishop*, 133 Cal. 574, 580, 62 P. 68, 65 P. 1094; *Wills v. Woolner*, 21 Cal. App. 528, 529, 132 P. 283; *H. K. McCann Co. v. Denny*, 205 Cal. 147, 151, 270 P. 190; *Finch v. Finch*, 68 Cal. App. 72, 79, 228 P. 553; *W. H. Marston Co. v. Central Alaska Fisheries, Inc.*, 201 Cal. 715, 258 P. 933.

[3] We are not impressed with appellants' argument that the section of the Negotiable Instruments Law, which is found in section 3202 of our Civil Code, and which provides that, "where the instrument is paid by a party secondarily liable thereon, it is not discharged," leaves respondent with but the single remedy—a suit on the original instrument. Assuming that the Code section applies to a contract of guaranty or suretyship, it is manifest that it has not changed the settled rule that a guarantor or a surety who pays the principal obligation has a right of action upon the implied obligation of reimbursement, irrespective of what right he might be able to assert in equity by subrogation, equitable assignment, or otherwise. 21 R. C. L. 1106; 28 C. J. 1037.

The judgment is affirmed.

We concur: SPENCE, J.; STURTEVANT, J.

109 Cal. App. 453

**FRANK H. BUCK CO. v. TUXEDO
LAND CO. et al.**
Civ. 7443.

District Court of Appeal, First District, Di-
vision 2, California.
Nov. 10, 1930.

1. Corporations ⇨318.

Transaction between two corporations having common directors, not ultra vires, could not be prevented by minority stockholder without proof of fraud, injury, or damage.

2. Corporations ⇨320(11).

In minority stockholder's action to enjoin corporation's purchase of land of another corporation, evidence supported finding that common directors of both corporations did not hold majority of stock.

3. Appeal and error ⇨1011(1).

Trial court's findings on conflicting evidence are conclusive.

4. Corporations ⇨320(11).

In minority stockholder's action to enjoin purchase of land, evidence supported finding that it was not policy of corporation to distribute to stockholders all sums realized from sale of property or to liquidate company when all property owned was sold.

5. Corporations ⇨318.

Minority stockholder could avoid action of majority in ratifying directors' action in buying properties of another corporation of which they were directors only upon proof of fraud.

6. Corporations ⇨432(2).

Directors' action in buying property was presumed to have been within their power.

Appeal from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Action by Frank H. Buck Company against the Tuxedo Land Company and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Frederick W. McNulty, Goldman & Altman, and Leland S. Fisher, all of San Francisco, for appellant.

Wright, Wright & Stetson, of San Francisco, for respondents.

BURROUGHS, Justice pro tem.

This is an appeal from a judgment in favor of defendants in an action in equity wherein

the plaintiff, a minority stockholder in the Tuxedo Land Company, seeks to enjoin a purchase by said company of all the properties of the Golden Valley Land Company, a corporation.

The offer to sell was authorized by the board of directors of the Golden Valley Land Company and unanimously ratified by its stockholders. The offer was then submitted to the Tuxedo Land Company and accepted by its board of directors on May 5, 1927. A permit was secured from the commissioner of corporations authorizing the Tuxedo Land Company to issue and sell the necessary stock called for by the agreement of sale. A special meeting of the stockholders of the Tuxedo Land Company was called for February 9, 1928, for the purpose of ratifying the proposed purchase. Appellant filed his complaint February 2, 1928, asking that the purported acceptance by the board of directors of the Tuxedo Land Company be declared null and void; that they be restrained from executing a deed or other conveyance; also that they be restrained from holding the proposed ratification meeting on February 9, 1928, or from taking any steps toward the completion of the proposed transaction.

Plaintiff alleges that the consideration is far in excess of the value of the properties purchased; that said vendor company was at the time of sale insolvent, its liabilities being far in excess of its assets.

Plaintiff further alleges that he will suffer and sustain irreparable injury and damage. There is no allegation of fraud. A restraining order pendente lite was issued on February 8, 1928, providing, however, that the proposed meeting might be held as scheduled, and that the stockholders might vote as they saw fit upon said proposed purchase, "but that the holding of said meeting shall not constitute a waiver on the part of plaintiff of its objection to the proposed purchase by the Tuxedo Land Company of the properties of the Golden Valley Land Company or of any of the other things complained of in the complaint of the plaintiff herein."

The stockholders' meeting was held as scheduled and the proposed purchase was ratified by an affirmative vote of 1,550 shares out of a total of 1950 shares and opposed by the 385 shares represented by plaintiff. Fifteen shares were not voted.

The individual defendants, five in number, were the board of directors of both corporations, the purchasing company, and the selling company. Following a trial on the merits, judgment was rendered for the defendants, and plaintiff appeals. Further facts will appear in the discussion of the findings assailed by appellant.

Appellant bases his appeal upon the contention that material findings of fact are not

supported by the evidence and further upon a question of law, which for convenience we will give first consideration. For this purpose we are assuming that the findings of fact are sustained by the evidence.

Plaintiff stresses the fact of the interlocking directorates and has seized upon the language occurring in the opinion of the court in *O'Conner, etc., v. Coosa F. Co.*, 95 Ala. 618, 10 So. 290, 291, 36 Am. St. Rep. 251, as follows: "Such transaction may be avoided by either company, or, at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company."

We find no case in which the courts of California have followed this rigid rule, allowing a minority stockholder to avoid the action of the directors and majority of stockholders merely because of an interlocking directorate, without showing injury, damage, or fraud. The rule in California is correctly set out in *California Jurisprudence*, volume 6, § 449, page 1077, as follows: " * * * Where one corporation deals with another and the same persons constitute all or a majority of the directorate of each company, *there being no actual or intended fraud*, the transaction is not void, but voidable only, and may be ratified by either party by conduct having that legal effect. Of course, such transactions may be avoided *for fraud*, by either company or at the instance of a stockholder in either company, *without regard to the question of advantage or detriment*." (Italics ours.)

In *O'Conner v. Coosa*, supra, the references to the rights of stockholders cited by counsel are dicta. That action was a creditors' suit which failed because there was no proof of fraud in the transaction complained of. The right of a stockholder to prevent a voidable transaction was not involved in the case. However, the decision in reference to the voidability of a transaction involving an interlocking directorate contains the further statement: "The general rule is that such dealings are not absolutely void, but are voidable, at the election of the respective corporations or of the stockholders thereof. They become binding if acquiesced in by the corporations and their stockholders."

The Sausalito Bay Land Company v. Sausalito Imp. Company, 166 Cal. 302, 136 P. 57, 59 (cited by both appellant and respondents herein), is an action to quiet title to land which the plaintiff corporation had sold to the defendant corporation, and for which the defendant corporation had not fully paid. Defendant corporation filed a cross-complaint in which the fact of an interlocking directorate was set out. Defendant's main contention was that by reason of this fact, regardless of the absence of fraud or bad intent, the conduct of the directors constituted constructive fraud sufficient to justify a rescission at

defendant's demand. Commenting on this phase of the case, the court says: "The rule established in this state is that, where one corporation deals with another, and the same persons, constituting the majority of the directorate of each company, control the deal, there being no actual or intended fraud, the transaction is not void, but only voidable, and may be ratified by either party by conduct having that legal effect, and that it is binding upon the party so ratifying it." And, further: "The correct doctrine is well stated in *O'Conner, etc., v. Coosa F. Co.*, 95 Ala. 617, 36 Am. St. Rep. 251, 10 So. 291, as follows: 'If the same persons as directors of two different companies represent both companies in a transaction in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company. Both the corporations are armed with the right to repudiate such a transaction, no matter how fair or open it may be shown to be. * * * The general rule is that such dealings are not absolutely void, but are voidable at the election of the respective corporations, or of the stockholders thereof. They become binding if acquiesced in by the corporations and their stockholders.' " The decision in the Sausalito Case rested upon the fact found by the lower court and sustained by the appellate court, that all the defendants and cross-complainants by their conduct had ratified that original sale, and the agreement, therefore, had become binding. The statement of the rule from the *O'Conner v. Coosa* Case was made for its bearing upon the fact of ratification and not for the purpose that the appellant in the instant case has cited it.

We believe the general inference of this decision, as well as in the other California cases cited and relied upon by appellant, are in favor of the rule as above quoted from *California Jurisprudence*, supra, *San Diego, etc., v. Pacific Beach Company*, 112 Cal. 53, 44 P. 333, 33 L. R. A. 788; *Pauly v. Pauly*, 107 Cal. 8, 40 P. 29, 48 Am. St. Rep. 98.

A case in point is that of *Roberts and The Daily Telegram Company of Long Beach, Cal., v. Prisk, Hosking and Press, etc., Pub. Company* (Cal. App.) 284 P. 984, at page 987, where all the directors of the two companies were the same and minority directors and stockholders refusing to ratify were the plaintiffs. The fact of interlocking directorates is urged as a reason why the transaction should be held void. The court says: "There must be either fraud or a lack of good faith, or some breach of trust shown in addition to the fact of interlocking directorates." The court cites from 14 *Corpus Juris*, page 873, § 1332, as follows: " * * * The law relating to dealings between interlocking directorates is thus stated: 'The fact that part or all of

the stockholders of two corporations are the same does not have the effect of rendering the corporations legally identical. It does not make either corporation responsible for the contracts of the other or for the acts of its members as members of the other. Neither does it prevent the corporations from dealing with each other, although where the same majority is in control of both corporations, the dealings of the corporations with each other will be subjected to a careful scrutiny and the rights of minority stockholders will be protected by the courts. However, it is held that the fact that the same persons constitute majority stockholders in each of two corporations, does not enlarge the jurisdiction of equity to interfere with the management of one of these corporations in relation with the other, at the suit of a minority stockholder."

[1] From the foregoing we believe the rule in California is too well settled to require further discussion. A transaction between two corporations having common directors, which is not *ultra vires*, cannot be prevented or avoided by a minority stockholder except he be able to prove actual or constructive fraud, injury, or damage. In the instant case plaintiff alleges injury and damage. The court found against him, and, if the findings of the court are sustained by the evidence, plaintiff's action must fail.

Appellant contends that the following findings of fact are not supported by the evidence: 1, 2, 4, 18, 19, 21, 22, 23, and 30.

[2] Findings Nos. 1 and 2 are to the effect that the defendant directors of the two land companies did not at any time hold a majority of the stock in either company. That they did not hold in excess of 581 shares in Tuxedo Land Company out of a total of 1,950 shares; that they did not hold in excess of 331 shares in Golden Valley Land Company out of a total of 760 shares.

Plaintiff alleged in his complaint that the directors owned and held more than one-half of the total issued stock of Tuxedo Land Company (1,950 shares), and that the same directors owned and held all the capital stock (760 shares) of the Golden Valley Land Company.

Plaintiff seeks to avoid these findings by a statement in his brief that "the majority of the stock in both concerns is held by these directors and their wives and immediate families."

The findings complained of are responsive to the issues as framed by the pleadings; without detailing the evidence on this point, it is sufficient to say there is no dispute as to the ownership of stock. The only evidence is that of two defendants to the effect that the directors held in their own names in the proportion stated in the findings of the court. Enough stock is held by relatives and connections of these directors to make a majority

of the stock owned by the directors and their relatives; the same evidence shows conclusively that these individual relatives each own the stock standing in their names and purchased it with their own separate money.

There were in the Tuxedo Company twenty stockholders, eleven of whom, holding 615 shares, are not shown to be in any way related to any of the directors. In the Golden Valley Land Company there were nine stockholders. It appears that but one stockholder, owning 117 shares, was not related or connected with the directors in any way. There were stockholders in the Tuxedo Land Company holding 885 shares who owned no stock in the Golden Valley Land Company.

[3] The findings 1 and 2 are wholly responsive to the issues and are supported by the evidence. Findings numbers 18, 19, 21, 22, 23, and 30 are all concerned with the various allegations of the unsoundness of the business deal and the fairness or unfairness of the consideration and the disputed valuations of the properties to be transferred by the Golden Valley Company to the Tuxedo Land Company, and the contention of injury and damage to defendant corporation, Tuxedo Land Company, and in consequence to the plaintiff.

To discuss in detail the evidence relating to these findings would reveal a conflict in the evidence which has already been decided by the trial court and therefore is not subject to change by this court. Suffice it to say that after a careful examination of the record there is sufficient evidence to sustain each finding.

[4] Finding No. 4 recites that it had not been the policy of the Tuxedo Land Company to distribute to its stockholders all sums realized from the sale of its property or to liquidate the company when all the property owned by it had been sold. On this subject two of the directors, Stetson and Oxnard, testified: "The Tuxedo Land Company, had, from sales of its land, accumulated considerable sums of money, the major portion of which had to be carried as the capital assets of the company. The reduction in the par value of the capital stock was accomplished in order to free some of these cash assets from the status of capital assets and to enable the board of directors of the Tuxedo Land Company to distribute the same and such future cash receipts as might seem proper in the form of dividends to the stockholders of the Tuxedo Land Company", and further, "The board of directors of the Tuxedo Land Company in accomplishing the reduction in the par value of its capital stock, did not take that action as a step preliminary to dissolution of the corporation or in an effort to wind up its affairs or conclude its activities."

The above finding is supported by the foregoing evidence. Both appellant and respond-

ents have given considerable space in argument as to the effect of the undisputed facts of ownership of stock in the two companies and to the contention by appellant that the action of the Tuxedo Land Company's directors was not properly, or at all, ratified by a majority of the stock. It is conceded that the plaintiff, who is a minority stockholder, did not at any time ratify the action of the directors.

There is no allegation and no evidence that the action of the directors of the Tuxedo Land Company was ultra vires, or that it was such an action as required a ratification by the stockholders, or that the directors had not the power or right as the business managers and representatives of the one land corporation to purchase the properties of another land corporation without an express ratification by the stockholders.

The undisputed facts of ratification or attempted ratification are as follows: The stockholders of the vendor corporation, Golden Valley Land Company, unanimously ratified the action of their board of directors. The directors of the Tuxedo Land Company accepted the offer of sale of the Golden Valley Land Company on May 5, 1927. The evidence shows that the stockholders of the Tuxedo Land Company were early advised of all the facts of the negotiations, including the fact of the interlocking directorates and that certain stockholders were opposed to the purchase.

Between the time, January 19, 1928, when the notices of the stockholders' meeting for the purpose of ratification were sent out, and the time of said meeting, February 9, 1928, at which meeting a majority of the stockholders expressly ratified the action of the directors, plaintiff filed his complaint. Therefore, plaintiff contends that the subsequent ratification by a majority of the stockholders should not be recognized by the court.

[5] If a ratification by the stockholders is necessary to such action of their board of directors, then, all the stockholders having been fully advised in the premises and a minority having contested, the majority stockholders by their conduct may be deemed to have acquiesced in the action of the board. Sausalito Bay Land Company v. Sausalito Imp. Company, supra. But, if, as contended by appellant, the board of directors owned and controlled a majority of the stock, then it follows a majority of the stock automatically ratified the action of the board of directors and plaintiff would still stand a minority stockholder attempting to avoid the action of the majority, which can be done only upon proof of fraud.

[6] Neither party has shown any necessity for a ratification by the stockholders of an action by the directors, which is, in the ab-

sence of any allegation or proof to the contrary, presumed to have been within the scope of their business organization and within the power of the directors as the business managers of the corporation, to conduct. Kennedy v. Savings Bank, 101 Cal. 495, 35 P. 1039, 40 Am. St. Rep. 69, and Roberts and The Daily Telegram Company, etc., v. Prisk et al., supra.

The minority stockholder in this case is seeking to avoid the business judgment of its board of directors on the ground that the dealings are conducted by two corporations having identical directors.

"There must be either fraud or a lack of good faith, or some breach of trust shown in addition to the fact of interlocking directorates." Roberts et al. v. Prisk et al., supra.

The minority stockholder has made no showing which would warrant a court of equity to interfere with the management of the corporation business or disturb the judgment of the trial court.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

109 Cal. App. 361

WALKER v. MASON.

Civ. 7405.

District Court of Appeal, First District,
Division 2, California.

Nov. 6, 1930.

Rehearing Denied Dec. 6, 1930. Hearing Denied by Supreme Court Jan. 5, 1931.

1. Automobiles ☞245(72).

Pedestrian's contributory negligence when struck by automobile at street intersection, held for jury, where evidence was conflicting.

2. Automobiles ☞206.

Pedestrian crossing a street under modern traffic control is entitled to assume that traffic rules will be obeyed.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by John E. Walker against George Mason sometimes known as Gerald Mason. Judgment for plaintiff, and defendant appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, and Theodore Hale and Barry J. Colding, both of San Francisco, for appellant.

Spencer G. Prime and C. K. Bonestell, both of San Francisco, for respondent.

NOURSE, P. J.

In an action for personal injuries tried before a jury the plaintiff recovered a verdict for \$3,415. The defendant appeals from the judgment on typewritten transcripts.

Plaintiff was walking in a southerly direction across Market street in San Francisco at the southeast intersection of Market and Third. At the same time defendant was driving a jitney bus in an easterly direction along Market. Plaintiff was struck by the right front fender of defendant's car just as he reached a point about three feet from the southerly curb of Market street.

Plaintiff plants his case on defendant's negligence in failing to obey the "stop" signal for east-west traffic on Market street. On this point there is a sharp conflict in the evidence, which the jury resolved in favor of plaintiff.

[1] Defendant insists that plaintiff was guilty of contributory negligence as matter of law. The argument is based upon some evidence tending to show that plaintiff failed to look to his right as he crossed the street and on evidence tending to show that he stopped and backed into the oncoming car. On both points the evidence is in conflict, and this court cannot say that plaintiff was guilty of contributory negligence. *Reaugh v. Cudahy Pack. Co.*, 189 Cal. 335, 343, 208 P. 125; *Swartz v. Acme Express Co.* (Cal. App.) 283 P. 358; *Hanson v. Cordoza* (Cal. App.) 290 P. 62.

[2] In this connection the appellant argues that we should follow *Finkle v. Tait*, 55 Cal. App. 425, 203 P. 1031; *Moss v. H. R. Boynton Co.*, 44 Cal. App. 474, 186 P. 631; *Mayer v. Anderson*, 36 Cal. App. 740, 173 P. 174, and similar cases holding that a pedestrian was guilty of contributory negligence in failing to continually look up and down the street he was crossing in order to ascertain if vehicles were approaching which might cross his line of travel. It is sufficient to say that none of these cases involved a question where plaintiff was crossing a street under modern traffic control. In the latter case a pedestrian is entitled to assume that the traffic rules will be obeyed (*Gornstein v. Priver*, 64 Cal. App. 249, 221 P. 396; *Averdieck v. Barris*, 63 Cal. App. 495, 497, 218 Pa. 786; *Hanson v. Cordoza* [Cal. App.] 290 P. 62), and if, under such circumstances, he is charged with contributory negligence, the question is one of fact for the jury.

From what we have said it would, of course, follow that the trial court did not err in denying defendant's motion for a directed verdict. 24 Cal. Jur. 916.

The judgment is affirmed.

We concur: SPENCE, J.; STURTEVANT, J.

109 Cal. App. 405

SADLER et al. v. BENSON.

Civ. 4080.

District Court of Appeal, Third District,
California.

Nov. 8, 1930.

1. Negligence ⇨83.

Last clear chance doctrine requires that party injured use ordinary care to extricate himself from position of peril after becoming aware of it.

2. Trial ⇨253(4).

Instruction on last clear chance omitting element that peril must have been one from which injured party could not have escaped by exercise of ordinary care *held* properly refused.

3. Negligence ⇨141(9).

Last clear chance instruction *held* properly refused as against contention word "peril" therein implied danger from which one could not reasonably extricate himself.

Refused instruction stated, in substance, that if jury believed deceased motorist by reason of negligence in operating automobile placed herself in position of peril, and defendant saw and realized her dangerous situation in time by exercise of ordinary care to avoid accident but failed to do all he could or should have done in exercise of ordinary care to avoid the accident, the defendant was solely responsible for death. "Peril" is defined as exposure to injury, loss, or destruction.

[Ed. Note.—For other definitions of "Peril," see Words and Phrases.]

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Naoma Pearl Sadler, as administratrix of the estate of Sarrah E. Carlile, deceased, and others, against J. M. Benson. From the judgment, plaintiff named appeals.

Affirmed.

William G. Snyder, of Jackson, and Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

Levinsky & Jones, of Stockton, and Hadsell, Sweet & Ingalls, of San Francisco, for respondent.

TUTTLE, Justice pro tem.

This is an action brought to recover damages on account of fatal injuries received by Sarrah E. Carlile in an automobile collision. It is filed by the administratrix of her estate.

The complaint contains three causes of action, the first being on account of the death of

Mrs. Carlile; the second on account of injuries received by Earl Sadler, a minor; and the third on account of injuries received by Robert Sadler, a minor. A jury brought in a verdict for plaintiffs on the second and third causes of action and for defendant upon the first. This appeal is taken by the administratrix of Sarrah E. Carlile from the judgment rendered upon the first cause of action.

The sole question presented for consideration is whether or not the trial court erred in refusing to give the jury the following instruction upon the doctrine of "last clear chance": "You are instructed that the party who has the last clear chance to avoid the accident, notwithstanding the previous negligence of his opponent, is considered solely responsible. If you believe from the evidence in this case that the deceased, Sarrah E. Carlile, was negligent in the operation of her automobile as she approached and entered the intersection of highways where the accident in question occurred, and, by reason of such negligence on her part, placed herself in a position of peril; and you further believe from the evidence in the case that the defendant, J. M. Benson, saw and realized the dangerous situation in which said deceased, Sarrah E. Carlile, had placed herself, in time, by the exercise of ordinary care, to avoid the accident and resulting death of said Sarrah E. Carlile, but failed, after seeing and observing the perilous situation of the deceased, to do all that he could or should have done in the exercise of ordinary care to avoid the accident, then I instruct you that the defendant, J. M. Benson, is solely responsible for the accident and resulting death of said Sarrah E. Carlile, deceased."

In *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36, 37, it was said: "The last clear chance rule presupposes: That the plaintiff has been negligent; that as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances that he realizes, or ought to realize, her inability to escape therefrom; that he then has a clear chance to avoid injuring her by the exercise of ordinary care, and fails to do so. If all of these elements are present, the rule applies and enables the plaintiff to recover, notwithstanding her own negligence. But if any of them be absent the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence."

[1-3] It will be noted that the instruction in question omits entirely one of the essential elements which is necessary before the rule can apply. The jury was not instructed that the situation of danger or peril must have been one from which decedent could not have escaped by the exercise of ordinary care. It is not enough that the party be placed in a position of peril. The driver (who was deced-

ent) must have been caught or entrapped, so that no reasonable effort on her part could have saved her. The "last clear chance" doctrine has been referred to as a humanitarian rule, in that it permits a recovery notwithstanding the negligence of the party injured, but it nevertheless requires that such party use ordinary care to extricate himself from the position of danger or peril, after he has become aware of it.

Assuming that the evidence justified the giving of the instruction, an examination of the record discloses that an instruction upon this essential element of the doctrine was absolutely necessary before a just conclusion in the case could be reached. Decedent was driving a Ford car, conveying as passengers, the two other plaintiffs, who were both under the age of nine years. The collision occurred at the intersection of an eighty-foot highway with a cross country road. There was evidence that decedent was traveling along the road about 14 miles per hour when she reached the intersection, while defendant was moving at about 28 miles per hour on the highway. Some fifty feet from the highway one of the passengers saw defendant's car approaching.

It can be readily seen that, if an instruction of this character were justified at all, this particular element is rendered, under the evidence, absolutely vital. It was for the jury to determine whether or not decedent could have escaped from the position of peril, and they should have been so instructed.

Again in the case of *Palmer v. Tschudy*, supra, the court said: "If, being aware of the danger and able to escape it by exercising ordinary care, she neglects to do so, she cannot invoke the last clear chance rule to place the burden of the resulting loss upon the other party."

The following language was used in the case of *Young v. Southern Pac. Co.*, 189 Cal. 746, 210 P. 259, 262: "Obviously, if both parties to an accident could, by the exercise of ordinary care, have avoided it, neither can be said to have had the last clear chance. It is only when a defendant charged with the negligent infliction of the injury, knowing plaintiff's peril, could and the injured plaintiff could not have avoided the injury that the defendant is liable. The liability is placed upon the party inflicting the injury only if immediately before the actual infliction of the injury the injured person was in such a situation as to be unable, by the exercise on his part of reasonable and ordinary care, to extricate himself, and vigilance on his part would not have averted the injury."

It is contended by appellant, in attempting to support and justify the instruction offered, that the word "peril," as used in view of the context, implies a position of danger from which one cannot reasonably extricate himself, and that such implication should be read

into it. We think this position is untenable. "Peril" means simply exposure to injury, loss or destruction. 48 C. J. 812. Surely not all perils can be held to be inescapable in their nature. We think that our juries have enough to do without casting upon them the additional burden of receiving their instructions through a process of "implication by context." We know of no place where the virtue of simplicity is more in demand and less in practice than in the matter of instructing a jury.

We do not deem it necessary to pass upon the question raised by appellant that the evidence justified the giving of an instruction upon this doctrine. It would appear, however, from an examination of the record, that defendant used every reasonable means to avoid the injury.

Our conclusion is that the trial court was justified in refusing the proffered instruction.

The judgment is affirmed.

109 Cal. App. 251

KECK v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 7512.

District Court of Appeal, Second District,
Division 2, California.

Oct. 28, 1930.

Rehearing Denied Nov. 26, 1930.

1. Automobiles ☞132.

Constitutional law ☞80(2).

Statute empowering officers to determine whether automobile license should be revoked confers quasi judicial powers and is constitutional (St. 1923, p. 517, § 73, as amended by St. 1929, p. 558).

St. 1923, p. 517, § 73, as amended by St. 1929, p. 558, provided that certain specified officers, on receipt of verified complaint that operator of automobile is reckless, negligent, or incompetent driver, may conduct hearing to determine whether license should be suspended or revoked, and that finding should be prepared on evidence received and considered.

2. Automobiles ☞144.

Evidence authorized finding that automobile driver's conduct was so careless as to warrant revocation of driver's license (St. 1923, p. 517, § 73, as amended by St. 1929, p. 558).

Evidence disclosed that automobile driver admitted driving from 35 to 50 miles an

hour; that driver had been arrested for speeding and was on probation; that driver had repeatedly collided with other automobiles and was twice fined, and was involved in accidents in which another automobile was wrecked on public street while driver was going between 35 and 40 miles per hour.

3. Courts ☞28.

Superior court, though having jurisdiction to try automobile driver's right to license, was not required to hear case where evidence before commissioner compelled conclusion that driver was incompetent (St. 1923, p. 517, § 73, as amended by St. 1929, p. 558).

Application for mandamus by Howard B. Keck, by William M. Keck, his guardian ad litem, against the Superior Court of the State of California in and for the county of Los Angeles.

Writ denied.

Chandler, Wright & Ward, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., and Harry L. Huston, Atty. for Division of Motor Vehicles, Department of Public Works, of Woodland, for respondent.

CRAIG, J.

A verified complaint having been filed with the division of motor vehicles, department of public works, charging the petitioner herein with having driven an automobile in a careless and reckless manner, and with being an habitually reckless driver, his license was suspended after a hearing thereon. He thereafter applied to the superior court, for a trial and determination of the question as to his right to a license, to which application a demurrer was sustained without leave to amend. He now petitions for a writ of mandamus requiring the overruling of the demurrer and requiring said court to set the cause for trial.

[1] The grounds of the application to the superior court were that the chief of the division of motor vehicles acted in excess of his authority in suspending petitioner's license, that the evidence was not sufficient to warrant such action, and that petitioner was thereby deprived of his "free exercise and enjoyment of his liberty and property." The California Vehicle Act (St. 1923, p. 517, as amended) is attacked as being unconstitutional, in that it attempts to confer upon executive officers excessive judicial authority. It is provided by section 73 thereof (St. 1929, p. 558) that certain specified officers, upon receipt of a verified complaint, that an operator is a reckless, negligent, or incompetent driver, may conduct a hearing to determine whether

his license shall be suspended or revoked; that the chief of the division or person holding such hearing shall prepare findings upon the evidence received and considered; and that the license may be suspended for a period of six months or revoked if the findings be to the effect that such person is incompetent or unfit to drive for any reason authorizing the refusal of a license, or by reason of negligent or reckless driving which has endangered life, limb, or property. All of the decisions cited by the petitioner hold or adhere to the rule that a commission or board may be empowered by legislative act to ascertain the existence of facts upon the finding of which the right to continue in the practice of a profession or business may depend. It is therein expressly held that the functions of such a board or commission are in this regard not an exercise of "the judicial power of the state" as contemplated by the Constitution, but that they are quasi judicial, and that statutes conferring such power are constitutional. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 P. 491; *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 P. 24; *Yosemite Lumber Co. v. Ind. Acc. Comm.*, 187 Cal. 774, 204 P. 226, 20 A. L. R. 994; *Tulare Water Co. v. State Water Comm.*, 187 Cal. 533, 202 P. 874; *Suckow v. Alderson*, 182 Cal. 250, 187 P. 965; *Lanterman v. Anderson*, 36 Cal. App. 472, 172 P. 625; *Leach v. Daugherty*, 73 Cal. App. 83, 238 P. 160. In *Tulare Water Co. v. State Water Comm.*, *supra*, it was observed that the act there construed vested in the water commission some discretion, but not the power to determine conflicting claims to unappropriated water. The act before us in plain terms invests the named guardians of motor safety with power and authority to "conduct an investigation and hearing to determine whether the license of an operator or chauffeur shall be suspended or revoked."

[2, 3] The petitioner, who appears by his guardian ad litem, is a young man about sixteen years of age. He admitted that he could not say that he had not driven past the complainant's house in a residential district at the rate of 60 miles per hour. He also admitted that he had driven upon other occasions from 35 to 50 miles per hour, had been arrested therefor, and that although on probation at the time of the hearing, he had exceeded 40 miles per hour. The evidence tended to show that he had repeatedly collided with other automobiles, that he had been twice fined, had forfeited bail, and had caused property damage to various machines for which large sums of money were expended by the automobile club. An accident following which the specific charges here in controversy arose, wherein his machine was damaged and another wrecked, occurred upon a public street in the city while the petitioner was

driving between 35 and 40 miles per hour. From the foregoing it cannot be seriously contended that it was unreasonable to conclude that petitioner's conduct was so careless, negligent, and reckless as to warrant the action taken. Indeed, to have done otherwise would have been a clear and inexcusable omission to perform an official duty, wisely imposed in the plain interest of public safety. Since the application which the petitioner in this court made to the superior court contained the testimony of witness given before the commissioner, and inasmuch as this evidence even considered most favorably to the petitioner compelled the conclusion that he was a reckless, negligent, and incompetent driver, it would have served no good purpose for the superior court to have set the matter down for hearing. While that court unquestionably has jurisdiction to do so, there is nothing in the statute which indicates that under such circumstances it cannot refuse. We think the demurrer was properly sustained.

Writ denied.

We concur: WORKS, P. J.; SCHMIDT, Justice pro tem.

109 Cal. App. 353

DOLMAN CO., Inc., v. RUBBER CORPORATION OF AMERICA.

Civ. 6840.

District Court of Appeal, First District,
Division 2, California.

Nov. 5, 1930.

Rehearing Denied Dec. 5, 1930. Hearing Denied by Supreme Court Dec. 29, 1930.

1. Principal and agent §89(7).

Evidence of payments made by advertising agent, suing principal for moneys due, *held* admissible as against contention that he acted as volunteer.

Plaintiff corporation's letter, confirming its president's conversation with defendant corporation's general manager regarding plaintiff's employment as advertising agent, stated that defendant was to remit to plaintiff for all monthly bills within certain time and receive cash discounts when paid in full.

2. Principal and agent §89(7).

Evidence of covenants of standard contracts between advertising agents and newspapers *held* admissible in agent's action against principal for moneys due.

3. Evidence ☞271(19).

Letters of parties to contract of employment as advertising agent after featured week *held* not inadmissible as self-serving declarations.

Agent's letter, confirming conversation regarding employment, stated that agency was contingent on confirmation by principal's permanent board of directors, but neither confirmation nor objection by such board was forwarded before agent fully performed its part of contract, at least as to some parts thereof.

4. Principal and agent ☞89(7).

Estimate of quantity and cost of advertising items and letter confirming conversation regarding employment as advertising agent *held* admissible in action against principal for money due.

5. Appeal and error ☞1064(4).

Instruction, inadvertently repeating date of letter listing amounts due newspapers for advertising in referring to previous letter specifying times for payments to advertising agent, *held* not reversible error.

The agent sued for and recovered judgment against principal for money due under oral contract of employment.

6. Trial ☞191(11).

Instruction, authorizing jury under certain enumerated circumstances to add commission in case of verdict for amount advanced by advertising agent, *held* not erroneous as assuming facts.

Total sum paid by advertising agent in accordance with alleged contract was not a disputed fact, nor was it disputed that advertising agent had paid all bills by it incurred thereunder, while circumstances under which agent was entitled to be repaid therefor was the subject-matter of other instructions.

7. Principal and agent ☞85.

Agent ordinarily is entitled to reimbursement by principal for all proper advances and expenditures in accomplishing purposes of agency, in absence of inconsistent contract stipulations.

8. Principal and agent ☞89(10).

Instruction as to advertising agent's authority to pay newspapers and thereafter collect from principal *held* properly refused in agent's action against principal for money due (Civ. Code, § 2343).

Civ. Code, § 2343, which instruction purported to follow, states the law as to an agent's obligation to a third person.

9. Principal and agent ☞89(10).

Instruction withdrawing from jury's consideration advertising agent's letter, confirming conversation respecting employment, as not evidence of contract, *held* properly refused.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by the Dolman Company, Incorporated, against the Rubber Corporation of America. Judgment for plaintiff, and defendant appeals.

Modified, and affirmed as modified.

Superseding 288 P. 131.

Glensor, Clewe & Van Dine, of San Francisco, for appellant.

Boyd Oliver, of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendant to recover moneys alleged to be due under an oral contract. The defendant answered and the trial was had in the lower court before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed and has brought up a typewritten record.

Mr. M. T. Dolman, president of the plaintiff corporation, met Mr. W. Flanders Setchel, the general manager of the defendant corporation, and a conversation was had regarding the employment of the plaintiff by the defendant as its advertising agent. Thereafter, on August 10, 1927, the two met again, and at that time Mr. Dolman delivered to Mr. Setchel a written plan, which is set forth in the transcript. It included the use of advertisements in newspapers, window cards, window streamers, and "throw away cards." Newspaper advertising was to be done in the metropolitan daily newspapers of San Francisco and Oakland. The advertisement in each newspaper was estimated as to size and the cost per week. Each other item of the plan was estimated as to quantity and the cost of each item. After that conversation, on August 12, 1927, the plaintiff wrote the defendant a letter confirming the conversation. Omitting irrelevant parts, and for our convenience numbering the paragraphs, the letter stated:

"1. We wish to thank you for placing your advertising account with this agency, and to confirm our understanding of the basis upon which it is to be handled.

"For the present all that is required is for us to prepare a booklet, illustrating Keaton Tires and describing their various points of superiority.

"And to plan and prepare and place a campaign of advertising to appear in San Francisco and Oakland newspapers (to be selected later) featuring Keaton Week, August 21.

"To supervise the preparation of publicity matter under the direction of Mr. A. S. Peterson, to be furnished the newspapers.

"To plan and prepare such window streamers and window cards and display advertising material as may be deemed necessary and compatible with good judgment.

"2. It is understood further that these arrangements, tentatively entered into by Mr. Setchel and this agency are contingent also upon confirmation by your permanent board of directors.

"3. It is agreed further that the Dolman Company, Inc., is to be assured, during the life of any agreement of a minimum remuneration of \$50.00 per month, regular agency commissions to apply against this fee.

"4. It is agreed by you that the Dolman Company, Inc., is to retain any and all customary agency commissions from publications, etc., that you will remit to us for all monthly bills on or before the tenth of the month following date of invoice, and you will receive, for this a 2 per cent. cash discount for such payments, but only when the monthly invoices have been paid in full."

The advertising was to take place during "Keaton Week," which was to commence on the 21st day of August, 1927. That letter was not answered by a letter written by the defendant. However, after the letter was written the plaintiff proceeded to prepare the advertising matter including the wording, size, etc., of the newspaper advertisement. Having done so, it caused its secretary to take the proofs and submit them to the defendant. When she returned and made her report, on August 19, 1927, the plaintiff wrote the defendant a letter confirming the conversation between the plaintiff's secretary and the defendant and stating that the plaintiff would make certain corrections which had been suggested. In that letter the plaintiff stated the cost of each newspaper advertisement and also the total thereof. After that letter was sent the advertisements were inserted in the newspapers. No claim is made that said advertisements did not in form, in size, and in all other respects conform with the terms of the oral agreements. During the oral negotiations the defendant discussed its desire to pay for some of the advertising in trade. Mr. M. T. Dolman testified that he stated to the defendant that agreements to pay in trade must be negotiated by the agents of the defendant and not by the agents of the plaintiff, but that otherwise such arrangements would be satisfactory to the plaintiff. Mr. William A. Dolman testified that prior to the placing of the advertisements he had a conversation with Mr. Setchel in which he stated to Mr. Setchel the necessity of bills being paid to the plain-

tiff promptly to the end that the plaintiff in turn could make its payments promptly to the newspapers and thus obtain the benefit of certain liberal discounts which were made to the plaintiff by the newspapers and which enabled the plaintiff to give to its patrons more liberal terms. Before "Keaton Week" had ended no further communications, oral or written, were had between the witnesses above named.

The plaintiff pleaded its claim in five separate counts. The defendant denied many of the allegations, but as to the newspapers, it admitted that it employed the plaintiff to place the advertising, but contended that the advertising was limited to \$1,200 and that it was to be paid for in trade and that each application for advertisements should have indorsed thereon a stipulation to that effect.

After the "Keaton Week" had taken place, the plaintiff paid the bills which it had incurred and asked the defendant to pay it. The defendant did not do so and this action was commenced. The defendant does not claim that it did not authorize everything done which the plaintiff did, nor does it claim any defect in the performance by the plaintiff, except as we shall note.

[1-4] Using the language of defendant: "The issues were (1) Whether the agency was authorized to place advertising to the extent of \$1,200 and no more; (2) whether such advertising was to be placed only upon condition that the newspapers would take payment therefor in trade and (3) whether in any event the defendant's liability to pay therefor was to the newspapers or to the agency." The defendant does not follow this order in briefing, but the gravamen of its complaint is that the issues so enumerated were not properly presented by reason of certain errors committed at the trial. In assignments 1, 3, 4, 6, and 9 the defendant complains of the admission of evidence showing payments made by the plaintiff. It asserts the plaintiff in making the payments acted as a volunteer. We think it did not do so. Paragraph 4 of the letter written August 12, 1927, shows that defendant was to pay the plaintiff and that the plaintiff was to pay the newspapers, receive the discount, and retain the discount to its own use. There was other evidence which clearly authorized, at least by implication, plaintiff to pay the other expenses which it was expressly authorized to incur. The defendant complains because evidence of usage was introduced. It was in the nature of a description of the business in hand which is somewhat out of the ordinary. Among other things, it showed the following: As to a newspaper, an advertising agency undertakes to solicit and finally prepare for insertion advertising matter and to collect therefor and then to pay the newspaper. In turn the newspaper gives to the agency liberal discounts on the payments which are made promptly. As to the adver-

tiser, the agency undertakes to inform itself of his wants and needs and express them in the most effective form for insertion in a newspaper, to select the place in the newspaper where the advertisement is to be inserted, to obtain the most efficient and economical space, and make all arrangements therefor. On all of these matters it undertakes to be informed as fully as the proprietors of newspapers. Both as to the newspaper and as to the advertiser it undertakes to do perfect work. In the interest of the newspaper and also in the interest of the advertiser it undertakes to make payments promptly, obtain discounts for the prompt payments, and give the advertiser the benefit of the cheapest service possible. Mr. Dolman testified that he stated these matters to Mr. Setchel. Continuing, he testified that said facts were the general usage. Evidence of the covenants of standard forms of contracts used by agencies and newspapers was admitted. We think the trial court did not err in admitting it. It was but a method of showing what the nature of one of these transactions is in the absence of express covenants to the contrary. As the contract, if any, between the plaintiff and defendant rested in parol the evidence just referred to was not improper. Letters written by the parties after the end of "Keaton Week" were introduced. The defendant asserts that they were improperly received and were in the nature of self-serving declarations. The point is not sustained by the record. As recited in paragraph 2 of the letter dated August 12, 1927, Mr. Setchel endeavored to hold the contract open until it was confirmed by the defendant's "permanent board of directors." As neither a confirmation nor objection of defendant's "permanent board of directors" was sent forward before the plaintiff had fully performed everything by it to be done and performed, at least as to some parts of the agreement, the terms were not agreed to. Until all communications, written or oral, made before the trial were received and considered, the jury under the circumstances was not in a position to ascertain exactly what had been agreed to and what had not been agreed to. From what has been said above it is patent that defendant's motion to strike out the written estimate dated August 10, 1927, was properly denied, and the same comment applies to the motion to strike the letter dated August 12, 1927.

[5, 6] The defendant makes several attacks on the giving or refusing to give instructions. We do not find any merit in any one of the attacks. It objects to instruction No. VI. It says that the instruction submitted to the jury whether the letters constituted a contract; that it is in conflict with instruction No. VII; and that it withdrew from the jury the question of authority. A bare reading of it shows that it did nothing of the kind. It was not addressed to authority. That subject was fully discussed in other instructions. It complains of instruction No. VII. That objection is hyp-

ocritical and rests on a typographical error. The letter dated August 12th contained statements regarding the times within which payment should be made. The letter dated August 19th contained a list of the amounts that would be due each paper. Instruction No. VII clearly refers to both letters, but inadvertently repeats 19th instead of using 12th when referring to the letter which specified the times of payments.

The defendant further complains of instruction No. VII and asserts that it ignores conflicts in the evidence and assumes facts in so far as the last sentence stated the amount expended by the plaintiff and the commission thereon. We think it does not do so. That the plaintiff paid all bills incurred by it was not a disputed fact. That the total sum so paid was \$2,075.79 was not a disputed fact. Under what circumstances the plaintiff was entitled to be repaid by the defendant was the subject-matter of other instructions. The instruction under attack told the jury that if it found those circumstances in favor of the plaintiff then the jury could, under certain circumstances, enumerating them, add to its verdict fifteen per cent. as commission. It went no further.

[7, 8] The trial court refused to give defendant's proposed instruction No. II. That instruction purported to state the law as to the authority of this plaintiff to pay the newspapers and thereafter collect from the defendant. It purports to follow Civil Code, § 2343. That section states the law as to an agent's obligation to a third person. In this case we are considering the rights and obligations between principal and agent. In 2 C. J. 793, the rule is stated as follows: "Except where the contract of agency contains stipulations contrary to or inconsistent with any right of the agent to * * * reimbursement for liabilities or expenditures incurred in the furtherance of the agency, an agent ordinarily is entitled * * * to reimbursement from his principal for all advances and expenditures properly made in carrying into effect the purposes of the agency." The text cites, among other authorities, *Thompson-Houston Electric Co. v. Central R. Co.*, 6 Cal. Unrep. 202, 55 P. 777. Applying that rule to the instant case, there was nothing precluding the plaintiff from making the payments. There was no covenant in the contract limiting its right so to do.

[9] Complaint is also made because the trial court refused to give defendant's requested instruction No. IV. The court did not err. The instruction was an improper statement of the law. Among other things it purported to withdraw the letter dated August 12, 1927, as being no part of the evidence of the contract between the parties. To have so held would have been to commit reversible error.

The defendant asserts that the judgment was excessive in the sum of \$50. The plaintiff

admits the fact and asks that the judgment be modified accordingly. Therefore the words "the sum of two thousand three hundred and eighty-nine and two one hundredths (\$2,389.02)" contained in the judgment are changed to read as follows: "the sum of two thousand three hundred and thirty-nine and two one hundredths (\$2,339.02)."

As so modified the judgment is affirmed, and the plaintiff will recover its costs on this appeal.

We concur: NOURSE, P. J.; SPENCE, J.

KAUTZ v. ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited.*

TUDHOPE v. SAME.

Civ. 7344, 7320.

District Court of Appeal, First District,
Division 1, California.

Nov. 7, 1930.

Rehearing Denied Dec. 6, 1930. Hearing
Granted by Supreme Court Jan. 5, 1931.

1. Insurance ⇨146(1).

Courts endeavor to carry out policy as made and at same time prevent, if possible, exceptions and conditions from wholly devouring policy.

2. Insurance ⇨435.

Indorsement in automobile liability policy providing that policy shall apply to persons "legally operating automobile" held not intended to limit policy to instances where negligence is not made penal by statute.

3. Insurance ⇨435.

Trial court's construction that assured operating automobile while intoxicated was "legally operating automobile" within policy held consistent with true intent of parties.

Upon the automobile liability policy involved was an "omnibus coverage indorsement" which provided that the policy was extended to apply to any person while riding in or "legally operating any of the automobiles described."

4. Appeal and error ⇨1008(1).

Where trial court's construction of policy appears consistent with true intent of parties, appellate court will not substitute another interpretation, though equally tenable.

5. Insurance ⇨309.

To avoid policy for violation of specified material provisions, policy must contain declaration

violation shall have such effect (Civ. Code, § 2611).

6. Insurance ⇨309.

If provision in policy is material to risk, though violation be not declared ground for avoiding policy, noncompliance will nevertheless constitute defense (Civ. Code, § 2611).

7. Insurance ⇨668(4).

Whether stipulation in liability policy that automobile "is garaged or principally used" in certain place was material held fact question.

The appellate court could not say as a matter of law that the stipulation was not a material provision of the policy. Whether it was material was a question to be determined from all the facts and circumstances by the trial court.

8. Insurance ⇨332¼.

Proof of noncompliance with condition in liability policy that automobile was maintained in certain place, and that fact was material to risk, is defense.

9. Appeal and error ⇨205.

In action on automobile liability policy, excluding evidence of noncompliance with stipulation that automobile "is garaged or principally used" in certain place held prejudicial error, notwithstanding offer did not expressly include evidence of increased risk.

Defendant's offer of proof did not expressly include evidence that alleged failure to comply with stipulations increased risk further than that counsel stated that lower rate was charged in the place stipulated than in the place where the automobile was actually maintained. Proof of the fact that the provision was not complied with was the foundation of the defense, and, where this was excluded, the defendant was not bound to offer all the facts which would authorize a judgment in its favor, as it will be presumed under such circumstances that it could have proved them in the absence of a ruling rendering further evidence immaterial.

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

Actions by Anna Irene Kautz and by Lesley Tudhope, by her guardian ad litem, George Tudhope, against the Zurich General Accident & Liability Insurance Company, Limited. From judgments in favor of plaintiffs, defendant appeals.

Reversed.

J. Hampton Hoge, of San Francisco, and J. E. McCurdy, of San Mateo (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Jered A. Maguire, of San Francisco, and James T. O'Keefe, of Redwood City, for respondent Tudhope.

Norman S. Menifee, of San Francisco, for respondent Kautz.

PER CURIAM.

The above actions were brought to recover on a policy of insurance issued by Zurich General Accident & Liability Insurance Company, Limited, a corporation, to Stella Bayne, who is designated therein as the assured. Defendant corporation agreed for the period of one year commencing December 7, 1927, to indemnify the assured against loss from legal liability for damages caused by bodily injury accidentally suffered as the result of the ownership, maintenance, or use of a certain automobile. Upon the policy was an "omnibus coverage indorsement," which read as follows: "The policy to which this endorsement is attached is hereby extended to apply to any person or persons (other than the assured named in Special Condition 1) while riding in or legally operating any of the automobiles described in Special Condition 5, and any person, firm, or corporation legally responsible for the operation thereof, provided, such use or operation is within the permission of the named assured, or if the named assured is an individual, with the permission of an adult member of the named assured's household other than a chauffeur or a domestic servant, and provided also that this endorsement shall not be available to any automobile garage, sales agency, and/or service station, nor to any agent or employee thereof, and provided further that indemnity under the said policy shall inure first to the named assured and then (as to the remainder, if any) to any other person entitled thereto."

At the time of its issuance, the policy contained certain special conditions, among which were the following: "2. Address of insured 2742 Filbert Street, San Francisco. * * * 9. The automobiles are principally maintained and garaged in the city or town of Los Altos. 10. The automobiles are principally used in the city or town of Los Altos and in the vicinity of said city or town." On March 21, 1928, an indorsement referring to the above conditions was attached to the policy. This indorsement was as follows: "Special Conditions 2, 9, and 10 of the policy to which this endorsement is attached are hereby amended to show that the address of the assured is now 201 Buena Vista Avenue, Mill Valley, California, and that the automobile covered is maintained, garaged, and principally used in the city or town of Mill Valley, California. This endorsement to be effective as of noon (12:01 a. m. or 12:00 noon) of the 21st day of March, 1928. This endorsement is issued subject to such agreements, conditions, provisions, declarations and warranties as are contained in the policy to which it is attached, if not inconsistent herewith. * * *" Pursuant

to the statute (Stats. 1919, p. 776), there was inserted in the policy a provision "that in case judgment shall be secured against the insured in an action brought by the injured person * * * then an action may be brought against the company on the policy and subject to its terms and limitations by such injured person."

On November 18, 1928, the plaintiff Tudhope, due to the negligent operation of the automobile by one Earle L. Drais, who was driving the same by permission of the assured, accidentally suffered bodily injuries. An action to recover damages therefor was filed by said plaintiff against Drais, and on April 12, 1929, a judgment in the sum of \$2,750 and costs, which has become final, was recovered against him. Execution issued thereon, and the same was returned wholly unsatisfied, whereupon demand for the amount of the judgment was made upon defendant corporation and refused. Plaintiff Kautz, who was also riding in the automobile with Drais, suffered injuries in the same accident, and on May 7, 1929, recovered against the latter a judgment for damages in the sum of \$2,500, with costs, based upon his negligent operation of the car. This judgment has also become final. Execution issued thereon against Drais was returned wholly unsatisfied, and a demand for payment of the judgment was refused by defendant corporation. In the present actions, by which plaintiff sought to recover the amounts of said judgments from defendant company, the above facts were alleged, and as defenses thereto defendant averred that Drais was not legally operating the automobile at the time plaintiffs were injured, and, further, that by the indorsement hereinbefore referred to it was provided that the automobile should be maintained, garaged, and principally used in the city or town of Mill Valley; that contrary thereto the automobile was on the date of the accident, and for a long time prior thereto had been, maintained, garaged, and principally used in the city and county of San Francisco, and that this fact materially affected the risk. The questions were submitted for decision upon the same evidence. The trial court found in accordance with the allegations of the complaints and against the defendant upon the defenses mentioned. Judgments from which defendant has appealed were entered accordingly. The evidence shows without dispute that Drais at the time of the accident was intoxicated, and defendant contends that the court consequently erred in its conclusion that the driver was legally operating the automobile within the meaning of the policy, and also that evidence tending to prove the alleged breach of the policy was improperly excluded. The appeals were presented and will be considered together.

[1] It was held in *Pacific Heating & Ventilating Co. v. Williamsburgh, etc., Ins. Co.*, 158 Cal. 367, 111 P. 4, 5, that, while a policy of

insurance, like other contracts, must be construed according to the language and terms used therein to arrive at their true sense and meaning and courts will not undertake to relieve parties from the plain stipulations of the policy, still the rule is well established that provisos and exceptions must be strictly construed against the insurer, who is bound to use such language as to make the conditions, specifications, and provisions thereof clear to the ordinary mind, and, in case it fails to do so, any ambiguity or reasonable doubt must be resolved in favor of the assured. In each of the following cases the policy was similar in form to the one in question, and the insurer denied liability on the ground that the driver, not having procured an operator's license, was illegally operating the automobile. It was held that, notwithstanding such failure, the car was being legally operated within the meaning of the policy. *Odden v. Union Indemnity Co.* (Wash.) 286 P. 59; *Fagiani v. General Accident, etc., Corporation, Limited*, (Cal. App.) 287 P. 377. In the case last cited, the court said: "Under a liberal definition of the term, one is not 'legally operating' an automobile when he is driving it in violation of any provision of law, but obviously the term was not used in that broad sense in the policy in question, because to give it that meaning would be to destroy the protection which the policy purports to give to persons driving the automobile with the permission of the owner. It is a matter of common knowledge that nearly every automobile accident is due to a breach of some statutory provision." The court suggested that the provision related to the manner of operating the automobile, but this construction no less than the one urged by the insurer in that case would tend to destroy the value of this character of insurance; it also being a matter of common knowledge that the majority of automobile accidents are caused by the failure to observe the statutory regulations respecting the driver's condition as to sobriety, and the manner of operating the car; such violations with few exceptions being made criminal offenses. But, as the court further said, after referring to the fact, which is true here, that the exemption claimed by the insurer was not inserted in the "exclusion" clause of the policy, and stating that this might properly be considered in construing the contract: "It is not necessary to determine what was intended by the use of the term 'legally operating,' but it is sufficient to show that it is uncertain whether it was the intention of the parties to the contract to give it the meaning for which appellant [the insurer] contends." As was aptly said in *Pacific Heating, etc., Co. v. Williamsburgh, etc., Ins. Co.*, *supra*, with respect to the rule of construction where the provisions of the policy are ambiguous: "This rule is based upon the fact that the contract of insurance is drawn by the insurer, and in it are usually placed many exceptions, conditions, and for-

feitures deliberately and purposely by the insurer so as to avoid liability, and the ordinary person in paying a premium and accepting a policy does not read, or, if he does read, he cannot understand the many conditions, exemptions, and exceptions contained therein. * * * Therefore the courts endeavor to carry out the contracts as made by the parties, and, at the same time, prevent, if possible, the exceptions and conditions from wholly devouring the policy."

[2-4] While the meaning of the provision cannot be determined with certainty, yet when the whole contract is considered in connection with what the parties appear to have had in mind, namely, indemnity against the consequences of the negligent use or operation of the automobile, it is reasonably clear that it was not the intention to limit the policy to the few instances where the negligent act or omission is not made penal by the statute. The construction given the instrument by the trial court appears to be consistent with the true intent of the parties, and, where that is the case, the appellate court will not substitute another interpretation, though it seem equally tenable. *Slama Tire Protector Co. v. Ritchie*, 31 Cal. App. 555, 161 P. 25; *Manley v. Pacific Indemnity, etc., Co.*, 79 Cal. App. 641, 250 P. 710.

[5-7] As stated, the indorsement of March 21, 1928, amended certain of the "special conditions" in the policy, namely, conditions 9 and 10, by providing "that the automobile covered is maintained, garaged, and principally used in the city or town of Mill Valley, California." The policy also contained the following provision: "This policy is made and accepted subject to the general conditions, special conditions, and warranties hereinafter set forth, together with such other general conditions, special conditions, and warranties as may be endorsed hereon or added hereto in like manner as if the same were respectively repeated and incorporated herein, and compliance with such general conditions, special conditions, and warranties shall be a condition precedent to the right of recovery hereunder." While no particular form of words is necessary to create a warranty (Civ. Code, § 2604), here the statement quoted is not found among the schedule of warranties in the policy, but is designated in the policy as one of the special conditions. The effect intended by these provisions is obscurely expressed, and, in case of doubt as to the construction to be given where the meaning of the instrument is not plain, it has been held that "the court should lean against that construction which imposes upon the assured the obligation of a warranty." *National Bank, etc., v. Union Insurance Co., etc.*, 88 Cal. 497, 504, 26 P. 509, 22 Am. St. Rep. 324. The statute provides that "a policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision

does not avoid the policy." Civ. Code, § 2611. To meet the terms of this section, however, the policy must contain a declaration that a violation of the specified provisions thereof shall avoid it, and it was held in *Everett v. Standard Accident Insurance Co.*, 45 Cal. App. 332, 345, 187 P. 996, 1001, that a clause, in substantially the same language as that above quoted, requiring compliance with the provisions of the policy as a condition precedent to a recovery thereunder, fell short of the declaration required by the statute. As the court said: "If such had been the intention, the policy should have so declared in clear and unmistakable terms."

But if the provision in question be in fact material to the risk, though its violation be not declared a ground for avoiding the policy, a noncompliance therewith will nevertheless constitute a defense to an action on the policy. *Victoria Steamship Co. v. Western Assurance Co.*, etc., 167 Cal. 348, 139 P. 807; *Everett v. Standard Accident Insurance Co.*, supra. The authorities recognize the reasonableness of the classification and premium charges based upon the place where automobiles are kept and used (*Brest v. Commissioner of Insurance* [Mass.] 169 N. E. 657), and we cannot say as a matter of law that the stipulation that the automobile "is maintained, garaged, or principally used" in Mill Valley was not a material provision of the policy. Whether it was material in the sense that a noncompliance increased the hazard or that the stipulation influenced the insurer in fixing the rate of the premium was a question to be determined from all the facts and circumstances by the trial court. *McEwen v. New York Life Ins. Co.*, 23 Cal. App. 694, 139 P. 242. Defendant in this connection sought to prove that, contrary to the stipulation in the policy, the automobile was garaged in San Francisco and not in Mill Valley. The court excluded the evidence on the ground that the fact would be immaterial. While defendant's offer of proof did not expressly include evidence that the alleged failure to comply with this provision increased the risk further than that its counsel stated that a lower rate was charged in Mill Valley than in San Francisco, proof of the fact that the provision was not complied with was the foundation of the defense, and, where this was excluded, it has been held that a party is not bound to offer all the facts which would authorize a judgment in his favor, as it will be presumed under such circumstances that he could have proved them in the absence of a ruling rendering further evidence immaterial. *Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209; *Loeb v. Willis*, 100 N. Y. 231, 3 N. E. 177; *Murphey v. Brown*, 12 Ariz. 268, 100 P. 801.

[8, 9] Proof that contrary to the terms of the policy the automobile was garaged in San Francisco and that this fact was material to

the risk would have constituted a defense to the action (*Victoria Steamship Co. v. Western Assurance Co.*, etc., supra; *Everett v. Standard Accident Ins. Co.*, supra), and the exclusion of evidence on this issue was prejudicially erroneous. For this reason the judgments must be reversed.

The judgments appealed from are accordingly reversed.

109 Cal. App. 489

EARLY v. OWENS et al.
Civ. 270.

District Court of Appeal, Fourth District,
California.

Nov. 10, 1930.

1. Principal and agent Ⓒ69(2).

Agent must disclose to principal all information within his knowledge concerning transaction, and cannot retain secret profit.

2. Brokers Ⓒ37.

Evidence held to support finding that plaintiff, party to exchange contract, was not damaged or defrauded by broker, exercising dual agency, who repurchased part of property from other party.

Evidence showed that plaintiff, in exchange for his property, received more valuable property; that he traded the identical property he intended to trade, and received the property which he expected; that he knew value of all property was inflated and fictitious trade value; that broker, dealing with other party to contract with plaintiff's consent, purchased some of plaintiff's property for cash, which other party desired to obtain; and that, if plaintiff had examined contracts of exchange and other instruments which had been deposited in escrow, he would have been informed of every detail of which he complained.

3. Escrows Ⓒ8(1).

Holder of escrow is agent for all parties until escrow is closed.

4. Principal and agent Ⓒ178(1).

Notice possessed by agent within scope of employment, and in connection with and during agency, is notice to principal (Civ. Code, § 2332).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by James G. Early against L. D. Owens, Jr., and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Otto A. Gerth, of Los Angeles, for appellant.

Howard F. Shepherd, of Los Angeles, for respondents.

MARKS, Acting P. J.

L. D. Owens, Jr., was a real estate broker, duly licensed under the laws of California, doing business under the name of L. D. Owens Company. W. J. Caverley was a salesman working out of the office of this company.

The complaint in this action alleges: That on or about October 27, 1926, appellant was the owner of ten acres of land near Rialto in the county of San Bernardino of the reasonable value of \$20,000; that he was also the owner of a promissory note in the principal sum of \$15,000 secured by a deed of trust upon real property in the county of Los Angeles; that he was also the owner of an improved lot located on Melrose avenue in the city of Los Angeles of the reasonable value of \$20,000; and that at said time Fannie Jacobs was the owner of four improved lots on Santa Monica boulevard in the city of Los Angeles of the reasonable value of \$70,000. The complaint further alleged that on the 27th day of October, 1926, respondents were employed by appellant as his agents and brokers to sell and trade his property together with the sum of \$1,250 for the Fannie Jacobs property at the agreed price of \$88,000; that the exchange was fully consummated and the conveyances made and delivered concluding the transfers; that appellant paid respondents the sum of \$1,965 for their services in consummating the exchange; and, further, that at the time of, and before the exchange, respondents had received a listing of the Fannie Jacobs property for a sum approximating \$70,000, at which price she was then willing to sell; that this fact was concealed by respondents from appellant; that in consummating the exchange, respondents, without the knowledge of appellant, kept for themselves the ten-acre orange and lemon grove near Rialto, and ever since such time have held the legal title thereto without the authority or consent of appellant. The complaint further alleged that upon discovering these facts appellant demanded that respondents return to him the Rialto property and the sum of \$1,965 paid as commission. This demand was refused. This action was brought to obtain a judgment decreeing that the title to the Rialto property was held by respondents in trust for appellant, and that respondents be ordered to convey said property to him; or that appellant be given judgment against respondent in the sum of \$21,965.

The answer of respondents denied all of the allegations of the complaint upon which fraud on their part could be predicated. They alleged that the L. D. Owens Company was the agent for appellant and for Fannie Jacobs in making the exchange of properties, and that this agency was known to both principals, together with the fact that commissions were paid by both of them. The answer further alleged that the \$15,000 promissory note was secured by a second deed of trust and was of the reasonable market value of not more than \$12,500; that the Melrose avenue property was subject to a mortgage of \$5,000 and that the equity of appellant therein was of a value of not more than \$9,500; that the Rialto property of appellant did not have a reasonable market value of more than \$8,000; that the property of Fannie Jacobs was of the reasonable market value of \$75,000 or more and was subject to incumbrances in the total sum of \$36,750, and that she had listed said property for sale with the L. D. Owens Company for the sum of \$70,310 in cash. It was further alleged that the exchange value put by appellant upon his property was greatly in excess of its market value, and that to meet this inflated value and to consummate the trade, Fannie Jacobs placed the value of her property at \$88,000. It was further alleged that Fannie Jacobs was willing to accept appellant's Melrose avenue property in the exchange, but was unwilling to accept either the promissory note or the Rialto orange and lemon grove, and that these had to be sold and reduced to cash to consummate the transaction; and that, with the full knowledge and consent of appellant, the promissory note was purchased by L. D. Owens, Jr., for \$13,800 and the Rialto property for \$7,500, which sums were paid by him to Fannie Jacobs and the trade thus consummated; that appellant indorsed the promissory note and deeded the Rialto property to Fannie Jacobs, who in turn conveyed these properties to L. D. Owens, Jr.

The trial court found the allegations of the answer true, and that respondents had informed appellant that the price of \$88,000 fixed upon the Fannie Jacobs property was a trade value only, and that it could be purchased for very much less than this amount. It further found that the sale of the promissory note and the Rialto property by Fannie Jacobs to L. D. Owens, Jr., was made with the knowledge and consent of appellant. It further found that the net value of the property traded and money paid by appellant for the Jacobs property totaled the sum of \$33,550, and that the net value of the Fannie Jacobs property received by appellant was the sum of \$38,250. It further found that there was no fraud or deceit practiced upon appellant by respondents or either of them, and that appellant had not been damaged in any sum, but had received in the exchange property of

more value than the worth of the money and property paid and conveyed by him to Fannie Jacobs. Upon these findings the court entered judgment in favor of respondents.

[1] Appellant's chief contention upon which he relies for a reversal of the judgment is that the evidence fails to support the findings of the trial court to the effect that the purchase of the Rialto property by L. D. Owens, Jr., was with the knowledge and consent of appellant. He relies upon the well-established rule of law that an agent is required to disclose to his principal all information within his knowledge concerning a transaction being consummated for such principal, and that an agent cannot make a secret profit when acting for the principal. He relies upon the fact that the valuations of the respective parcels of his property were set forth in the exchange agreements and maintains that these valuations were binding upon all of the parties. He also contends that respondents should have obtained for him the Fannie Jacobs property at a price of \$70,310 instead of \$88,000.

[2] We have examined the record at length and have reached the conclusion that the findings of the trial court are amply supported by the evidence. Both respondents told appellant that the valuation of \$88,000 placed upon the Fannie Jacobs property was for trading purposes only, and that it could be purchased for much less than that sum. They told appellant that Fannie Jacobs needed money very badly and could not accept all of his property in trade, and that the orange and lemon grove and promissory note would have to be liquidated and reduced to cash before the transaction could be consummated. It is well established that respondents tried to get appellant to take the orange grove for \$7,500 and pay this amount into the escrow so that the transaction could be closed. In fact, L. D. Owens, Jr., testified that appellant knew that he had taken title to the orange and lemon grove and had told him where he could sell the orange crop. There is ample evidence in the record to support the court's finding that this information was conveyed to appellant during the negotiations between the parties and before the transaction was completed.

Appellant admitted that respondents tried to get him to repurchase the orange grove for \$7,500, but maintained that this offer was made after the exchange was completed. Appellant's testimony in this respect was thoroughly impeached by his testimony in a deposition given before the trial. In this deposition he testified that he knew that the prices fixed on his properties were fixed above their actual values and upon an exchange basis, and that he knew that the Fannie Jacobs property could be purchased for a sum much less than the \$88,000 named in

the agreement of exchange. In this deposition he testified that L. D. Owens, Jr., told him that Fannie Jacobs would not take the Rialto property on the exchange, and that it would have to be disposed of before the exchange was completed, so that Fannie Jacobs could receive money therefor.

It further appears from the undisputed evidence in the record that the contracts of exchange were placed in escrow with the Guaranty Building & Loan Association of Hollywood, Cal. In this escrow and as a part thereof are instructions to the escrow holder signed by Fannie Jacobs and her husband in which it appears that the Rialto grove was to be sold to Owens for the sum of \$7,500 and the promissory note and deed of trust for the sum of \$12,750, she receiving for her property, through escrow, the Melrose avenue property of appellant and cash in the sum of \$20,800. An assignment of the note and deed of trust from Fannie Jacobs and her husband to L. D. Owens, Jr., was placed in this escrow, as was a deed to the Rialto property conveying it from Fannie Jacobs and her husband to L. D. Owens, Jr. A further instruction was deposited by L. D. Owens, Jr., in this same escrow instructing the escrow holder to deliver the promissory note and deed of trust to the Los Angeles Home Builders upon its payment of \$13,800 into the escrow. This same instrument recited that this sum, together with the money paid into escrow by Owens for the Rialto property, be paid to Fannie Jacobs. It clearly appears from the escrow instructions of Fannie Jacobs that the promissory note and deed of trust and the Rialto grove were being sold by her to L. D. Owens, Jr., at a price fixed by her. Before the close of the escrow Owens succeeded in selling the note and deed of trust to the Los Angeles Home Builders. Had appellant examined the various instruments and instructions deposited in escrow, he would have been informed of the entire transaction and would have known every detail of it about which he now complains.

[3] It is well-settled law in California that the holder of an escrow is agent for all parties up to the time that the escrow is closed. *Shreeves v. Pearson*, 194 Cal. 699, 230 P. 448; *McDonald v. Huff*, 77 Cal. 279, 19 P. 499; *Bartley v. Fraser*, 16 Cal. App. 560, 117 P. 683; *First National Bank v. Caldwell*, 84 Cal. App. 438, 258 P. 411; *Law v. Title Guarantee & Trust Co.*, 91 Cal. App. 621, 267 P. 565. In this case the escrow was not closed until after all of the documents we have referred to were placed therein.

[4] It is also well-settled law in this state that notice given to or possessed by an agent within the scope of his employment and in connection with, and during his agency, is notice to the principal. Section 2332, Civ. Code; *Bogart v. George K. Porter Co.*, 193

Cal. 197, 223 P. 959, 31 A. L. R. 1045; Waldeck v. Hedden, 89 Cal. App. 485, 265 P. 340. In the case of Shamlian v. Wells, 197 Cal. 716, 242 P. 483, 484, it was held as follows: "The general rule is well settled that the knowledge of the agent in the course of his agency is the knowledge of the principal. 1 Cal. Jur. 846, and cases cited. It rests on the assumption that the agent will communicate to his principal all information acquired in the course of his agency, and when the knowledge of the agent is ascertained the constructive notice to the principal is conclusive. 1 Cal. Jur. 853, and cases cited."

In the case of Watson v. Sutro, 86 Cal. 500, 24 P. 172, 176, 25 P. 64, it was held as follows: "Knowledge, by notice to attorney or counsel or agent, acquired during the negotiation for a purchase, is constructive notice to their principal. If it were otherwise, it would cause great inconvenience, and notice would be avoided in every case by employing agents." See cases cited in 2 Lead. Cas. Eq. pt. 1, pp. 133, 134. That notice to an agent is notice to the principal has been held in this state ever since Connelly v. Peck, decided in 1856, and reported in 6 Cal. 348; followed in May v. Borel, 12 Cal. 91; Stanley v. Green, 12 Cal. 148; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543. See other cases referred to in Gear's California Index-Digest, on page 97. Notice to counsel or attorney is constructive notice to client: Bierce v. Red Bluff Co., 31 Cal. 161 (decided in 1866), and Donald v. Beals, 57 Cal. 399. All these cases in regard to an agent apply to an attorney or counsel, for they are a species of agent. Justice Bradley, in the Distilled Spirits Case, 11 Wall. 367 [20 L. Ed. 167], states the principle on which the rule rests. "The general rule," says the learned judge, "that a principal is bound by the knowledge of his agent, is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty." It will be of no avail to the purchaser that the agent omitted to communicate what he ascertained to his principal. Williamson v. Brown, 15 N. Y. 359. In other words, one who acts through another will be presumed to know all that the agent learns during the transaction, whether it is actually communicated to him or not. There is no difference in this respect between actual and constructive notice; for, if there were, an agent would be employed whenever it was convenient to remain in ignorance. Bank of United States v. Davis, 2 Hill [N. Y.] 451-461. Or, as the reason of the rule was stated by

Lord Brougham: "Policy, and the safety of the public, forbid a person to deny knowledge while he is so dealing, as to keep himself ignorant, or so that he may keep himself ignorant, and yet all the while let his agent know, and himself profit by that knowledge." Kennedy v. Green, 3 Mylne & K. 699-719. It is plain that the ordinary dealings of men could not be carried on without imperiling the rights of property to a degree which could hardly be conceived, and infinite wrong done to innocent persons, unless the rules above pointed out were established canons of law."

We must therefore conclude that appellant had actual notice from respondents that L. D. Owens, Jr., was purchasing the Rialto property from Fannie Jacobs, and that he also had constructive notice through his agent, the escrow holder, of every detail of the transaction before the exchange was consummated. Appellant cannot now be heard to complain because his agent, Owen purchased a portion of the property from Fannie Jacobs, the party to whom appellant conveyed it, as this was all disclosed in the escrow instructions. Respondents received no secret profit. Furthermore, Owens paid his own money to Fannie Jacobs for the Rialto property, the benefits from which payment are still retained by appellant, and nowhere does it appear that he ever made any offer to restore to Owens the money paid out by him.

It further appears that appellant gave to Fannie Jacobs just the property he intended to give her and received from her in exchange the identical property which he expected to obtain. The value of the property given, and the value of the property received, had been raised above their actual market values to fictitious trade values by both parties to the transaction. Appellant received a greater value in the Jacobs property than he gave to Fannie Jacobs in his property. He has shown no damage resulting from this transaction and under the circumstances of this case he cannot complain. Rouse v. Morgan (Cal. App.) 291 P. 441.

As we have concluded from the record before us that the findings of the trial court are amply supported by the evidence, that there was no fraud practiced upon appellant in the transaction, that no secret profit was made by respondents, that appellant was in no way damaged by anything said or done by any of the other parties to the transfers, we cannot disturb the judgment.

Judgment affirmed.

We concur: BARNARD, J.; WARMER, Justice pro tem.

**PACIFIC COAST ENGINEERING CO. v.
DETROIT FIDELITY & SURETY
CO. ***
Civ. 7475.

District Court of Appeal, First District,
Division 2, California.

Nov. 14, 1930.

Rehearing Denied Dec. 13, 1930. Hearing
Granted by Supreme Court Jan. 12, 1931.

1. Principal and surety ⇨118.

Any act of creditor by which principal is discharged from liability will discharge surety.

2. Contracts ⇨272.

Where subcontractor abandoned work and contractor wrote that subcontract was "terminated and canceled," *held* contract was rescinded, restoring parties to position prior to making contract (Civ. Code, § 1688).

[Ed. Note.—For other definitions of "Terminate," and "Cancel," see Words and Phrases.]

3. Contracts ⇨271.

Notice to rescind need not be formal or explicit, but is sufficient if clearly giving notice of intention to consider contract at end.

4. Contracts ⇨350(3).

Finding that contract to furnish labor and equipment for erection of structural steel was not rescinded *held* not supported by evidence.

Evidence disclosed that subcontractor abandoned contract and that contractor wrote letter to subcontractor terminating and canceling contract, took over work, and actually completed it.

5. Corporations ⇨406(2).

Cancellation by engineering company's president of contract with subcontractor *held* within scope of business, as regards president's authority.

6. Corporations ⇨426(7).

Where engineering company's president canceled contract with subcontractor, and company completed work, treating contract as canceled, *held* company could not urge president's lack of authority to cancel contract.

7. Corporations ⇨432(12).

Cancellation by engineering company's president of contract with subcontractor *held* *prima facie* to show authority; no by-laws having been introduced to contrary.

8. Principal and surety ⇨119.

Where contractor rescinded contract with subcontractor, *held* subcontractor's surety was discharged.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by the Pacific Coast Engineering Company against the Detroit Fidelity & Surety Company. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

John Ralph Wilson, of San Francisco, for appellant.

George F. Snyder, of San Francisco, for respondent.

PRESTON, Justice pro tem.

Plaintiff, Pacific Coast Engineering Company, had a contract for the construction of the Sacramento Memorial Auditorium in Sacramento. On November 25, 1925, plaintiff entered into a contract with W. H. Worswick, whereby Worswick agreed to furnish all of the labor and equipment, including staging, planking, machinery, rigging, etc., necessary to commence and complete the erection and field painting of all structural steel for said memorial auditorium. Defendant, Detroit Fidelity & Surety Company, a corporation, executed and delivered to plaintiff a bond for the faithful performance of the contract by Worswick. Worswick commenced work in January, 1926, and during that month erected 67 tons of steel. On February 3, 1926, plaintiff paid Worswick \$200, on February 16th, \$200, and on February 19th, \$250. Worswick erected no steel subsequent to February 17, 1926.

On said February 17, 1926, Worswick abandoned said contract, and the plaintiff took over the performance of the work required by said contract and completed said work. After the work was completed, plaintiff brought this action against the defendant bonding company as Worswick's surety. The case was tried by the court without a jury, and judgment was rendered in favor of plaintiff, from which judgment the defendant appeals.

Appellant's first contention is this: "Worswick's contract was cancelled by plaintiff; the contract was thereupon at an end and plaintiff could not, thereafter, maintain an action for its breach against Worswick or against defendant as his surety."

We think this contention must be sustained. The trial court found: "It is not true the said contract was cancelled or rescinded." This finding is not supported by the evidence. As above stated, Worswick abandoned his contract on February 17, 1926. Thereafter, and on March 1, 1926, after Worswick had abandoned the work, the plaintiff wrote him a letter as follows:

"Mr. W. H. Worswick, 444 California Street, San Francisco, California.

"Dear Sir: Inasmuch as you are in default in your performance of the agreement entered

into between yourself and the undersigned, Pacific Coast Engineering Company, on the 25th day of November, 1925, for the erection of the steel work on the Sacramento Memorial Auditorium at Sacramento, and this default has continued for a period of more than ten days to our great damage, this will serve to notify you that your contract above mentioned is now terminated and cancelled (italics ours).

"Yours very truly,

"Pacific Coast Engineering Company

"By [signed] J. J. Coney, President."

[1] It is a familiar principle of suretyship that any act of the creditor, by which the principal is discharged from liability, will also discharge the surety. *Lamb v. Wahlenmaier*, 144 Cal. 91-95, 77 P. 765, 103 Am. St. Rep. 66; *Montgomery v. Sayre*, 100 Cal. 182, 34 P. 646, 38 Am. St. Rep. 271; secs. 2819 and 2840, Civ. Code; *Montgomery v. Sayre*, 91 Cal. 210, 27 P. 648; 32 Cyc. 151; *Holden v. Mensinger*, 175 Cal. 300-304, 165 P. 950.

[2] Therefore, if Worswick was discharged from his contract, appellant was discharged from any liability under the bond. In the letter above quoted, plaintiff notified Worswick that the contract was "terminated and cancelled." We see no escape from the conclusion that, by this act on the part of plaintiff, the contract was annulled and rescinded, and the parties were in the same position as though the contract with Worswick had never been entered into. Section 1688, Civ. Code; *Hayt v. Bentel* (Cal. App.) 126 P. 370; *Lemle v. Barry*, 181 Cal. 1, 183 P. 150; *House v. Piercy*, 181 Cal. 247, 183 P. 807; *Pearson v. Brown*, 27 Cal. App. 125, 148 P. 956.

[3] The law is also well settled that it is not necessary that the notice to rescind shall be in any formal or explicit language. It is sufficient that the notice shall be given to the other party which clearly shows the intention of the person rescinding to consider the contract at an end. *McNeese v. McNeese*, 190 Cal. 402, 213 P. 36; *Dyer Bros. Golden West Iron Works v. Central Iron Works*, 72 Cal. App. 202, 237 P. 386.

Plaintiff's intention to cancel the contract with Worswick is further manifested by the fact that plaintiff took over the work and actually completed it.

[4] It is therefore clear to us that said finding of the trial court is not supported by the evidence.

[5-8] Plaintiff insists that the president of the plaintiff corporation had no authority to write the above letter of cancellation and rescission. We see no force to this contention. It is admitted in the evidence that Mr. Coney was president of plaintiff at the time of the execution and cancellation of the con-

tract. No by-laws were introduced by respondent showing any limitation upon his authority. It was obviously a matter within the scope of plaintiff's business, and the evidence shows that, after the trouble arose, Mr. Coney actively endeavored to adjust matters, and that after March 1st the plaintiff treated Worswick's contract as canceled by its president and completed the work. Under such circumstances, plaintiff is in no position to contend that its president had no authority to cancel the contract with Worswick. Furthermore, a prima facie case of his authority was made out, which plaintiff did not attempt to overcome by introducing its by-laws. *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 P. 964; *Grummet v. Fresno Glazed Cement Pipe Co.*, 181 Cal. 509, 185 P. 888; *Reardon v. Richmond Land Co.*, 21 Cal. App. 358, 131 P. 894; *International M. Co. v. National R. Co.*, 67 Cal. App. 498, 227 P. 918.

The other contention made by appellant need not be considered.

We think the judgment must be reversed, and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

109 Cal. App. 534

BABCOCK v. OLHASSO.

Civ. 4216.

District Court of Appeal, Third Appellate District, California.

Nov. 14, 1930.

Rehearing Denied Dec. 13, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

1. Appeal and error ⇌ 1033(9).

Where maker of note recovered usurious interest, appealing payee could not complain because judgment was less than evidence warranted.

2. Usury ⇌ 52.

Promissory note that includes bonus which, with interest, exceeds 12 per cent. on sum borrowed, is usurious, and void to extent of interest and bonus (*Deering's Gen. Laws* 1923, p. 1384, §§ 2, 3).

3. Usury ⇌ 102(2).

Payment of usurious interest is not regarded as voluntary, but as being exacted under restraint (*Deering's Gen. Laws* 1923, p. 1384, §§ 2, 3).

4. Usury ⇌ 102(6).

Usurious interest actually paid may be recovered in assumpsit (*Deering's Gen. Laws* 1923, p. 1384, §§ 2, 3).

5. Usury $\S$ 102(7), 138.

Maker of note held entitled to recover usurious interest paid over one year before action, besides bonus exacted for loan, and treble amount of interest paid within one year (Deering's Gen. Laws 1923, p. 1384, §§ 2, 3).

6. Usury $\S$ 129.

Maker of note, secured by trust deed, notwithstanding subsequent conveyance of trust property to third person, who paid purchase price to payee under escrow agreement, could recover usurious interest from payee (Deering's Gen. Laws 1923, p. 1384, §§ 2, 3).

Evidence showed that maker of note involved, in selling trust property to third person, deposited instruments of conveyance in escrow, and that payee thereupon deposited his note and trust deed in escrow, together with reconveyance, with instructions to deliver instruments to proper persons on payment of balance due on note. As part of same transaction, third person deposited balance due on note, with instructions to pay it to payee when sale was consummated.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Edith Babcock against B. Olhasso. Judgment for plaintiff, and defendant appeals.

Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

Frazier McIntosh, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment for the recovery of usurious interest against the payee of a promissory note.

November 27, 1924, the respondent borrowed \$2,000 from the appellant. A bonus of \$500 was exacted by the appellant for making the loan. The respondent executed and delivered to the appellant her promissory note for \$2,500 at 8 per cent. interest per annum. The note was payable in monthly installments of \$55 until June 2, 1927, at which date the balance became due. This note was secured by a trust deed upon real property belonging to the respondent. Prior to October 26, 1925, twelve installments of \$55 each had been paid. These payments were first applied to the interest due, and the balance was credited upon the principal. The sum of \$182.72 was thus applied to the account of interest. The balance of these payments, amounting to \$477.28, was credited to the principal. This

left a balance of \$2,022.72 due upon the principal sum.

On the last-mentioned date the respondent sold to George W. Heckert the real property upon which she had executed the trust deed. The necessary instruments of conveyance were deposited in escrow with the Alhambra branch of the California Bank. On the same day the appellant deposited in escrow with that bank the note and trust deed, together with a reconveyance of the property, accompanied by instructions to deliver the instruments to the proper parties upon payment of the balance of principal and interest which was due upon this note. This sum was to be credited to the appellant's account. As a part of the same transaction Heckert forthwith deposited with the bank the amount due upon the note, with directions to pay it to the appellant when the purchase was consummated. This sum was subsequently paid to the appellant in satisfaction of the note, and charged against Heckert as a part of the purchase price of the property.

June 15, 1926, the respondent brought suit to recover judgment for treble the amount of interest and bonus paid to the appellant on the ground that the payments were usurious and void. The answer admits the loan substantially as it was alleged. It acknowledges the receipt of interest in the sum of \$207.98. The exacting of \$500 bonus is not denied. The record shows that \$126.06 was paid on account of interest more than a year before the commencement of the action.

The court found that the respondent borrowed only \$2,000 from the appellant; that the appellant exacted \$500 bonus for the loan, and charged in addition thereto 8 per cent. interest on the sum of \$2,500; that the respondent executed and delivered to the appellant her promissory note for \$2,500 at 8 per cent. interest per annum, due three years from its date; that the respondent paid the appellant the full amount of the loan, together with \$500 bonus and \$207.98 interest; that a portion of said interest, to wit, the sum of \$77.82, and the bonus were paid within one year prior to the commencement of the action; that the balance of the interest, to wit, \$130.16, was paid more than one year before the commencement of the action; that the payments of bonus and interest exceeded 12 per cent. per annum of the amount borrowed, and were usurious and void. The court thereupon rendered judgment in favor of the respondent for treble the amount of \$577.82, plus the additional sum of \$130.16, which the court erroneously found to be \$1,852.62.

[1] The undisputed evidence shows that only \$126.06 was paid on account of interest prior to one year before the commencement of the action. The difference between that

sum and \$207.98, which was the total amount of interest paid, is \$81.92. This last-mentioned sum, together with the bonus, was the amount paid on account of interest within one year prior to the commencement of the action. The court should have allowed treble the sum of \$581.92 in addition to the further sum of \$126.06, which aggregates the sum of \$1,871.82. The appellant, however, may not complain because the court has rendered judgment for less than the evidence warrants.

[2-4] A promissory note which includes a bonus in addition to a rate of interest which in the aggregate amounts to more than 12 per cent. on the sum borrowed is illegal and void so far as the interest and bonus are concerned. Calif. Usury Law, 1. Deering's Gen. Laws of 1923, p. 1384, § 2. The principal sum loaned is, however, not forfeited. *Haines v. Comm. Mtg. Co.*, 200 Cal. 609, 622, 254 P. 956, 255 P. 805, 53 A. L. R. 725; *Baker v. Butcher* (Cal. App.) 289 P. 236; *Van Noy v. Goldberg*, 98 Cal. App. 604, 610, 277 P. 538. The payment of usurious interest is regarded as having been exacted under restraint. It is not deemed to be a voluntary payment. 27 R. C. L. 269, § 72. Such usurious and illegal interest which has been actually paid may be recovered in an action of assumpsit. *Curtis v. Thaxter*, 204 Cal. 439, 268 P. 630.

Section 2 of the Usury Law, supra, provides that: "Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement * * * to pay interest. * * *" Section 3 of this act provides a penalty against "any person * * * who shall ask, demand, receive, take, accept or charge more than twelve per centum per annum upon the sum of money actually loaned." The person exacting such usurious interest is guilty of a misdemeanor, and may be punished therefor by a fine or imprisonment. This same section further provides that: "Every person * * * who for any loan * * * of money * * * shall have paid * * * any greater sum or value than is allowed to be received under the preceding sections, one and two [to-wit 12% interest per annum on the amount actually borrowed], may either in person or [by] his or its personal representative, recover in an action at law against the person * * * who shall have taken or received the same, * * * treble the amount of the money so paid * * * providing such action shall be brought within one year after such payment. * * *"

[5] The respondent was therefore entitled to judgment for threefold the sum of \$581.92, which was the amount of interest paid within one year of the time of commencing this action. The respondent was also entitled to recover the balance of the interest, to wit, \$126.06, which was illegally collected from her, although it was paid more than a year before the action was brought. This last sum, however, may not be trebled. The total sum to which the respondent was entitled is \$1,871.82.

[6] The only ground for reversal which the appellant seriously urges is that the usurious payments were in fact made by Heckert, the purchaser of the land, and not by Edith Babcock, the maker of the note, and that the respondent is therefore precluded from maintaining the action. The answer alleged that the final payments amounting to the sum of \$2,047.88 were paid by Heckert.

The position of the appellant in this regard is stated in the following language: "Where property encumbered by a usurious lien, is transferred, subject to the lien, there can be no recovery for usury on the part of either the seller or the buyer." To support this assertion he quotes from *Matthews v. Ormerd*, 140 Cal. 578, 74 P. 136, 138, as follows: "The law seems to be well settled that a purchaser of mortgaged premises from the mortgagor, who takes a conveyance expressly 'subject to the mortgage,' cannot set up a taint of usury in the mortgage."

The foregoing principle, however, has no application to the present case. Heckert did not purchase the land subject to the trust deed. The trust deed was paid, satisfied, and reconveyed before Heckert took title to the property. All of the instruments, together with the entire purchase price of the property, including the amount which was necessary to satisfy the note, were placed in escrow with adequate instructions to constitute one complete transaction. The legal effect of this transaction is that Heckert bought the land from the respondent free from incumbrance, paying to the bank as her trustee the full purchase price. She applied a sufficient amount of this purchase price to satisfy the appellant's note. He thereupon reconveyed the incumbered land and canceled the note. Heckert then took title. It was one transaction. The trust deed and note were not transferred to Heckert. The respondent is therefore entitled to recover judgment for the usurious interest which she paid, pursuant to the provisions of the usury law of California.

The judgment is affirmed.

109 Cal. App. 392

BARRON et al. v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA.

Civ. 7319.

District Court of Appeal, First District, Division 1, California.

Nov. 8, 1930.

Rehearing Denied Dec. 8, 1930. Hearing Denied by Supreme Court Jan. 5, 1931.

1. Statutes ☞188.

Words of statute, unless having technical meaning, must be interpreted according to common acceptance and read and understood in natural, ordinary, and popular sense.

2. Physicians and surgeons ☞10.

Truthful advertising, whether by newspaper or radio, by licensed dentist, is not prohibited (St. 1915, p. 698, § 13).

3. Physicians and surgeons ☞11(2).

Where board is granted power to revoke license for certain reasons, license may not be revoked for other or different causes not clearly within express or implied provisions of statute.

4. Physicians and surgeons ☞11(2).

Truthful advertising by radio held not employment of "cappers and steerers," within statute authorizing suspension or revocation of dentist's license (St. 1915, p. 698, § 13).

St. 1915, p. 698, § 13, provides, *inter alia*, that dentist's license may be revoked or suspended by the board for unprofessional conduct, and defines unprofessional conduct as, *inter alia*, "the employment of persons known as cappers or steerers, to obtain business." Accusation alleged that dentists employed "cappers and steerers" by advertising through radio broadcasting, but did not allege that facts stated over radio were untrue.

5. Physicians and surgeons ☞11(3).

Sufficiency of accusation against dentists in proceeding for suspension of licenses held properly tested by certiorari to board (St. 1915, p. 698, § 13).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Proceeding before the Board of Dental Examiners of California against Fred T. Barron and another. From a judgment of the superior court annulling orders of the board suspending respondents' licenses to practice dentistry, the board appeals.

Affirmed.

Jesse R. Carter, of San Francisco, for appellant.

Fred B. Mellmann, of Oakland, for respondents.

PER CURIAM.

An appeal from a judgment annulling certain orders of the board of dental examiners of the state of California. Respondents are regularly licensed and practicing dentists. On May 16, 1929, verified accusations were filed with the board charging respondents with unprofessional conduct. The accusations were identical in form, the material portion of that filed against respondent Barron being as follows: "Pursuant to the provisions of the law of the State of California, I do hereby charge Fred T. Barron, who is and was, at all of the times herein mentioned, a regularly licensed and practicing dentist in the State of California, with unprofessional conduct as the same is defined in said law aforesaid, specifying as the basis of such charge the following facts: That the said Fred T. Barron on or about the ninth day of May, 1929, at the city of Oakland, county of Alameda, State of California, did employ certain persons as cappers and steerers to obtain business for him in the following manner, to wit: That at the time and place aforesaid said Fred T. Barron did employ radio broadcasting station KLX, operated by the Oakland Tribune, a corporation, to obtain business for him by means of the following announcements over said radio broadcasting station, to wit: 'You are now to be entertained with a program sponsored by Doctors Barron and Wilkinson, those gentle dentists. Their office is at Seventeenth and Broadway, opposite the Oakland post office. The entrance is No. 455 Seventeenth street. Doctors Barron and Wilkinson are specialists of the highest degree in the dental profession. Dr. Barron is a plate specialist and guarantees a perfect fit. He does all the work himself. You will be agreeably surprised at their prices. These gentle dentists are celebrating their first anniversary, having opened their office on May 8th, a year ago. They now have 1400 satisfied patients. Their telephone number is Oakland 1819. Telephone for an appointment. Open evenings until eight.' That said announcements were regularly broadcasted over said radio station and were heard by the general public; that said Fred T. Barron paid said radio broadcasting station a consideration for making said announcements and each of them, and it was thereby intended by said Fred T. Barron that business should be obtained by him as a result of said announcements from those who heard the same. That all of said acts above set forth are contrary to the law of the State of California."

Respondents, after demurring to the accusations, entered pleas of not guilty, and upon a hearing their licenses to practice were suspended by the board for a period of 90 days. On October 16, 1929, on petition of respondents, a writ of review issued out of the su-

perior court of Alameda county directed to the board, which, pursuant thereto, certified its record to said court. After a hearing the court adjudged that the facts alleged in the accusations were insufficient to constitute a violation of an act entitled "An act to insure the better education of dental surgeons and to regulate the practice of dentistry in the State of California," etc. (Stats. 1915, p. 698, and amendments thereto), or any other law of the state, and by its judgment annulled the orders of suspension.

[1-5] It is urged by appellants that the acts complained of constituted the employment of persons as cappers or steerers within the meaning of section 13 of the act which provides that "any dentist may have his license revoked or suspended by the board of dental examiners for any of the following causes:

* * * (3) For unprofessional conduct or for gross ignorance or inefficiency in his profession. Unprofessional conduct is hereby defined to be: The employment of persons known as cappers or steerers, to obtain business. * * * It is not contended that any of the statements contained in the announcements were untrue, and we may say at the outset that other than the provisions of the above subdivision of the section by which advertising under any false, assumed, or fictitious name, or in any name other than the name under which he was licensed, was denominated unprofessional conduct, no law of the state prohibited advertising by a licensed dentist. A "capper" has been defined as a decoy or lure for the purpose of swindling (Standard Dictionary; Century Dictionary). A "steerer" has been held to be one who gains the confidence of the person intended to be fleeced (People v. Simmons, 125 App. Div. 234, 109 N. Y. S. 190), and who may be said to steer or lead the victim to the place where the latter is to be robbed or swindled. It is the rule that the words of a statute unless they have a technical meaning are to be interpreted according to their common acceptance and will be read and understood in their natural, ordinary, and popular sense. Ex parte Galivan, 162 Cal. 331, 122 P. 961, Ann. Cas. 1913C, 1349; Corbett v. State Board of Control, 188 Cal. 289, 204 P. 823. Whatever abuse the Legislature intended to correct by the above provisions of the act, it is clear that truthful advertising, whether by newspaper or radio, cannot by any reasonable construction of the statute be brought within its inhibitory provisions. And it is well settled that, where a board is granted the power to revoke a license for certain reasons set forth in the statute, it may not be revoked for any other or different causes not clearly within the provisions of law or by implication included therein. Kentucky State Board, etc., v. Crowell, 220 Ky. 1, 294 S. W. 818; 48 Cor. Jur.; Physi-

cians and Surgeons, § 65, pp. 1097, 1098. While it is ordinarily sufficient to charge in the words of the statute (Suckow v. Alderson, 182 Cal. 247, 187 P. 965), here facts were pleaded which showed affirmatively that respondents' actions were not in violation of the statute and the sufficiency of the accusations was properly tested by certiorari. Dymment v. Board of Medical Examiners, 57 Cal. App. 260, 266, 207 P. 409.

No error is disclosed by the record, and the judgment is accordingly affirmed.

109 Cal. App. 316

HOBBS, WALL & CO. v. MORAN.
Civ. 4044.

District Court of Appeal, Third
District, California.

Nov. 1, 1930.

1. Municipal corporations ⇨231 (3).

Where councilman was manager of merchandise company from which supplies were purchased for city, he was "indirectly interested," and transaction was illegal (Deering's Gen. Laws 1923, Act 5233, § 886).

Deering's Gen. Laws 1923, Act 5233, § 886, provides that no officer of city of sixth class shall be interested, directly or indirectly, in any contract with such city or with any officers thereof in their official capacity, or in doing any work or furnishing any supplies for use of such city or town.

[Ed. Note.—For other definitions of "Indirectly Interested," see Words and Phrases.]

2. Municipal corporations ⇨231 (3).

Claim for water furnished to fire department of city by merchandise company of which councilman was manager was properly rejected as illegal (Deering's Gen. Laws 1923, Act 5233, § 886).

3. Municipal corporations ⇨231 (3).

Where councilman was manager of merchandise company furnishing supplies to city, it was not necessary to show actual fraud, dishonesty, or loss to invalidate transaction (Deering's Gen. Laws 1923, Act 5233, § 886).

4. Municipal corporations ⇨231 (4).

Where councilman was manager of merchandise company furnishing supplies to city, company could not recover upon quantum meruit (Deering's Gen. Laws 1923, Act 5233, § 886).

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Petition for writ of mandate by Hobbs, Wall & Company against J. J. Moran. From a judgment for respondent, petitioner appeals.

Affirmed.

See also *Hotchkiss v. Moran*, 293 P. 148.

John L. Childs, of Crescent City, and J. F. Coonan, of Eureka, for appellant.

Geo. W. Howe, of Crescent City, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment refusing to grant a writ of mandate to compel the treasurer of Crescent City to cash warrants which were issued by the city in payment for supplies purchased from the petitioner.

The appellant is a corporation engaged in a general merchandise business at Crescent City. The respondent was the treasurer of that city. Leo A. Dressler was a member of the city council. He was also employed on a salary as the manager of the mercantile business. He was not a stockholder in the corporation and had no direct pecuniary interest in it. He merely acted as the agent and manager thereof. During the time Dressler's relationship existed as manager of the business and member of the council, the city purchased from the petitioner merchandise and supplies of the value of \$249.66. Four claims were duly presented to the city for payment of these bills. They were approved and ordered to be paid by the council. Dressler participated in this action of the council, voting to pay the claims. Warrants were accordingly issued and presented for payment to the treasurer by the petitioner. Payment of these warrants was refused. This action was then commenced to procure a writ of mandate to compel the payment of the warrants. The court held that the merchandise was purchased in violation of section 886 of the Municipal Corporation Act of California, and that the transaction was illegal. The petition for a writ was thereupon denied.

[1] It conclusively appears that Councilman Dressler, as the manager of the business from which the supplies were purchased, was indirectly interested in the transaction, and that it was therefore illegal.

Section 886 of the Municipal Corporation Act of California (Deering's Gen. Laws of Calif. for 1923, Act 5233, p. 2247) provides:

"No officer of such city or town [of the sixth class, to which Crescent City belongs] shall be interested, directly or indirectly, in any contract with such city or town, or with any of the officers thereof in their official capacity, or in doing any work or furnishing any supplies for the use of such city or town, or its

officers in their official capacity; and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void, and if audited and allowed shall not be paid by the treasurer. Any willful violation of the provisions of this section shall be a ground for removal from office, and shall be deemed a misdemeanor, and punished as such."

This statute provides that not only the contract, which is executed under such circumstances, is void, but any claim for payment of work or supplies purchased under such circumstances shall also be illegal. Indeed, the entire transaction is void, and the treasurer, under penalty, is prohibited from paying such claims. It is therefore immaterial, in the present case, whether Dressler was a party to the original making of the contract for the supplies which are here involved, or not.

[2] The challenged claims contained several items for water furnished to the fire department of the city. A public utility corporation which is engaged in supplying customers with water is entitled to collect the value of water furnished to a city in spite of the inhibition of the Municipal Corporation Act, *supra*. This exemption from the application of the statute is declared to exist for the reason that a public utility corporation is compelled by law, as distinguished from contract, to supply all customers, upon demand, and such public utility corporations are subject to regulation by the Railroad Commission. *Capital Gas Co. v. Young*, 109 Cal. 140, 41 P. 869, 29 L. R. A. 463. However, there is no evidence in the present case that the appellant was engaged in the business of supplying the public with water. It does not appear that the mercantile company was also a public utility corporation. For that reason the items for water which were included in the challenged claims were also within the inhibition of the statute and were properly rejected as illegal.

Statutes which declare contracts or transactions with a municipality to be void when an officer of such city is privately interested therein are based on the sound principle that the officer's interests are conflicting and that it is contrary to public policy to permit an officer under such circumstances to purchase supplies for a city or participate in a contract with respect thereto. Such transactions are held to be void whether they arise from the relationship of an agency which is public, quasi-public, or private in its nature. The theory of the law is that a councilman or other officer of a city sustains the same fiduciary relationship toward the citizens of his community that a trustee bears to his *c'estui que trust*, and should therefore act with the utmost good faith. 2 *McQuillin's Municipal Corp.* (2d Ed.) p. 216, § 531; *Woods v. Potter*, 8 Cal. App. 41, 95 P. 1125; *Berka v. Woodward*,

125 Cal. 119, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; 18 Cal. Jur. 978, § 253; 44 C. J. 89, § 2169.

It is argued that since the councilman, Dressler, was merely employed and worked for a salary as manager of the mercantile corporation, that he was not a stockholder and that he had no pecuniary interest therein, he was therefore not interested in the business to such an extent or in such a manner as to invalidate the transaction, since the supplies were purchased for the city in perfect good faith.

[3] The statute declares that a transaction consisting of the "furnishing of any supplies" for a city or town, in which an officer is "directly or indirectly" interested, shall be void. As manager of the mercantile business, which employment demanded strict loyalty to his employer, it may be inferred Dressler, as a councilman, was not free to negotiate a bargain in behalf of the city as favorable to the municipality as though these conflicting interests did not exist. Dressler's membership on the council may reasonably be expected to influence his associates in purchasing supplies for the city. The desire to favor a fellow councilman, unwarranted confidence, or carelessness in bargaining for supplies might result in a substantial loss to the city. It is not necessary to show actual fraud, dishonesty, or loss to invalidate the transaction. The purpose of the statute is to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty.

Nothing in the relationship of a public officer should prevent him from exercising absolute loyalty and undivided allegiance to the best interest of the municipality he serves.

Although Mr. Dressler had no greater interest in the transaction than is shown by the mere agency as business manager of the store from which the supplies were purchased, even though they were obtained in perfect good faith at favorable prices, still the transaction was void and the claims were illegally allowed.

In the case of *Stockton P. & S. Co. v. Wheeler*, 68 Cal. App. 592, 229 P. 1020, 1024, it was held that a contract with the city of Stockton for plumbing to be installed in a public building of the city was illegal and void because Charlesworth, a member of the city council, was also foreman of the sheet metal department of the hardware business with which the contract was made. The court there says:

"If his interest in the contract is such as would tend in any degree to influence him [Charlesworth] in making the contract, then the instrument is void because contrary to public policy. * * * Indeed, we think it cannot well be denied that, abstractly speaking, the interest which Charlesworth had in the petitioner's business would be sufficient to

invalidate any contract made by a public officer in which he had a similar interest."

[4] Upon the same principle the vendor or party contracting with a municipality under such circumstances is also denied the right to recover upon a quantum meruit. *Berka v. Woodward*, 125 Cal. 119, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; 18 Cal. Jur. 978, § 253.

Our courts have been very scrupulous in the enforcement of the spirit of statutes similar to the one which is here involved. *Osborn v. Stone*, 170 Cal. 480, 490, 150 P. 367; *Pacific Vinegar Works v. Smith*, 145 Cal. 352, 366, 78 P. 550, 104 Am. St. Rep. 42. When it appears that an officer is substantially benefited, financially or otherwise, by his participation in a contract with the municipality which he represents, the transaction is invariably declared to be illegal. Under such circumstances, in its effort to uphold the transaction, a court will not resort to fine distinctions in order to determine just what facts will constitute an "indirect interest" on the part of the officer. The case of *Moody v. Shuffleton*, 203 Cal. 100, 262 P. 1095, 1096, illustrates this tendency on the part of the courts. In that case H. L. Moody sold a newspaper and job printing business to his son, accepting a chattel mortgage as part payment therefor. The father was thereafter elected supervisor of the county in which the printing business was located. The son continued to supply the county with job printing, presenting his claims therefor. These claims were approved by the supervisors. The father participated in this approval. The auditor refused to draw warrants for the claims. In a suit for a writ of mandate the trial court ordered the claims to be paid. On appeal the Supreme Court reversed the judgment and said with reference to the statute which is here involved:

"The foregoing statutory pronouncements are in consonance with the well-settled policy of the common law, and numerous decisions are to be found vigorously enforcing the rule."

In rendering the decision the Supreme Court approved the following contention of the auditor that:

"The value of the security of said chattel mortgage is therefore increased by the business received by said newspaper. * * * and said H. L. Moody is benefited thereby."

It follows, in the present case, that Dressler, as manager, had such an interest in his employer's mercantile business as to preclude him from participating, as a member of the council, in the allowance of the claims.

Clearly the facts of this case bring it within the inhibition of the statute. The transaction was illegal and void. Payment of the warrants was properly refused. The writ of mandate was therefore properly denied.

The judgment is affirmed.

All concur.

109 Cal. App. 321

HOTCHKISS v. MORAN.

Civ. 4083.

District Court of Appeal, Third District, California.

Nov. 1, 1930.

1. Municipal corporations ⇨231(3).

Contract for lighting city was not illegal because councilman was manager of mercantile corporation in which prominent stockholder of electric company was a stockholder (Deering's Gen. Laws 1923, Act 5233, § 886).

Deering's Gen. Laws 1923, Act 5233, § 886, provides in part that any claim for compensation for work done or supplies or materials furnished, in which any officer of city is interested directly or indirectly, shall be void.

2. Municipal corporations ⇨231(1).

Statute making void claim for supplies furnished city in which officer is interested did not apply where claimant was public utility and the only company furnishing electricity (Deering's Gen. Laws 1923, Act 5233, § 886).

3. Corporations ⇨382½.

Public utility corporation is bound, upon demand, to supply its commodity to consumers.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Petition for writ of mandate by J. M. Hotchkiss, an individual doing business under the firm name and style of J. M. Hotchkiss Electric Light Plant, against J. J. Moran. From a judgment for petitioner, respondent appeals.

Affirmed.

George W. Howe, of Crescent City, for appellant.

John L. Childs, of Crescent City, and J. F. Coonan, of Eureka, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment awarding a writ of mandate to compel the appellant, as treasurer of Crescent City, to cash certain warrants issued to the respondent, a public service corporation, in payment of the purchase price of electric energy for lighting the city.

This is a companion case to that of Hobbs, Wall & Co. (a Corporation) v. Moran, 293 P. 145, in which an opinion of this court was this day filed. The essential facts of the two cases differ materially.

The respondent is a public service corporation, engaged in the enterprise of manufacturing and marketing hydro-electric energy for lighting purposes in and about Crescent City. Hotchkiss, the president of this electric lighting corporation, was also a stockholder in a mercantile corporation doing business in the same community under the name of Hobbs, Wall & Company. Leo A. Dressler was the business manager of this mercantile establishment, working for it on a salary. He was not otherwise interested in the mercantile company. He was not a stockholder or employee of the electric lighting company. He was, at the same time, a member of the city council and chairman of the finance committee of Crescent City. The petitioner, electric lighting company, sold and furnished Crescent City with electric energy for lighting the city and its public buildings. Claims amounting to the sum of \$305.82 were presented to the city for this service and allowed with the approval of Councilman Dressler. Warrants were drawn therefor and presented for payment to the appellant as treasurer of the city. Payment of these warrants was refused on the ground that the contract for lighting the city was illegal and void under the provisions of section 886 of the Municipal Corporation Act of California (Deering's Gen. Laws of Calif. for 1923, Act 5233, p. 2247), for the reason that one of the councilmen of Crescent City was interested in the company which supplied the electric light to the city. This suit was thereupon instituted. The trial court ordered a writ of mandate to issue directing the treasurer to pay the warrants. From this judgment the treasurer has appealed.

The judgment should be affirmed for two reasons. It is true that section 886 of the Municipal Corporation Act, supra, provides in part:

"Any claim for compensation for work done, or supplies or materials furnished, in which any such officer [of a city or town] is interested [directly or indirectly], shall be void, and if audited and allowed shall not be paid by the treasurer."

[1] It is also true this rule is inflexible and the courts will not trifle in enforcing the spirit of the law. *Pacific Vinegar, etc., Works v. Smith*, 145 Cal. 352, 78 P. 550, 104 Am. St. Rep. 42; *Osburn v. Stone*, 170 Cal. 480, 490, 150 P. 367. In the present case, however, Councilman Dressler was not employed with or interested in the electric lighting company, directly or indirectly.

It may not reasonably be said a contract for lighting a city violates the Municipal Corporation Act merely because the councilman who participates in the transaction is the manager of a mercantile business in which a prominent stockholder of the electric compa-

ny is also a stockholder. The interest of the councilman under such circumstances is too remote and speculative upon which to assume the contract will be affected thereby.

[2, 3] Moreover, the respondent Hotchkiss Electric Light Company is a public utility corporation engaged in the business of generating and marketing electric energy for Crescent City and its vicinity. It is the only electric lighting company from which the city can procure the energy. Subject to regulation by the California Railroad Commission, as provided by article 12, § 23, of the Constitution of California, and section 46 of the Railroad Commission Act of California (Stats. 1915, p. 138), upon demand, the respondent is bound to supply Crescent City with light for municipal purposes. The reason for protecting a city against the possible result of the personal interest of an officer in a contract or transaction with a city, as provided by the Municipal Corporation Act, does not exist under such circumstances. The obligation of the lighting company to supply this public utility to the city under the law distinguishes the transaction from the mere enforcement of a contract.

In the case of Capital Gas Co. v. Young, 109 Cal. 140, 41 P. 869, 871, 29 L. R. A. 463, a claim of the gas company for gas supplied to the city of Sacramento was sustained although the mayor of the city was also a stockholder in the company at the time the contract was awarded and when the claims were presented for payment. The court said:

"Under the operation of this law [section 629 of the Civil Code as it existed prior to the enactment of the Public Utilities Act of 1915], the gas company was not a free agent with power to contract or refuse to do so, but it became its duty upon demand to furnish gas to the city, irrespective of the status of its president.

"This duty to furnish gas to the city devolved upon the respondent, not by virtue of any contract, but by operation of law; and hence the laws governing ordinary contracts resting in the volition of the parties thereto has no application."

It is true that section 629 of the Civil Code was repealed after the rendering of the last cited authority. The principle which is there announced is nevertheless applicable to the present case. Independent of the Civil Code provision which was construed in that case, a public utility corporation is bound, upon demand, to supply its commodity to consumers. Section 629 of the Civil Code was repealed only because the regulation of public utilities was transferred to the Railroad Commission by the terms of the constitutional and statutory provisions above mentioned.

The judgment is affirmed.

All concur.

109 Cal. App. 505
SECURITY TRUST & SAVINGS BANK v.

McADOO et al.

Civ. 4215.

District Court of Appeal, Third District, California.

Nov. 13, 1930.

1. Mortgages ⇨159.

Transaction whereby grantor of property authorized lender to make grantor's trust deed inferior to lender's mortgage for construction money paid grantee *held not within* statute (Civ. Code, § 2235).

Letter of instructions explicitly provided that grantor's trust deed was to be made subject to mortgage for construction money paid to grantee in favor of lender, thereby manifesting parties' intention to give lender the first security so as to take case out of Civ. Code, § 2235, providing that all transactions between a trustee and his beneficiary by which trustee obtains any advantage from his beneficiary are presumed to be entered into by latter without sufficient consideration and under undue influence.

2. Evidence ⇨271(1).

In action to foreclose mortgage, evidence regarding conversations between mortgagor and beneficiary under trust deed had without mortgagee's knowledge *held properly excluded*.

3. Mortgages ⇨159.

Grantor authorizing lender to take mortgage not exceeding \$4,500 prior to grantor's trust deed could not claim it did not authorize mortgage for \$1,000.

Facts disclosed that lender took mortgage and note from grantee for \$4,000, for construction money, but that grantee failed to carry out his building contract with grantor, and money which lending bank had placed to credit of grantee, on execution of \$4,000 note and mortgage, with exception of \$1,000 advanced, was later charged back against him, and that this reduced amount of loan to sum of \$1,000.

4. Evidence ⇨448.

Where written instructions relating to precedence of mortgage over trust deed were unambiguous, oral testimony interpreting instrument was properly excluded.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by the Security Trust & Savings Bank against the Averill-Weymouth Company

and others. From a judgment for plaintiff, defendant named appeals.

Affirmed.

Eastham & Smith, of San Pedro, for appellant.

Lloyd S. Nix, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in an action to foreclose a mortgage on certain property described in the complaint, from which judgment the Averill-Weymouth Company, a corporation, appeals.

The record shows that the Averill Company was engaged in the building of houses, and in so doing had contracted with one W. H. McAdoo for the erection thereof. The money to erect the buildings and to erect the building upon the lot involved in this action was to be obtained from the plaintiff.

In pursuance of this agreement the appellant, the owner of the lot, executed a grant, bargain, and sale deed in favor of the defendant W. H. McAdoo, and handed the same to the respondent. In handing this deed to the respondent, the appellant accompanied the deed with the following letter of instruction, to wit:

"Averill-Weymouth Company

"Real Estate, Loans and Investments

"725 South Olive St.,

"Los Angeles, California.

"Security Trust and Savings Bank, San Pedro, Calif. Gentlemen: We are enclosing herewith our grant deed drawn in favor of W. H. McAdoo, a married man, covering Lots 1 and 2 in Block 26 Vista Del Oro subject to taxes for the fiscal year 1923-24, conditions, restrictions, reservations and rights of way of record.

"You may use this deed when you can hold for us a note for \$1500.00 in favor of this company, executed by our grantee and his wife, Mrs. Ella M. McAdoo, payable in monthly instalments of \$50.00 or more, including interest at 7% per annum, this note to be secured by deed of trust executed by the above parties, affecting the easterly 60 feet of Lots 1 and 2, Block 26, Vista Del Oro, which deed of trust is to be made subject to a mortgage in favor of your bank for an amount not in excess of \$4500.00 due in three years. As we do not have the necessary data in order to enable us to draw the note and trust deed above mentioned, we would ask that you kindly attend to this matter using Title Guarantee and Trust Company form of note and trust deed.

"We have ordered two separate guarantees of title at the Title Insurance and Trust Company, under their order #700621, as follows: One guarantee to cover the easterly 60 feet of

Lots 1 and 2 in Block 26 Vista Del Oro, liability \$1500.00. The other guarantee to cover the westerly 60 feet of Lots 1 and 2 in Block 26, Vista Del Oro, liability \$1500.00. We have asked them to hold this order open for further papers and closing instructions to come from you and to bill you with all expenses in connection with this transaction, with the exception of item for cost of continuation of Title to our name on the two guarantees, which amount will be taken care of direct by us.

"Kindly collect interest for us on \$1500.00 at 7% per annum from September 30th, 1923, to the date of our trust deed. Please cancel the \$3.00 revenue stamp which we have attached to our deed and acknowledged receipt of this instrument by signing and returning the enclosed receipt for same.

"Yours very truly,

"Averill-Weymouth Company, Inc.

"IM:DO By I. MacManus, Jr."

In pursuance of the instruction just set forth, the respondent took from W. H. McAdoo and wife a mortgage in the sum of \$1,000 and also a note in favor of the appellant for the sum of \$1,500 secured by a deed of trust on the property mentioned in the letter of instructions. Thereafter the respondent advanced to W. H. McAdoo the sum of \$1,000, as part payment for materials to be used in the erection of a building upon the premises involved herein. The remainder of the loan was simply carried as a credit to McAdoo on the books of the bank, and no further advancements were ever made by the bank to McAdoo. The record shows that McAdoo did not erect or complete any building upon the premises, and thereafter filed a petition in bankruptcy. The \$1,000 advanced by the bank upon the \$4,000 loan not having been repaid, the respondent began this action in foreclosure.

Upon this appeal, it is urged that the findings of the trial court are not supported by the evidence; that the judgment is contrary to the evidence; that the court erred in refusing to grant a new trial; that the court erred in failing to render judgment in favor of the appellant; that the court erred in rendering judgment for the respondent; and, further, that there were errors occurring during the trial, prejudicial to the appellant.

[1] In support of the foregoing specifications the appellant cites first section 2235 of the Civil Code, which reads: "All transactions between a trustee and his beneficiary, * * * by which he [the trustee] obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." A number of cases are then cited having to do with transactions between trustees and beneficiaries, all of which set forth the law correctly upon the facts presented for consideration, but none of which are applicable to the instant case.

The record in this case shows that the mortgage in favor of the bank was to have precedence over the trust deed that was to be executed in favor of the appellant. The appellant, by its own letter of instructions, authorized the bank to accept a mortgage on the property involved from McAdoo in a sum not in excess of \$4,500. The mortgage executed was in the sum of \$4,000. It is true that the appellant directed the bank to see to the execution of the trust deed in favor of the appellant. The letter of instructions explicitly provides that the trust deed is to be made subject to the mortgage in favor of the bank; the language of the instruction being "which deed of trust is to be made subject to a mortgage in favor of your bank," etc. It follows as a matter of course that the intention of the parties to give the bank the first security is manifested in such a manner as to take the case entirely out of the provisions of section 2235 of the Civil Code. The bank did not acquire any advantage over the beneficiary not contemplated by the parties or not provided for in the letter of instructions. The evidence fails to show any confidential relations between the parties. At best it only shows that the parties were having business dealings, and, in view of the instructions which were executed purely voluntarily on the part of the appellant, and was being conducted for the benefit of the appellant, to the end and purpose that W. H. McAdoo might be enabled to erect a building upon the premises referred to in the instructions, we do not very well see how any confidential relations were taken advantage of, even though it be admitted that such existed. The fact that the respondent held the papers executed by the parties is wholly immaterial. The rights of the parties, including their priorities, were specifically set forth, and the record fails to show any violation thereof.

[2] The alleged errors committed by the trial court during the hearing of the cause consisted in the exclusion of certain testimony. It is not necessary to set forth the testimony sought to be introduced; it being sufficient simply to state that the offered testimony consisted of conversations between the defendant McAdoo and the appellant, without any showing whatever that these conversations were with any of the officers of the bank, or that the bank had any knowledge thereof. The bank not having any knowledge of any communications between McAdoo and the ap-

pellant, it cannot be successfully urged that any failure on the part of the bank to comply with secret understandings had between McAdoo and the appellant furnished a basis for any finding that the respondent was guilty of any fraud, or had taken any undue advantage.

[3] Again, it is urged that the appellant did not authorize a mortgage in the sum of \$1,000. The record shows a complete answer in that the mortgage was executed for \$4,000, but that only \$1,000 was advanced on the mortgage by reason of the failure of McAdoo to carry out his building contract with the appellant. The fact that no greater sum than \$1,000 was turned over to McAdoo by the bank on the \$4,000 note and mortgage heretofore referred to inures to the benefit of the appellant, and is not a cause working a detriment. As we have said, the appellant authorized the execution of a note and mortgage, to be a first lien upon the premises, in a sum not exceeding \$4,500. The money which had been placed to the credit of McAdoo, upon the execution of the note and mortgage, was charged back against him after the occurrence which we have heretofore mentioned, and thus reduced the amount of the loan to the sum of \$1,000.

[4] The letter of instructions being plain and unambiguous, there was no occasion, on the part of the trial court, to admit oral testimony as a means of interpreting the instrument. Upon this hearing the appellant has not pressed consideration of the affidavits upon which a new trial was sought in the court below. However, we have read the same, and fail to find therein any reason for disturbing the conclusion of the trial court. We see no occasion for reviewing such cases as *Bury v. Young*, 98 Cal. 446, 33 P. 338, 35 Am. St. Rep. 186; *Jones v. Title Guaranty & Trust Co.*, 178 Cal. 375, 173 P. 586, for the reasons that in those cases confidential relations were relied upon, and here, irrespective of the relations of the parties, specific instructions only appear to have been followed. Nor do we find anything in the case of *First National Bank v. Garner*, 91 Cal. App. 176, 266 P. 849, decided by this court, applicable to the case at bar. There is no question but that the instructions provided for the trust deed being subsequent to the mortgage, which is not parallel to the circumstances presented in the case last cited.

There being no merit in the appeal in this action, the judgment of the trial court is affirmed.

109 Cal. App. 511

ANDREWS v. BUSH.

Civ. 435.

District Court of Appeal, Fourth District,
California.

Nov. 13, 1930.

Rehearing Denied Dec. 8, 1930. Hearing De-
nied by Supreme Court Jan. 12, 1931.**1. Joint adventures ⇨1.**

Agreement for joint adventure is not invalid because of indefiniteness in respect to its details.

2. Joint adventures ⇨1.

Courts, in determining whether relationship of joint adventurers or partners has been created, are guided not only by spoken or written words, but also by acts of parties.

3. Joint adventures ⇨1.

Misunderstanding between parties as to determination of profits did not prevent them from having assumed relationship of joint adventurers.

4. Joint adventures ⇨4(1).

Duty and liability of parties to joint adventure as between themselves was that of fiduciaries.

5. Joint adventures ⇨4(1).

Acceptance of amount advanced under agreement for joint enterprise pursuant to false representations did not terminate enterprise as respected right to share in profits.

Party to agreement for purchase of real estate as joint enterprise after advancement of money by other party falsely represented that prospect of success had vanished and paid back amount advanced after having arranged for sale at a profit, thereby violating duty of acting in highest good faith by reason of fiduciary obligation.

6. Joint adventures ⇨4(1).

Party to joint adventure acquiescing in termination of agreement pursuant to false representations was not estopped to claim profits accruing from relationship.

7. Joint adventures ⇨5(1).

Party to joint adventure terminated pursuant to false representations of other party did not lose right to accounting as respected limitations (Code Civ. Proc. § 339, subd. 1).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Roger M. Andrews against Grant A. Bush. From the judgment, defendant appeals, and plaintiff cross-appeals.

Affirmed.

Wright & McKee and C. M. Monroe, all of San Diego, for appellant and cross-respondent.

Edgar A. Luce and Harrison G. Sloane, both of San Diego, for respondent and cross-appellant.

CARY, P. J.

Plaintiff brought this action against defendant alleging in his amended complaint the existence of a joint adventure between them regarding a real estate deal, that the joint adventure had been completed and certain profits made, all of which had been retained by defendant, and asked for an accounting. Defendant's answer denied the allegations of the complaint and alleged that the action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure and that plaintiff was estopped to claim any share of the profits.

The court found for the most part in accordance with the allegations of the amended complaint. It further found, however, that in one particular the minds of the parties did not meet—plaintiff believing he was to receive back all moneys advanced by himself with interest and in addition thereto one-half of all profits—defendant believing and thinking that plaintiff believed that all sums received from the deal were to be divided equally without any reimbursement to plaintiff for the money he had originally advanced. The court adopted the latter of these two methods for its accounting, found plaintiff's share to be \$8,270.77, that the action was not barred by the statute of limitations, that plaintiff was not estopped to claim his share of the profits, and gave judgment for plaintiff for \$8,270.77.

Defendant urges that the judgment be reversed for the following reasons: (1) Since the minds of the parties did not meet on how the net profits were to be arrived at, there was really no agreement for a joint adventure and all plaintiff was entitled to was the return of his \$5,000 investment which, as the evidence shows, he had already received prior to the institution of this action; (2) that even if it be conceded that a joint adventure was originally created, nevertheless the undisputed testimony shows that the joint adventure had been terminated and plaintiff had made no attempt thereafter to comply with the terms of the joint adventure agreement, thus forfeiting his right to participate in any profits; (3) that even though it be conceded that plaintiff's termination of the joint adventure agreement was brought about by defendant's concealment from him of certain facts, that situation only gave rise at the most either to a right of action by plaintiff for breach of the joint adventure agreement which, not having been brought within two years, was barred by the provisions of subdivi-

vision 1 of section 339 of the Code of Civil Procedure, or to a right of action by plaintiff for fraud—an issue not raised by the pleadings; (4) that the uncontradicted evidence shows that plaintiff is estopped to claim any of the profits of the joint adventure; and (5) that certain findings are unsupported by the evidence.

The facts follow. A certain tract of land lying east of the city of San Diego was owned by the El Cerrito Park Company. February 16, 1926, defendant obtained an option to purchase this tract by the terms of which \$2,500 was to be paid ten days after date, another \$2,500 fifteen days later, and \$20,000 ninety days later, at which time a mortgage securing the remaining \$175,000 of the purchase price was to be executed. The option was informal, consisting merely of a letter addressed to the El Cerrito Park Company by defendant, at the bottom of which the company had indorsed a statement that its board of directors had sanctioned the acceptance of the proposal contained in defendant's letter. Within a few days after the execution of this option, one Smith, a Los Angeles subdivider, approached the El Cerrito Company and attempted to buy the tract but was informed that defendant had an option on it. Knowledge of Smith's interest in purchasing the land soon reached defendant and negotiations were begun between them, but the first payment under the option fell due before these negotiations had progressed very far. February 26, the last day this first payment could be made, defendant went to the bank where he did business and attempted to borrow \$2,500 on the option in order to make this first payment. Plaintiff, executive vice president of that bank, to whom he explained the matter, informed him that it was not a bankable loan. Defendant then told plaintiff that Smith was ready to purchase the property, that it could be sold to him at a good price, and that if plaintiff would personally advance the money necessary to meet the option payments they could both make a good profit. Plaintiff consented to go in, made out his personal check for \$2,500 to defendant "Grant A. Bush, Trustee," and defendant immediately used the money to make the first payment called for under the option. The testimony is in sharp conflict as to just what each was to receive should the deal prove profitable. According to plaintiff's version, the money he advanced was to be returned to him with interest first, and all over was to be divided equally between them. Defendant, on the other hand, testified that all sums received from the deal were to be divided equally between them without any reimbursement to plaintiff for his advances. A few days after this first payment plaintiff and defendant met in the office of plaintiff's attorney to draw up an agreement defining the terms of their joint adventure. Both plain-

tiff and his then attorney testified that at this conference the attorney was instructed to prepare a written agreement calling, among other things, for the repayment to plaintiff with interest of the \$25,000 which he was to advance and then an equal division between plaintiff and defendant of any profits they might make out of the option, and that defendant raised no objection to the terms of the proposed agreement. This agreement was drawn up by plaintiff's then attorney, submitted to and approved by plaintiff, and by him submitted to defendant, who, stating that he desired to consult his own attorney, delayed executing it. For reasons which can only be surmised defendant never executed the written agreement regarding the joint adventure. In the meantime defendant had again contacted his prospective purchaser Smith and informed him that before making a final proposition he (defendant) would have to get rid of his partner in the deal but defendant would not tell who his partner was. The effect of defendant's attitude on Smith is graphically described by the statement in Smith's testimony, "There apparently was always a mystery over the thing that created a suspicion in my mind." At this stage of the proceedings the second option payment fell due. Plaintiff again made out his personal check to defendant "Grant A. Bush, trustee" for \$2,500 and defendant used this money to make the second payment. There was now a period of ninety days ahead of them before the next payment fell due. Defendant resumed his negotiations with Smith and on April 8, without plaintiff's knowledge, accepted Smith's offer to purchase a half interest in the option for \$27,500. A formal escrow based on the informal option was opened on April 24 to which El Cerrito Park Company was a party, and at this time out of the \$27,500 purchase money for the half interest in the option Smith put up in the escrow \$20,000 with which to meet the third payment required by the option. The \$7,500 balance of the price Smith had agreed to pay defendant for a half interest had already been paid direct to defendant. Two days later defendant went to the plaintiff and told him: "The deal with Smith has fallen down, all I was able to save out of the wreck was \$5,000, I am through with the real estate business. Under the circumstances you are lucky to get your \$5,000 back." Relying upon the truthfulness of these statements, plaintiff consented to and did receive back from defendant his investment of \$5,000. A week or so after plaintiff had received back his \$5,000, he got wind of the fact that defendant still retained some sort of an interest in the deal, and on May first wrote defendant a letter in which he said, in part:

"If you had been Andrews and I had been Bush, would you feel fully satisfied with the termination of our El Cerrito deal?"

"If the answer is 'Yes,' then put this in the waste basket, and forget it, as I will. * * *

"The matter as now concluded has refunded my \$5,000, which they had for 60 days, has provided otherwise the \$25,000 required for the first year, and saved intact your half interest without liability and without investment.

"Your ability obtained the favorable option.

"My investment protected it until you made a better deal.

"From the transaction you gained a valuable holding on a future prospect.

"I gained nothing.

"Would you feel that it was a Golden Rule settlement if you were Andrews and I were Bush?"

Defendant paid no attention to this letter, but after several telephone calls finally came in to see plaintiff and said: "All I have been able to get out of Smith is \$5,000. Smith is going on with the deal and pay the remaining \$20,000 when it is due in June. Smith has taken over all of the interest and I am through." At some time apparently between May 1 and the time defendant sold the remaining half interest in the option he expended some \$900 in the way of taxes, etc., on the property. Thereafter defendant sold the remaining half interest in the option to Smith for \$20,000. Plaintiff left San Diego to reside in the East some time during the year and made no attempt to follow up the matter until December, when his attorneys wrote defendant demanding an accounting, and this being refused this action was instituted April 8, 1927. At the trial the defendant produced no witnesses other than himself, while plaintiff placed on the stand every person who had knowledge of the transaction, including Smith.

[1-3] Does the fact that there was no meeting of the minds of the parties, on the precise method by which profits should be determined, result in there being no joint adventure and thus no right in plaintiff to obtain an accounting? The law requires little formality in the creation of a joint adventure. *Anderson v. Blair*, 202 Ala. 209, 80 So. 31, 35. Such an agreement is not invalid because of indefiniteness in respect to its details. 33 C. J. 848. Thus a partnership, which in many respects is similar to a joint adventure (*Menefee v. Oxnam*, 42 Cal. App. 81, 85, 183 P. 379), is none the less a partnership though there be no definite agreement as to how the profits shall be divided (*Doudell v. Shoo*, 20 Cal. App. 424, 438, 129 P. 478). Likewise, with a joint adventure. *Hoge v. George*, 27 Wyo. 423, 200 P. 96, 99, 18 A. L. R. 469; *Goss v. Lanin*, 170 Iowa, 57, 152 N. W. 43, 46. In considering whether or not a relationship such as that of joint adventurers or partners has been cre-

ated, the courts are guided, not only by the spoken or written words of the contracting parties, but also by their acts. *Niroad v. Farnell*, 11 Cal. App. 767, 769, 106 P. 252; *Bartelt v. Smith*, 145 Wis. 31, 129 N. W. 782, 783, Ann. Cas. 1912A, 1195; *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 A. 130, 136; *Knapp v. Hanley*, 108 Mo. App. 353, 83 S. W. 1005, 1008; *Saunders v. McDonough*, 191 Ala. 119, 67 So. 591, 593; *Reece v. Rhoades*, 25 Wyo. 91, 165 P. 449, 453; *O. K. Boiler Co. v. Minnetonka Lumber Co.*, 103 Okl. 226, 229 P. 1045, 1047, 1048; *Doan v. Dyer* (C. C. A.) 286 F. 339, 341. From the facts in the case at bar there is no question but that the parties intended to go into the deal together so that each might derive profit therefrom. Under the authorities above cited, the fact that there may have been a misunderstanding as to how the profits were to be determined does not prevent the parties from having assumed the relationship of joint adventurers. In defendant's reply brief he modifies the contention made in his opening brief and contends that there was no mere failure of the parties to understand each other, but rather an open disagreement as to the division of the profits, and that hence defendant was within his rights in returning plaintiff's money and terminating the relation. Such contention, however, while testified to by defendant, was not upheld by the findings of the court.

Was the joint enterprise terminated when the plaintiff received back his \$5,000 and did he then lose all right to any profits accruing thereafter? Defendant urges that this question should be answered in the affirmative, arguing that the evidence shows, without conflict, such a termination and he relies particularly upon the letter written by plaintiff to defendant of May 1, quoted above. He urges that, regardless of the circumstances of the termination of the relationship, nevertheless it was terminated, that plaintiff never put up the last \$20,000 installment, and therefore was not entitled to an accounting for any future profits. Plaintiff replies to this argument that a termination of such relationship brought about by fraudulent concealment of the actual facts is no termination at all.

[4, 5] The relationship of the parties being that of joint adventurers, their duty and liability as between themselves was that of fiduciaries. *Reece v. Rhoades*, 25 Wyo. 91, 165 P. 449, 453; *McMillen v. Olmsted*, 85 Cal. App. 656, 664, 259 P. 1104; *Menefee v. Oxnam*, 42 Cal. App. 81, 85, 86, 183 P. 379; *Munson v. Fishburn*, 183 Cal. 206, 211, 190 P. 808; *Humburg v. Lotz*, 4 Cal. App. 438, 442, 88 P. 510; *Lomita Land Co. v. Robinson*, 154 Cal. 36, 50, 97 P. 10, 18 L. R. A. (N. S.) 1106; *King v. Wise*, 43 Cal. 628, 633, 634; *Dennis v. Gordon*, 163 Cal. 427, 433, 125 P. 1063. The defendant was charged with the duty of acting in the highest of good faith towards

plaintiff and of refraining from taking any advantage of him. Not only did defendant violate this obligation, but, realizing that he was on the threshold of disposing of the property successfully at a profit, he sought to discourage his coadventurer by falsely stating that all prospect of success had vanished and that plaintiff would be exceedingly fortunate to recover back from the "wreck" his \$5,000 original investment. To allow defendant under these circumstances to claim that the alleged termination of their relationship forfeited all plaintiff's rights to share in the profits would be to enable defendant to enrich himself by the violation of his fiduciary obligation, a situation at once obnoxious to the principles of equity. *Richards v. Fraser*, 122 Cal. 456, 460, 55 P. 246; *Llewellyn v. Levi*, 157 Cal. 31, 37, 38, 106 P. 219. We therefore hold that the alleged termination of the relationship, procured by the means that it was, did not in fact result in forfeiting plaintiff's rights in the profits of the joint adventure.

[6] Defendant contends that the plaintiff is estopped to assert any right to the profits accruing from the relationship. As grounds for this assertion, he states that plaintiff acquiesced in the termination of this agreement, accepted the return of all money which he had advanced, admitted in writing that the arrangement was terminated, stood by, allowing defendant to alter materially his position, allowed Smith to advance \$20,000 which should have been advanced by plaintiff, and allowed defendant to expend for taxes, etc., \$958.45, and that defendant's change of position as brought about by plaintiff's acquiescence now renders it inequitable to allow plaintiff to reverse his position, assert his right to the profits, and recover same. To this line of argument there are at least two answers: First, the evidence fails to show any detriment suffered by defendant. Second, to hold that plaintiff was estopped would, in itself, work an injustice. Were defendant's contention regarding estoppel to be sustained, it would be equivalent to holding that where one has by violation of his duties as a fiduciary succeeded in ousting his associate from a profitable business deal, the guilty party could carry through the project, make a profit, and if, upon discovery of the facts, the innocent party laid claim to his share of the profits, all the guilty party need say in defense would be: "I relied on your being out of the deal, went ahead and made a big profit for myself, and now it would not be fair to me to have to divide with you." There is no merit in defendant's contention.

[7] Regarding the contention that the action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, defendant readily admits that the action for an accounting was begun within the time allowed by statute, but contends that the re-

lationship of the joint adventurers having been terminated before any profits had accrued, plaintiff has no right to an accounting, that his only right of action is for damages for breach of the original joint adventure agreement, that since that agreement was not in writing such an action must be begun within two years from the breach of the agreement, and that more than two years have elapsed between that time and the institution of this action. As we have held that plaintiff did not lose his right to an accounting, no further consideration of this point is necessary.

Defendant contends that the findings are, in certain particulars, unsupported by the evidence. The first of these mentioned in his brief is the finding that plaintiff at all times was ready, willing, and able to make payment of the \$20,000 installment on the option. Even if there were no evidence to support this finding, which we do not concede, defendant, due to his own acts, cannot be said to be aggrieved by that fact. He next complains of the finding that the defendant exonerated plaintiff from any obligation to advance or contribute the \$20,000. There is no merit to his complaint. The next finding attacked is, "That the purposes and objects of said joint adventure have been fully performed." Defendant attacks this finding, claiming that the uncontradicted evidence shows that plaintiff did not make the \$20,000 payment which he was obligated to make. But the defendant did unquestionably succeed in raising the \$20,000 payment through the sale of plaintiff's interest in the option, and we regard that as equivalent in substance to a payment by plaintiff of that amount. Defendant's attack on the finding that defendant did not suffer any injury or prejudice by failure of plaintiff to claim profits prior to the time that he did so, has been answered in our consideration of his contention regarding estoppel. His assignment that the finding that the subsequent agreement between Smith, Bush, and the El Cerrito Company was expressly founded on the writing of February 16, 1926, is without support in the evidence is without merit. On the contrary, it finds ample support, since the escrow agreement entered into by Smith and the El Cerrito Company contained the following: "This escrow being based on an agreement between G. A. Bush and El Cerrito Park Company dated February 16, 1926."

Plaintiff prosecutes a cross-appeal from the judgment, giving as his sole grounds thereof that the court erred in not allowing plaintiff his \$5,000 investment with interest and also one-half of the profits remaining after such payment. We feel this point to be without merit, for the reason that the court upon conflicting evidence expressly found that there was no meeting of the minds of the parties on that method of division of the profits.

We have carefully scrutinized the entire record and have read the numerous cases cited by counsel. In our opinion the case was tried fairly and the decision arrived at by the trial court was correct and finds ample support in the evidence.

The judgment is affirmed.

We concur: BARNARD, J.; MARKS, J.

109 Cal. App. 476

WOLFE v. SEVERNS.

Civ. 76.

District Court of Appeal, Fourth District,
California.

Nov. 10, 1930.

1. Appeal and error ⇨931(1).

Evidence conflicting appellate court must accept as true testimony tending to support findings, with reasonable inferences therefrom.

2. Fraud ⇨50.

Fraud is never presumed.

3. Fraud ⇨58(1).

To establish fraud, evidence must be clear, satisfactory, and convincing.

4. Sales ⇨39.

Representations as to ownership of personalty *held* material, as regards fraud in inducing purchase (Civ. Code, § 1572).

5. Sales ⇨52(7).

Record *held* to show seller knew representations as to title and claims of third parties were false, showing fraud (Civ. Code, § 1572).

Record showed seller had purchased property involved at sheriff's sale, and was then informed by attorney that he could buy only judgment debtor's interest in property. According to buyer's evidence, seller represented to him that he was absolute owner of property, and that he knew of no claims against it, except city taxes, whereas, in fact, property was owned by third persons; judgment debtors, through whom seller claimed title, having no interest therein.

6. Sales ⇨39.

That buyer was shown sheriff's certificate of sale by seller, who had purchased at sheriff's sale, *held* not to deprive buyer of right to rely upon representations, made be-

fore and after certificate was exhibited, *that* title was good (Civ. Code, § 1572).

7. Sales ⇨39.

Seller's statement title was good, after inquiry by buyer showing reliance, *held* fraud, though buyer had seen sheriff's certificate of sale (Civ. Code, § 1572).

8. Sales ⇨39.

Representations that seller had title and had no knowledge of claims against property, except city taxes, *held* representations of material facts, not expressions of opinion (Civ. Code, § 1572).

9. Sales ⇨52(7).

Record *held* to show seller falsely represented he had good title, and that there were no claims against property, except city taxes, that buyer relied thereon, and that seller was guilty of fraud (Civ. Code, § 1572).

10. Sales ⇨39.

Sale being fraudulently induced through misrepresentations as to title and claims of third parties, contract *held* void ab initio.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by T. J. Wolfe against Clayton Severns. From an adverse judgment, plaintiff appeals.

Affirmed.

Nelson & Burns, of Santa Ana, for appellant.

Chandler, Wright & Ward, of Los Angeles, for respondent.

WARMER, Justice pro tem.

This action arose out of the pretended sale of certain oil well equipment consisting of a derrick, tanks, tools, etc. James, Price, and Richards owned certain oil leases and oil well equipment at Huntington Beach, Orange county, Cal. They were in financial difficulties and made an assignment of their interest in said leases and said equipment to a certain creditors' committee consisting of Spraul, Fairchild, and Gale. Said creditors' committee had certain negotiations with Clarence R. Bailey, Pearl R. Bailey, his wife, W. J. White, and Mamie B. White, his wife, looking to the sale of said property. In said negotiations it was agreed to sell said property to Bailey and White for an agreed consideration, payable at specified times; that they were to place all necessary papers in escrow and the delivery thereof was to be made according to the escrow instructions. The deal was never completed because of the failure of Bailey and White to carry out the terms of their agreement. Bailey and White were never in

possession of the property, although they did a little work thereon by special arrangement with Spraul, one of the creditors' committee. The appellant, as judgment creditor of Bailey and White, caused an execution to be levied on certain of the personal property in said lease, said personal property being the same property that is the subject of the controversy here. At the sheriff's sale on said execution the said Spraul announced publicly that the creditors' committee claimed the property being offered for sale under said execution. The appellant and his attorney and others were present. Appellant's attorney heard the claim made by Spraul, but appellant does not remember hearing any such claim. Appellant's attorney advised him that all he would get as a result of said sale was the right, title, and interest of the judgment debtors. The appellant was the purchaser of said property at said execution sale.

Appellant requested one Dockins to inform him if he found any one desiring to purchase oil well equipment, stating that he had two complete outfits, derricks, and all, from the crown block down, referring to the property that he had purchased at the said execution sale. Dockins brought respondent to see appellant concerning said property. After the introduction of said appellant and respondent, they went to inspect the property, and after some negotiations regarding the particular property to be included in the deal, and the prices thereof, they agreed on a deal, and at the suggestion of Wolfe went to the office of appellant's attorney to have a bill of sale made and executed.

While they were inspecting the property before going to the office of appellant's attorney, certain representations were made, appellant representing to respondent that he was the owner of said property and there was no claim against the same that he knew of, except city taxes, which, in his opinion, would not exceed \$50. They went to the office of appellant's attorney, and said attorney prepared an instrument and handed the same to the respondent, who objected to the description of the property therein, and then said attorney suggested that he make an assignment of the sheriff's certificate of sale, which theretofore had been handed to the respondent for perusal, or a bill of sale on the back of the sheriff's certificate of sale. An assignment of said certificate was placed on the back thereof, executed, and delivered to the respondent herein. Whereupon the respondent asked if it was good, and, being informed that it was, delivered a check for \$1,000, the purchase price of said property, to the appellant. They immediately went to the sheriff's office and inquired if appellant had a right to sell the certificate of sale and were informed by a deputy sheriff that the appellant had such right. Respondent then ordered his

employees to dismantle the derrick preparatory to moving the same, but shortly after they began to do so they were notified by some other parties that they were the owners of said property, which fact said employees reported to the respondent. Respondent then made further inquiry of the sheriff's office and learned for the first time that the only interest that he received in the property was the interest of the judgment debtors, which, if any, was questionable. Whereupon respondent immediately returned the certificate of sale, together with the assignment thereon, which had been delivered to him, and demanded the return of his check. The check was delivered to the appellant herein on the 12th day of February, 1929, and the return thereof was demanded by the respondent on the 14th day of February of the same year. Appellant refused to return the same and brought this action to compel the payment thereof. Respondent's answer sets up, among other things, fraud and failure of consideration.

Respondent asks affirmance of the judgment for failure of the appellant to set up sufficient evidence to comply with the rules of this court. While the testimony set out by the appellant is rather meager, yet we are of the opinion that it is sufficient to require a denial of the motion for affirmance. The motion is, therefore, denied.

It is admitted by the appellant that, if there is any substantial evidence to support the findings of the trial court, the findings cannot be disturbed on appeal. However, appellant insists that the evidence is insufficient to support the findings. The theory upon which appellant's contention is based is that appellant acquainted respondent with the source of his title by showing him the sheriff's certificate of sale, and insists that in so doing respondent was placed within that class of persons whose duty it is to investigate before purchasing, and, having failed to do so, he is precluded from the defense of fraud, and that he got all he bargained for; hence no failure of consideration.

Appellant cites *Brimmer v. Salisbury*, 167 Cal. 522, 140 P. 30. That case is one where the court is passing upon the obligation of one who has entered into an executory contract of sale, and the court says at page 527 of 167 Cal., 140 P. 30, 32: "The conveyance by the vendor was not a breach of the contract. One may sell land which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." Here it is immediately to be

noted that a vendor under an executory contract of sale who has title may part with it under two essentially different conditions. He may part with it to a third person, who, if he be not charged with knowledge of the previous executory contract, takes it freed from the obligations of that contract. Such would be the case were the executory contract of sale unrecorded. He may, however, part with his title, subject to the rights of the vendees under the executory contract of sale, and thus not put it beyond his reasonable power to make title to his vendees under the executory contract of sale when in due time title may be demanded of him. In the one case the conduct of the vendor may with propriety be termed a fraud upon the vendee, since he has parted with the title, and consequently with the security upon which his vendee was entitled to rely in the making of his installment payments, and after having done so he insists that these installment payments should be continued without any legal assurance to him that, at the time when he is entitled to demand a deed, the vendor will be in a position to convey title."

Appellant cites certain other cases to the same effect. It will readily be seen that these cases are not in point where there is no executory contract in connection with the sale.

[1] There is a conflict in the evidence on the question of the representations made as to title and the claims of others thereto. This court, therefore, must accept as true that testimony which tends to support the findings, together with all reasonable inferences therefrom.

[2, 3] It is never presumed that a party has committed a fraud, and, where fraud is alleged for the purpose of depriving him of a right, it must be clearly made out. *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Ryder v. Bamberger*, 172 Cal. 791, 158 P. 753; *Wendling, etc., Co. v. Glenwood, etc., Co.*, 153 Cal. 411, 95 P. 1029; *Casey v. Leggett*, 125 Cal. 664, 58 P. 264; *Abrams v. Daugherty*, 60 Cal. App. 297, 212 P. 942; *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, 187 P. 996. To establish fraud the evidence must be clear, satisfactory, and convincing. *McCarthy v. White*, *supra*; 12 R. C. L. 183. Such has been the rule in this state from an early date and such the rule continues to be.

Respondent testified in part as follows:

"He (Dockins) told Mr. Wolfe (appellant) that he brought me down, that I was in the market for a rig, and Mr. Wolfe said he had two for sale and we got in the car and came down to look at them.

"Mr. Mabry: Q. Where were they located?

"Witness: A. At the corner of Sixteenth and Olive streets, Huntington Beach.

"Q. When you got there, did you have any further conversation with him? * * * A. We talked the matter over and I asked Mr. Wolfe if he owned them and he said he did. I told him I didn't want both of them, I just wanted one, and asked what he wanted for them and he said he wanted thirty-five hundred dollars for the two. I told him I didn't care only about one, I just needed one, and he said he would rather sell all of them, so we talked about one thing and another and I said, 'Now just what do I get if I just buy this?' He said, 'You will get everything, it all belongs to me, everything you see, even the pipe in the hole. If you take it, you will get the pipe in the hole.' I told him I didn't want the pipe. I just needed the derrick. That was the general line of conversation,—that was practically all. * * * I asked him what he would take for the one rig, not the two rigs, and he asked me fifteen hundred dollars for it. I told him it was second-hand materials, and a salvage sale, it was too much money, that I would give him a thousand dollars. He said he couldn't sell this for that. I said that was too bad, but that was all I could give. I asked him if there was anything against this and he said not that he knew of excepting a sign which was posted upon the rig and the city taxes. I asked him about that and he said he didn't know if they had been paid or not. I asked him how much he thought they would be and he said probably fifty dollars but it might be more than that. I said if it was only fifty dollars I will pay that fifty dollar taxes above the thousand dollars. I said I wondered if we could find out more about the taxes and he said, 'Yes, by going down to the city hall,' so we went down to the city hall, but it was on Lincoln's birthday, a holiday, and it was closed. He said he knew Mr. Rossin, the city engineer, he lived right across the street, we would go over there and he would probably have some idea. * * * (Speaking to Mr. Rossin) Mr. Wolfe stated what we came over there for—he said he was selling me one of those rigs that he owned down on Sixteenth and Olive streets and we came over there for the purpose of finding out if he knew how much taxes, or if any taxes were due against them and how much they were, and he said he didn't think it was over fifty dollars—that this might be for the last year's taxes, which would be fifty dollars I think he said was due."

Respondent then ordered his employees to dismantle the derrick, preparatory to moving the same, but shortly after they began to do so they were notified by other parties that they owned the property, which fact was reported to the respondent. Respondent further testified:

"Upon these claims being made against the property what did you do? Witness: A. I

thought I better examine it and see if Mr. Wolfe had title to it.

"Q. What did you do? A. I went down to Mr. Wolfe's house and told him I understood he didn't have full title to that property down there.

"Q. What did he say? A. He said he did.

"Q. Was anything else said? A. So we got in the car and we drove back down to where the rigs were and Mr. Gifford came out and I said to him, 'Well, we are going to Santa Ana to see about the title to this property, so you better not do any more here until I find out where we stand on this. I don't want to get mixed up in any affairs that are not right.' Then I said, 'Mr. Wolfe says he owns it and I want to find out about it.'

"Q. Now, what did the gentleman at the sheriff's office advise you upon inquiries being made there? A. Well, we met the gentleman there and he said— * * *

"Q. Now, at this conversation, did you have a conversation at the sheriff's office?

"Witness: A. Yes, sir.

"Q. All right; who were present? A. Myself, Mr. Wolfe and I didn't know the other gentleman's name, the sheriff.

"Q. State just what was said, Mr. Severns. A. Well, I asked him what title Mr. Wolfe had in that property over there and he said he didn't have any. I asked him what he sold and he said he sold a nigger's interest. (Referring to Bailey and White), I said to Mr. Wolfe, 'I didn't buy no interest, I bought the whole outfit and you agreed to give me a clear title to the rig. You said you owned it,' and he said 'No, they just sold the niggers' interest and that's what I sold you.'"

Appellant testified:

"Did you ever tell Mr. Severns you were the owner of the property? * * * I only told him I had a sheriff's bill of sale.

"Mr. Mabry: Q. You never told him you were the owner of the property? * * * He didn't answer the question yet.

"The Court: Answer the question. Read the question, Miss Reporter. * * *

"The Court: Answer the question. Did you tell him that or not? Do you understand the question?

"Witness: A. Yes.

"The Court: Will you answer it then?

"Witness: A. I don't believe I did, only the way I stated it.

"Mr. Mabry: Q. You are not positive whether or not you did?

"Witness: A. No; I am not."

In the case at bar the defendant went to the place where the property was located and after examining that which he desired

to buy he made two direct and pertinent inquiries and two only. First, "What do I get if I buy this property?" Second, "Is there anything against it?" As to the first inquiry he was told, "I own it. You get it all from the crown block down, including the pipe in the ground." As to the second he was told, "There is no claim against it that I know of except the city taxes." The defendant was satisfied with what he saw and agreed to purchase a derrick, tanks, tools, etc., after having been told by appellant that he owned said property, that he got it all, that there was nothing against it, except the city taxes, which, in the opinion of appellant, would not exceed \$50.

Blake v. Arp, 180 Cal. 144, 179 P. 683, 684, is a case where fraud was alleged and found. The basis for such allegation and finding was that defendant therein was the owner of a lot and sold the same to plaintiff, stating to plaintiff that he owned the title to said lot. At the time of the purchase a lis pendens was on record in the case, which resulted in a judgment against himself and his vendee (plaintiff in said cause). The court said: "The jury was justified in finding him guilty of fraud under the circumstances, even though he believed the truth of his assertion (Civ. Code, § 1572, subd. 2), and they were so instructed by the court. Appellant urges the fact that the evidence was insufficient to show any fraud on his part, for the reason, as he claims, that the plaintiff knew as much about the title as he did, and that therefore his statement was a mere expression of opinion, and cites in relation thereto the following cases: Choate v. Hyde, 129 Cal. 580, 62 P. 118, and Rheingans v. Smith, 161 Cal. 362, 365, Ann. Cas. 1913B, 1140, 119 P. 494. * * * Moreover, the evidence of plaintiff was that she was constantly lulled into inaction by the repeated assertion of defendant that he had the title, notwithstanding the allegations of the plaintiff in said suit."

Crandall v. Parks, 152 Cal. 772, 93 P. 1018, is a case wherein the plaintiff was the owner of certain real and personal property, and the defendant, in order to induce plaintiff to make an exchange for his property in Oregon and a restaurant in San Diego, made certain representations as to the value of the Oregon land and the ownership of personal property. The personal property concerning which the representation of ownership was made consisted of a hot water tank and a refrigerator represented to belong to the defendant when in fact it did not. An exchange of property was effected, plaintiff being induced to make the same solely by reason of such representations as to value and ownership, upon which he wholly relied. Defendant well knew that plaintiff in making the exchange relied and acted solely upon these representations. In this case the court said, at page 776 of 152 Cal., 93 P.

1018, 1019: "A statement as to the value of property is not always made as a mere expression of opinion upon which the other party has no right to rely. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such, it is like any other representation of fact, and may be a fraudulent misrepresentation warranting rescission. The rule in regard to this matter is stated by Mr. Pomeroy as follows: 'Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation.' 2 Pom. Eq. Jur. § 878. * * * That plaintiff never made or commenced an investigation for himself as to the value of the Oregon land or the ownership of the personal property, that he believed and relied solely on the statements and representations of defendant in regard thereto, and that he was induced to make the exchange solely by reason thereof, are all fully established by the findings, which are conclusive upon this appeal. We know of no reason why defendant should be allowed to maintain that plaintiff was not entitled to rely, without investigation on his part, upon a representation as to the value of land so remotely situated, which he had never seen and could not personally examine—a representation, 'to the truth of which the party has deliberately pledged his faith.' See *Dow v. Swain*, 125 Cal. 681 to 684, 58 P. 272 to 274. He was clearly entitled also to rely upon the representation as to the ownership of the personal property."

In *Oppenheimer v. Clunie*, 142 Cal. 313, 75 P. 899, 901, the court says, in quoting Mr. Justice Temple in *Colton v. Stanford*, 82 Cal. 398, 23 P. 16, 16 Am. St. Rep. 137:

"The power to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution—nay, I may say, with great reluctance—unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length of the chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the interests of the country. In general, the parties must look out for themselves."

"It is stated in *Southern Development Co. v. Silva*, 125 U. S. 250, 8 S. Ct. 881, 31 L. Ed. 678, that, in order to justify a court of equity in setting aside a contract on the ground of

fraudulent representations, the complainant must show by clear and decisive proof:

"First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; fourthly, that it was made with intent that it should be acted on; fifthly, that it was acted on by complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

"This court said in *Colton v. Stanford*, 82 Cal. 399, 23 P. 28, 16 Am. St. Rep. 137: 'A misrepresentation as the basis of rescission must be material, but it can be material only when it is of such a character that if it had not been made the contract would not have been entered into. The misrepresentation, it is true, need not be the sole cause of the contract, but it must be of such nature, weight, and force that the court can say, "Without it the contract would not have been made."' "

"* * * The rule is thus stated by Pomeroy in his work on Equity Jurisprudence (section 893): "If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled.' And again the same author says (section 894): 'If, in a contract of sale or leasing representations are made by the vendor concerning some incidents, qualities, or attributes of the subject-matter which are open and visible, so that the falsity of the statement is patent to an ordinary observer, and it is made to appear that the purchaser at, or shortly before, the concluding of the contract, had seen the thing itself which constitutes the subject-matter, then a knowledge of the facts is chargeable upon such party; he is assumed to have made the agreement knowingly, and cannot allege that he was misled by the false representations.' "

[4, 5] In the case at bar said representations were material and respondent relied on them and delivered his check to appellant in

payment for said property. Certainly such representations were false. Appellant knew them to be false, because he was informed by his attorney that the only interest he had in said property was the interest of the judgment debtors. Second, the record is silent as to any other or further knowledge of appellant concerning his ownership of said property. The record does not show any knowledge on the appellant's part to justify his claim of ownership. Such information did not justify a representation of ownership of any title at all. Civ. Code, § 1572; *Blake v. Arp*, supra. Plaintiff told defendant that he knew of no claims against the property, except city taxes, which would not be more than \$50 in his opinion.

[6, 7] Does the fact that he was shown a sheriff's certificate of sale, and looked at the description of the property therein and upon inquiry was again told that the title was good, deprive the defendant of his right to rely upon those representations? We think not. Appellant must have known that the sheriff's certificate of sale carried with it the title of the judgment debtors and no more, and the respondent had a right to believe that the appellant was aware of the title he had received by virtue of the sheriff's certificate of sale. But to be certain, he again asked if the title was good. Then, if not before, appellant must speak the truth, because he knew then, if not before, that the respondent was relying upon his representations without investigation. That is, appellant was then, if not before, legally bound to disclose the nature of the title of the judgment debtors, or at least to state to respondent his lack of knowledge concerning the same. Having failed so to do, appellant's statement that the title was good was in fact a fraud. Civ. Code, § 1572; *Blake v. Arp*, supra; *Crandall v. Parks*, supra.

[8, 9] Further, taking the representation that there were no claims against the property excepting city taxes in a sum less than \$50, in the opinion of the appellant, appellant joined the creditors' committee, Spraul, Fairchild, and Gale, as parties defendant with Bailey, White, etc., in the action out of which the judgment and execution sale and sheriff's certificate arose, and, upon the creditors' committee's representation in open court of the contract between the creditors' committee and Bailey and White et al., appellant dismissed the cause of action as to the creditors' committee and continued to prosecute said cause as to Bailey and White to judgment, caused execution to issue in said cause, and upon the execution sale, before buying said property, was present when one of the creditors' committee, Spraul, announced to all present that they claimed such property. Plaintiff does not remember the statement so made, or if one

was made. However, his attorney heard such a statement. His attorney, a number of times, advised appellant that all he got by the said purchase was the interest of the judgment debtors, and that was all he had a right to sell. Further, plaintiff must have known that the defendant was making these inquiries as to title and claim of others, to know what he was buying, and that he was relying upon him (appellant) for his information relative thereto. Appellant apparently either paid no attention to what was going on at the sale and gave no heed to his attorney's advice or as to what title he had purchased or received and therefore erroneously believed he had a good title, or else he knew he had no title to said property and knew there were claims by others to said property, and thought by lulling the said respondent into inaction by his continued affirmation that the title respondent was getting was good, and that there were no others claiming the same, that he would get the \$1,000, in entire disregard of respondent's rights. The evidence shows that such price was a fair and reasonable value of the property agreed to be sold. In such circumstances the respondent had a right to rely upon the representation that the appellant knew of no claims against said property except the taxes. The representation as to title was a representation of a material fact and false, and not the expression of an opinion. *Blake v. Arp*, supra; Civ. Code, § 1572. The representation as to the appellant having no knowledge of any claims, except city taxes, was a representation as to a material fact and false. *Crandall v. Parks*, supra. Such representations were relied upon by respondent. Said representations were the inducing cause of the contract. There can be no doubt but that without them no contract would have been entered into. *Craig v. Shea*, 45 Cal. App. 351, 188 P. 73; *Colton v. Stanford*, 82 Cal. 399, 23 P. 16, 16 Am. St. Rep. 137; *Oppenheimer v. Clunie*, supra.

[10] Fair dealing, common honesty, and good conscience required the appellant to make a full disclosure as to the title and other claims known by him to be against the property, rather than to continue to lull this confiding defendant into a continuance of his belief in the representations of the plaintiff. Appellant, having failed to do so, was guilty of fraud in procuring the \$1,000, and the whole contract was void ab initio. There was therefore no consideration for the check for \$1,000. Other objections urged are devoid of merit. The findings are abundantly supported by the evidence, and the judgment is not against the law.

Judgment affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

109 Cal. App. 539

CARPENTER v. ELMER R. SLY CO. et al.
Civ. 4218.District Court of Appeal, Third District,
California.

Nov. 14, 1930.

1. Joint-stock companies and business trusts
C-17.

Where contract in compliance with trust declaration set forth provision limiting liability to trust estate, trustees are exempt from liability, and recourse can only be had to trust property.

Declaration of trust provided that every contract executed by trustees shall be conclusively taken to have been executed or done only in their or his capacity of trustee or trustees, and that such trustee or trustees shall not be personally liable. It further provided that every instrument executed by trustees "shall recite the substance of the section showing the nonliability of the individual trustees."

2. Joint-stock companies and business trusts
C-17.

Statute providing that singular promise by several is presumed to be joint and several *held* inapplicable to contract by trustees of trust estate (Civ. Code, § 1660).

Contract provided that it was not made by undersigned individually, but as trustees under declaration of trust creating trust estate, and that contract was enforceable only against trust property "any and all personal liability of the trustees and beneficiaries thereunder being, and having been expressly waived."

3. Joint-stock companies and business trusts
C-17.

Provision in agreement between trust estate and third person, whereby latter associated himself with former, *held* to constitute third person a trustee of trust estate.

Contract provided that upon execution of agreement trust estate would constitute third person one of trustees, subject, however, to all the terms and conditions contained in the trust agreement, constituting the trust estate.

4. Contracts C-147(1).

In interpreting contract, primary object is to ascertain and carry out intention of parties (Civ. Code, § 1636).

5. Contracts C-221(3).

Contract to pay may be restricted to particular fund, so as to make sufficiency of fund condition precedent to liability.

In such case, promise cannot be enforced until fund is realized, unless failure to realize or collect fund from which payment is made is due to promisor's neglect or unreasonable refusal to act or is otherwise attributable to him.

6. Contracts C-221(3).

Bonus under terms of contract engaging third person to superintend construction of houses *held* payable only out of profits derived from undertaking (Civ. Code, § 1636).

Contract provided, in substance, for payment of \$10 per day for services rendered, and a bonus of \$100 on each and every house constructed and superintended by third person, payable as and when said houses had been sold and settlement made through escrow. Parties building houses did not own lots, but were only interested in profits derived from sale of houses after their construction.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by G. A. Carpenter against the Elmer R. Sly Company, a trust estate, and others. From a judgment for plaintiff against defendant Richard E. Eagan, the latter appeals.

Reversed.

E. O. Leake, of Los Angeles, for appellant. Newcomb Condee, Vernon P. Spencer, and W. W. Farrow, all of Inglewood, for respondent.

PLUMMER, J.

The plaintiff had judgment against Richard E. Eagan in the sum of \$2,400, from which judgment the defendant appeals.

The record shows that the defendant Elmer R. Sly Company is a trust estate formed under and by virtue of a trust indenture, dated the 15th day of March, 1925. The trust instrument provides in section 3 as follows: "Every note, bond, contract, instrument, certificate or undertaking, and every other act or thing whatsoever, executed or done by the trustees, or any of them, in connection with this trust shall be conclusively taken to have been executed or done only in their or his capacity of trustee or trustees under this agreement and declaration of trust, and such trustee or trustees shall not be personally liable." The section then further provides that every instrument executed by the trustees shall recite the substance of the section showing the nonliability of the individual trustees.

On the 1st day of April, 1925, an agreement was entered into between the Elmer R. Sly Company and the defendant Richard E. Eagan, wherein it was recited that the party of the first part, to wit, Elmer R. Sly Compa-

ny, had a contract with the Fidelity Mortgage Company, a corporation, relative to the building of certain houses, and that the party of the second part had been building houses in the city of Los Angeles, and had established a certain organization for the building thereof, and was desirous of entering into a contract with the party of the first part to assist party of the first part in carrying through successfully the contract of the party of the first part with said mortgage company. Wherefore, it was understood and agreed that party of the first part, to wit, Elmer R. Sly Company, should transfer to party of the second part, to wit, to Richard E. Eagan, a one-half interest in the profits to be derived from a building contract with the Fidelity Mortgage Company, etc. The contract just referred to, among other things, contained the following: "It is further agreed between the parties hereto, upon the execution of this agreement, that the party of the first part will constitute said party of the second part one of the trustees of the Elmer R. Sly Company, a Trust Estate, subject, however, to all the terms and conditions contained in the trust agreement constituting Elmer R. Sly Company a Trust Estate." Thereafter, the Elmer R. Sly Company and the defendant Richard E. Eagan entered into an agreement with the plaintiff, G. A. Carpenter, which agreement is in the words and figures following, to-wit:

"This agreement made in triplicate this 6th day of April, 1925, by and between Elmer R. Sly Company, a Trust Estate, organized and existing under the laws of the State of California, whose principal place of business is in the City of Los Angeles, State of California, and Richard E. Eagan of the said city and state, hereinafter called 'parties of the first part' and G. A. Carpenter, of the said city and state, hereinafter called 'party of the second part,'

"Whereas, the parties of the first part are desirous of securing the services of the party of the second part to assist them in the erection of twenty-four houses in the city of Los Angeles, State of California, and whereas the party of the second part has agreed to associate himself with the said parties of the first part. Now, Therefore, the parties hereto agree with each other as follows: The party of the second part agrees to devote his entire time and attention to the business of the parties of the first part, and to diligently do and perform all work necessary to superintend the construction of such houses as shall be erected by the parties of the first part, and to carry out all instructions given him in a workmanlike manner. The parties of the first part agree to pay party of the second part the sum of \$10.00 for each and every day that he is employed by said parties of the first part, and are to pay to the said second party a bonus of \$100.00 on each and every house constructed and superintended by said second party, payable as and when said houses have been

sold and settlement made through escrow. It is agreed by and between the parties hereto that in the event of the death of the party of the second part, that the bonus herein agreed to be paid shall cease upon all houses upon which actual construction has not been started.

"It is further agreed by and between the parties hereto that this contract is made by the undersigned, not individually, but as trustees under a certain trust agreement creating Elmer R. Sly Company, and hereby made a part hereof, and is enforceable only against, and is payable only out of, the trust property held hereunder, any and all personal liability of the trustees and beneficiaries thereunder being, and having been, expressly waived by the holder hereof.

"In Witness Whereof, the said Elmer R. Sly Company has caused its signature to be affixed hereto, and said Richard E. Eagan and G. A. Carpenter have hereunto set their hands the day and year first above written.

"Elmer R. Sly Co.

"By Elmer R. Sly.

"R. E. Eagan,

"G. A. Carpenter."

At the time and prior to the execution of this agreement, G. A. Carpenter had been working for the appellant Eagan on the basis of \$9 per day and 50 per cent. of the profits from their building operations. Thereafter, twenty-four houses were built under the above contract, and payment of \$10 per day as wages was made by the defendants, or, rather, by the Elmer R. Sly Company, to the plaintiff. No part of the bonus was paid, and the judgment against the appellant in this action is for the sum of \$2,400, representing the bonus of \$100 per house. The record shows that after the building of twenty-four houses the defendant R. E. Eagan withdrew from all connection with the building transactions and severed his connection with the Elmer R. Sly Company, a trust estate.

The transcript further shows that the plaintiff had knowledge of the agreements which we have herein referred to, and of the relationship existing between the Elmer R. Sly Company, a trust estate, and the appellant, Richard E. Eagan. The testimony of the respondent, as it appears in the transcript, in this particular, reads as follows: "Mr. Eagan and Mr. Sly both told me the arrangements under which they were working. Each was to receive one-half of the profits made from the building of the houses. I knew that they did not own the lots upon which the houses were built; they were only interested in the profits to be derived from the sale of the houses, and each of them was to receive one-half. About a week before the execution of plaintiff's exhibit I (being the first agreement referred to herein), I had a lengthy discussion with Mr. Eagan and Mr. Sly at my house, during which time we talked about the build-

ing of the houses and how much we were all going to make out of it. About the following day Mr. Sly and Mr. Eagan outlined to me fully what their connection was with the transaction. Immediately prior to this time I had been working with Mr. Eagan on a basis of \$9 per day and 50 per cent. of the profits made in the building of the houses." The plaintiff further testified that all the directions he received relative to the building of the houses came from the Elmer R. Sly Company, and not from the defendant; that the defendant never gave any instructions relative to the building of the houses.

The record further shows that sixteen of the twenty-four houses were sold through escrow, and the remainder by the Elmer R. Sly Company, and that in order to acquire title the defendant and his wife executed a few quitclaim deeds. There is nothing in the record, however, to warrant the holding that the defendants did anything which could be construed as a violation of the contract with the plaintiff, so as to render themselves individually liable for the \$100 agreed to be paid as a bonus for each house. The record, as we have indicated, shows that Elmer R. Sly Company and Eagan were interested only in the profits to be made, and had no ownership in or to either the lots upon which the buildings were erected or in the buildings themselves.

[1] That a trust declaration similar to the one executed by the Elmer R. Sly Company is valid, and if the contracts thereafter executed by them comply with the trust declaration in setting forth in the instruments the provision of the trust declaration limiting liability to the trust estate, then and in that case third parties, or the parties so contracting with the one or the ones executing the trust declaration, have recourse only to the property of the trust estate, is expressly held in the case of *Goldwater v. Oltman et al.* (Cal. Sup.) 292 P. 624. Upon this appeal the appellant challenges the sufficiency of the evidence to sustain the findings of the court, the court having found the appellant individually liable, irrespective of his relation to the Elmer R. Sly Company, and that the appellant did not occupy the position of a trustee of said company. The findings of the court, so far as necessary to be considered here, may be limited to a portion of finding No. 6, which reads: "And it is not true that said agreement also provided that the same was not made by the defendant Richard E. Eagan individually; and it is not true that the said agreement was enforceable only against and was payable only out of certain trust property therein described (referring to the agreement), and it is not true that said agreement contained an express waiver of any and all personal liability of the defendant Richard E. Eagan, but it is true that the said agreement was executed by the said defendant Richard E. Eagan individually and as a joint obligor with the said de-

fendant Elmer R. Sly Company, a trust estate." The argument in support of this finding is based upon the holding of the court in the following cases: *Farmer's Exchange Bank v. Morse*, 129 Cal. 241, 61 P. 1088; *Gummer v. Mairs*, 140 Cal. 537, 74 P. 26; *Bell v. Adams*, 150 Cal. 772, 90 P. 118; *Wood v. Longyear*, 197 Cal. 723, 242 P. 932, 934; *Reuter v. Gaudreau*, 58 Cal. App. 634, 209 P. 216; *Bagley v. Cohen*, 121 Cal. 604, 53 P. 1117. All of these cases have been carefully examined and none of them sustain respondent's contentions.

In the case of *Bagley v. Cohen*, supra, it appears that the parties held liable expressly guaranteed the payment of the sum agreed to be paid in the contract. There was nothing in the contract bearing any likeness to the agreement entered into between the plaintiff in this action and the defendants Elmer R. Sly Company and Richard E. Eagan.

In the case of *Wood v. Longyear*, the most recent one cited by the respondent, the holding that the defendant there was liable was based upon the language of section 1659 of the Civil Code, which reads, "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several," followed by a statement in the opinion as follows: "There being nothing in the instrument itself to overcome this presumption, it follows that the trial court was correct in holding that the obligation of these defendants was a joint and several obligation, and hence that the action might have been begun and might proceed against either of them in so far as an individual remedy against either was sought," etc.

[2] In the contract before us there is something to the contrary. The contract itself expressly provides the fund out of which payment shall be made. Nor does section 1660 of the Civil Code, which provides that a promise made in the singular, but executed by several persons and presumed to be joint and several, apply to this case.

[3] Respondent further contends that the defendant Richard E. Eagan did not occupy the position of a trustee of the Elmer R. Sly Company, a trust estate, and therefore the exemption of liability, other than as against the property of the company, does not apply to him. The excerpt from the agreement between Elmer R. Sly Company and Richard E. Eagan which we have set forth, and of which the plaintiff had knowledge, is a conclusive answer to this contention.

[4-6] Taking all the instruments together and considering the building project in which the parties were about to engage, it seems to us absolutely clear that the \$100 bonus was to be paid out of the profits, if any, derived from the undertaking. This is further strengthened by the fact that the plaintiff, instead of

being paid \$9 a day, his original compensation, was given an additional \$1, and was paid at the rate of \$10 per day. The plaintiff's own testimony shows that he understood the whole transaction; he understood the basis upon which the parties were operating, and that it was in the expectation of profits to be made by all of the parties in building the houses and selling the same. Section 1636 of the Civil Code provides that: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Other sections of the Code provide that the whole contract must be taken together, and also the circumstances under which it is made should be taken into consideration. In this behalf it is sufficient to cite California Juris. vol. 6, p. 252, where it is said: "The primary object of all interpretation is to ascertain and carry out the intention of the parties." This text is supported by a long list of authorities, so numerous that we cannot list them here.

Respondent makes the further contention that the condition in the agreement constituted only a stipulation as to the time of payment of the bonus fixed therein, and cites 13 C. J. 632. This reference, however, we think inapplicable. The statement of the law controlling in this case is found in the same volume of Corpus Juris, but on page 631, § 701, which reads: "A contract or promise to pay may be restricted to a particular fund so as to make the raising or the sufficiency of the fund a condition precedent to the liability, and in such case the promise cannot be enforced until the fund is realized, unless the failure to realize or collect the fund from which payment is made, is due to the neglect, or the unreasonable refusal to act, of the promisor, or is otherwise attributable to him. So, where the contract of the parties is that the creditor shall look to a particular fund, he cannot, on the failure of such fund not attributable to the fault of the debtor, hold the debtor personally responsible, unless the contract contains stipulations amounting to a guaranty that the funds specified shall be sufficient for payment, or unless the promisee is induced to perform by the promise that a third person who, the promisor claims, owes him a debt or duty, shall pay the agreed price to the promisee, in which case the promisor is primarily liable to pay the contract price, although his debtor does not pay, or the debt or the duty does not exist."

We have in this case an agreement providing that the bonus shall be paid out of a certain fund. There is also an agreement in the record, of which the respondent had knowledge, that the appellant Eagan stood in the relation of trustee to the Elmer R. Sly Company, by virtue of its own written agreement. This excludes any reasonable contention that

the appellant stood either in the relation of an individual promisor or as a guarantor of the payment of the \$100 per house bonus, to the respondent. There was no profit in the enterprise, and therefore no trust estate was created.

What we have said we think shows conclusively that the finding of the trial court from which we have quoted is not sustained by the testimony, but is contrary thereto. There is nothing in the record upon which any finding could be based to the effect that the appellant has done anything to render himself liable or void the effect of the agreement entered into by the parties to this action. The contention that the quickclaim deeds amounted thereto is without merit, as they were executed only to remove a cloud upon the titles.

The judgment is reversed.

All concur.

109 Cal. App. 377

HIRAIDE et al. v. COCHRAN.

Civ. 152.

District Court of Appeal, Fourth District,
California.

Nov. 7, 1930.

1. Physicians and surgeons ⇨18(8).

In action for malpractice, proof of negligence or lack of care or skill on part of physician can only be made by testimony of experts, viz., physicians familiar with practice in particular locality.

2. Physicians and surgeons ⇨18(8).

Unless there is expert testimony, in action for malpractice against physician, showing negligence, plaintiff is not entitled to judgment.

3. Appeal and error ⇨933(1).

On appeal, presumption is in favor of order granting a new trial.

4. New trial ⇨71.

Trial judge is under duty to grant new trial if not satisfied with verdict, notwithstanding substantial conflict in evidence.

5. Appeal and error ⇨979(2).

Order granting defendant a new trial in malpractice action was not disturbed on appeal, where evidence was substantially conflicting and trial judge was not satisfied with verdict.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by George K. Hiraide and another against Dr. R. C. Cochran. From an order granting defendant's motion for a new trial after a verdict for plaintiffs, plaintiffs appeal.

Affirmed.

Roland Thompson, of Santa Ana, for appellants.

Head, Wellington & Jacobs, of Santa Ana, and Moote & Longeroft, of Los Angeles, for respondent.

WARMER, Justice pro tem.

This is an appeal from an order granting a new trial in a malpractice action, the complaint charging negligence, lack of care, and lack of skill of the defendant in the performance of his professional duties in caring for Cho Hiraide. The answer denies the negligence, lack of care, and lack of skill. The motion for a new trial was made on a number of grounds, among which was insufficiency of the evidence to justify the verdict and that the verdict is against the law. The motion was granted upon the ground that the evidence was insufficient to justify the verdict. The sole question presented by the appellants is whether or not the evidence is sufficient to justify the verdict of the jury. From a careful reading of the brief of the appellants it appears that the appellants have applied the rule on appeal as the rule for the direction of the trial court on the motion for a new trial and contend that if there is sufficient evidence to support a verdict on appeal from the judgment that the trial court commits error if it grants a new trial.

Appellants cite the case of Priestley v. Stafford, 30 Cal. App. 523, 158 P. 776, as authority in support of his contention. This is an action which is an appeal by the defendant from the judgment and an order denying his motion for a new trial. The only ground urged for reversal is appellant's contention that the findings are not supported by the evidence, and the appellate court quotes the evidence and finds that there is sufficient evidence to support the judgment. Taylor v. De Vaughn, 91 Cal. App. 318, 324, 266 P. 960, 963, cited by appellants, is a case of an appeal to the same effect. The court there says: "The findings of the trial court have ample support in the evidence." Rankin v. Mills, 207 Cal. 438, 278 P. 1044, also cited by appellants, is an appeal from the judgment. It would seem, therefore, necessary to again review a few of the many cases announcing the rule for the guidance of the trial court in passing upon a motion for a new trial in the determination of this appeal.

The old case of Curtiss v. Starr & Co., 85 Cal. 376, 24 P. 806, is a case in which the plaintiff introduced testimony tending to show certain facts which the jury evidently believed, but from the granting of the motion for

a new trial, it must be presumed, the judge did not. In this case the court says: "And if he did not, it was his duty to grant a new trial. The rule as to conflict of evidence does not apply in the trial court. The judge should set aside the verdict whenever he is not satisfied with it upon the evidence, and his order in that regard will not be disturbed on appeal if the evidence is substantially conflicting. Dickey v. Davis, 39 Cal. 569; Sherman v. Mitchell, 46 Cal. 580; Irving v. Cunningham, 58 Cal. 306; Breckenridge v. Crocker, 68 Cal. 403, 9 P. 426."

In Gordon v. Roberts, 162 Cal. 506, at page 509, 123 P. 288, 289, the court says: "And, if there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or the finding is against the weight of the evidence, and that there should be a new trial. 'When the evidence is conflicting, the trial court is authorized to review it; and if, in its opinion, the verdict is against the weight of evidence, it is its duty to grant a new trial.' Warner v. Thomas, etc., Works, 105 Cal. 409, 38 P. 960. See, also, Bjorman v. F. B. R. Co., 92 Cal. 500, 28 P. 591; Cole v. Wilcox, 99 Cal. 549, 34 P. 114; Bledsoe v. Decrow, 132 Cal. 312, 64 P. 397."

In the case of Marr v. Whistler, 49 Cal. App. 364, at page 369, 193 P. 600, 602, the court says: "The wide extent of the discretion of the trial court in granting or denying a new trial for insufficiency of the evidence is well-nigh axiomatic. Its action in such matters is conclusive upon the appellate court unless there has been an abuse of discretion. When there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict, or the finding, is against the weight of the evidence, and that there should be a new trial. [Citing cases.] * * * 'Even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to the one or the other of the parties litigant, the question as to the probative force or evidentiary value of the testimony, in a proceeding on a motion for a new trial based upon the ground that the evidence is insufficient to justify the verdict, is one whose determination is with the trial court. The rule (elementary and commonly familiar in our system of jurisprudence) is that the plaintiff in a civil action must establish his case by a preponderance of proof, but, although many witnesses may testify directly in favor of his position, and no adversary testimony directly adduced, it is still with the jury, in the first instance, and finally with the trial court, where a new trial is asked on the ground stated, to say whether such testimony, when subjected to the legal tests whereby the probative value of evidence is to be judged, measures up to the requirement of

the law as to the degree of proof essential to the support of an issue of fact.' Otten v. Spreckels, 24 Cal. App. 251, 257, 141 P. 224, 226. In such cases the presumption is in favor of the order and against the findings, or the verdict." Condee v. Gyger, 126 Cal. 546, 59 P. 26; Hass v. Mutual, etc., Ass'n, 118 Cal. 6, 49 P. 1056; Clohan v. Kelso, 42 Cal. App. 67, 183 P. 349.

In Smith v. Royer, 181 Cal. 165, 183 P. 660, 663, the court says: "In a jury trial a party is entitled to two decisions on the evidence—one by the jury and one by the trial court, and the trial court is not bound by a conflict in the evidence." Citing cases.

In Estate of Wall, 183 Cal. 431, 191 P. 687, the court says: "The trial court in acting upon a motion for a new trial, particularly on the ground of insufficiency of the evidence to support the verdict or findings, has a wide discretion, and its action thereon, either for or against the motion, will not be disturbed on appeal, unless it clearly appears to the appellate court that the discretion was abused. This proposition has been so often decided that it is unnecessary to cite authorities in support of it."

In this case three eyewitnesses (daughters of the decedent) testified directly and positively that the decedent acknowledged the signature to the document proposed as a codicil to them and declared the same to them to be a codicil to her will and, that two of them then and there at her request signed their names thereto in her presence and in the presence of each other. The contradiction thereof consisted of the evidence of three other children of the decedent to the effect that in their opinion the signature to the codicil was not the signature of the decedent and the testimony of a handwriting expert to the effect that after comparing the same with numerous admittedly genuine signatures of the decedent it was his opinion that the signature to the codicil was not genuine. There was other testimony in the record also. The court said: "It is obvious that in this state of the evidence it was within the discretion of the court to grant a new trial. If he believed the evidence of the witnesses for the proponents, it was his duty to do so. While it is true that on cross-examination the said witnesses contradicted themselves and showed evidence of considerable agitation, there was nothing from which, as a matter of law, we can say the court should have refused to credit their testimony. The

judge who tried the case was the judge who granted the new trial, and he saw and heard the witnesses as they were testifying, and was in a much better position to determine their credibility than this court could possibly be. It is unnecessary to consider the other points presented in the motion for a new trial. Upon this ground alone the order must be affirmed."

For further citation of authorities on the subject of insufficiency of the evidence as a ground for the granting of the motion for a new trial, see 20 Cal. Jur. 117; Hayne's New Trial and Appeal, p. 467; Conwell v. Varain, 20 Cal. App. 521, 130 P. 23, and cases there cited.

[1, 2] Appellants' brief concedes a conflict in the testimony, there being the testimony of Dr. Herbert A. Johnson, Dr. Claude E. Stein, and the testimony of the defendant himself in support of the defendant's contention. In support of the complaint there is the testimony of Dr. Cowles and lay witnesses. Without setting out the testimony in detail, there was a direct conflict in the evidence. Respondents urge that in cases of this kind proof of negligence or lack of care or lack of skill on the part of a physician can only be made by the testimony of experts, viz., physicians familiar with the practice in the locality. Unless there is such testimony showing negligence, no judgment can be sustained. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128; Linn v. Piersol, 37 Cal. App. 171, 173 P. 763. With such contention the appellants do not take issue and, of course, could not because it is the recognized rule in this state.

[3-5] The presumption is in favor of the order granting a new trial. There was a substantial conflict in the evidence. The trial judge was the judge who granted the motion for a new trial; he saw the witnesses and heard them testify and was in a better position to determine their credibility than this court can possibly be. It was his duty to grant the new trial in this case if he was not satisfied with the verdict. Under such circumstances, the order granting a new trial will not be disturbed on appeal. The order appealed from must therefore be affirmed.

Order appealed from affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

RICHARDSON v. HISLOP et al.
Civ. 7442.

District Court of Appeal, First District,
Division 2, California.
Nov. 10, 1930.

Rehearing Denied Dec. 10, 1930. Hearing De-
nied by Supreme Court Jan. 8, 1931.

1. Novation $\hookrightarrow$ 1.

Closing agreement in respect to part-
nership adventure, contemplating immediate
fulfillment of terms, without any dispute be-
tween parties, constituted "novation" (Civ.
Code, §§ 1530, 1531).

Under the closing agreement the part-
nership operating theretofore pursuant to
selling agreement between parties was
terminated by the sale by certain mem-
bers to another, of all right, title, and in-
terest in company, and all assets, includ-
ing certain discount from dealers' prices
on all sales made by firm composed of re-
tiring members, and all orders to certain
date, with agreement to deliver any and
all assets within possession of retiring
members or in possession of their firm,
with further provision that on completion
of required payments and delivery, the re-
tiring members and firm would be released
to sell their wares to any and all dealers
or to other persons without any claims
whatever.

[Ed. Note.—For other definitions of
"Novation," see Words and Phrases.]

2. Novation $\hookrightarrow$ 10.

Party, in order to recover on old contract
after novation, must rescind, and as condition
place other party in status quo (Civ. Code, §§
1530, 1531).

3. Estoppel $\hookrightarrow$ 92(2).

Member of partnership retaining benefit
of closing agreement in respect to previous
selling agreement was estopped to claim un-
der original contract.

Upon the execution of closing agree-
ment in respect to partnership operating
under sellers' agreement, retiring mem-
bers of partnership reorganized business,
establishing their own sales agency, and
continued manufacturing products pre-
viously handled through partnership, and
remaining member of partnership not only
did not attempt to organize and maintain
sales force in accordance with require-
ment of original selling agreement, but
also retained benefits pursuant to closing
agreement providing for payment to him
in cash of certain profits made by part-
nership.

4. Trover and conversion $\hookrightarrow$ 47.

Owner of published designs, models, and
molds, not copyrighted, was entitled to dam-

ages for use thereof only in amount equal
to cost of production (Civ. Code, §§ 980, 983).

5. Trover and conversion $\hookrightarrow$ 16.

Owner of published designs and models
had no property rights therein, in absence
of copyrights warranting recovery of dam-
ages for value of use thereof.

Appeal from Superior Court, Contra Costa
County; A. B. McKenzie, Judge.

Action by Erl H. Richardson, individually,
and doing business under the firm name and
style of the Clay Glow Tile Company, against
James W. Hislop and others, doing business
under the firm name and style of Hislop &
Myers, also known as California Art Tile
Company, and another, wherein defendants
filed a counterclaim. From the judgment
plaintiff appeals.

Affirmed.

Frederick W. Kant and Warren H. Pills-
bury, both of San Francisco, for appellant.

T. H. Delap and Tinning & Delap, all of
Martinez, and Hiram E. Jacobs, of Richmond,
for respondents.

BURROUGHS, Justice pro tem.

On July 14, 1922, the plaintiff Erl H. Rich-
ardson and the defendants James W. Hislop
and A. C. Myers entered into an agreement
of partnership under the name of Clay Glow
Tile Company, by which they agreed to en-
gage in the business of buying, selling, and
retailing goods, wares, and merchandise for
cash, on a commission basis or otherwise, but
more especially to deal in clay and tile prod-
ucts, including terra cotta and ornamental
tile of all descriptions; together with any
other articles or products appertaining or be-
longing thereto.

The partnership was to continue for one
year unless sooner terminated as provided in
said agreement and hereinafter set forth.
It was further agreed that the capital stock
of said copartnership was \$1,000, to be sub-
scribed for and distributed as follows: Erl H.
Richardson, 60 per cent; James W. Hislop, 20
per cent; A. C. Myers, 20 per cent. It was fur-
ther provided that Richardson should be the
manager of the business and should do his
best to dispose of the entire output of a cer-
tain clay and tile plant, said output to be con-
tracted for with James W. Hislop, A. C. My-
ers, W. A. Hislop, L. J. Hislop, and C. E.
Cummings, a partnership doing business un-
der the firm name of Hislop & Myers. It was
further provided that Richardson's services
above referred to were to supervise the archi-
tectural arrangement, drafting and color ar-
rangement of tiles. It was also provided that
compensation was to be arranged with Rich-
ardson for any special designs of fountains,

fireplaces, or other special lay-outs. If the use of any special design was granted without charge by Richardson, it was understood that such special design, also the models, molds, and dies were to become the property of Richardson in consideration of such use and were to be delivered to the latter upon demand by him, and that the Clay Glow Tile Company should market and dispose of the clay and the other products contracted for with Hislop & Myers on a margin of gross profit of 25 per cent. It was also agreed that in addition to the 60 per cent. interest owned by Richardson in said business, he should receive a salary equal to 10 per cent. of the 25 per cent. gross profit to be made by the partnership firm on the clay and tile products purchased under the contract to be made with Hislop & Myers.

The partnership of Clay Glow Tile Company should continue from year to year unless sixty days before the beginning of the new year one of the partners should give notice in writing to the other partners of a desire to terminate the same.

It was also agreed that the interest of James W. Hislop and A. C. Myers was in reality their interest in the copartnership of Hislop & Myers, the copartnership hereinbefore referred to. On the same day Eri H. Richardson, James W. Hislop, and A. C. Myers, as copartners, under the name of Clay Glow Tile Company, hereinafter called the "purchasers," and James W. Hislop, A. C. Myers, W. A. Hislop, L. J. Hislop, and C. E. Cummings, copartners, doing business under the firm name of Hislop & Myers, hereinafter called "sellers," entered into an agreement, hereinafter referred to as "the selling contract," wherein it was recited that it was an exclusive contract between the parties and was to cover the "Western States of America and Hawaii," that it was an exclusive contract for the entire output of said sellers' plant, within said territory. It was further provided that all material embraced by said agreement should bear the trade name Clay Glow Tile Company or any other name or mark furnished by the purchasers and none other. It was also agreed that all designs furnished by the purchasers to the sellers and all models and molds made from designs belonging to the purchasers should at all times be and remain the property of the purchasers. Other provisions of the selling agreement will be hereinafter referred to.

On February 26, 1923, E. H. Richardson and Hislop & Myers entered into an agreement, hereinafter called the closing agreement, by the terms of which the firm of Hislop & Myers sold to said Richardson all their right, title, and interest in the Clay Glow Tile Company and all assets thereof, which included the 25 per cent. discounts from dealers' prices on all sales made, and all orders dated

up to March 1, 1923, and agreed to deliver to Richardson any and all assets within their possession or in the possession of the firm known as Hislop & Myers. Hislop & Myers also agreed to take the new Ford coupé and pay the amounts so far invested by Clay Glow Tile Company, and to pay all amounts still due thereon. Hislop & Myers also agreed to deliver to E. H. Richardson, or order, tiles at Clay Glow's net prices for the sum of \$500 advanced to them by Clay Glow Tile Company, or the same could be deducted, together with any other amounts due Clay Glow Tile Company, from any outstanding amounts due them from the Clay Glow Tile Company. It was further provided that upon the completion of such payments and deliveries, E. H. Richardson was to pay to Hislop & Myers the balance due them by sixty days acceptance, whereupon E. H. Richardson would and did release them to sell their wares to any and all dealers or to other persons without any claim whatever. Upon completion of the above deliveries and payments that contract dated July 14, 1922, "will become null and void."

The second amended complaint upon which the cause was tried contains four separate counts. So far as necessary to an understanding and decision of this case, it is alleged therein that up to and including the date of the closing contract, the defendants had rendered a full and true account to the Clay Glow Tile Company, in accordance with the terms of the sellers' agreement above referred to, and have received all sums of money due to the Clay Glow Tile Company, therein provided. But from and after said date defendants have refused to render said accounts or make any payments thereunder, although they have continuously made clay and tile products at their plant and sold the same. It is then alleged that defendants have violated the terms of the closing agreement in that they had in their possession under the seller's agreement, divers and sundry properties and assets of the Clay Glow Tile Company, including numerous designs furnished by plaintiff Richardson to the Clay Glow Tile Company, for the use of Hislop & Myers, and models and molds made therefrom, all of which were then and there the property of plaintiff Richardson and said Clay Glow Tile Company. That defendants failed and refused to return to plaintiff, as required by the closing agreement, said property and although frequent demand has been made therefor, defendants have refused to return the same and still retain them in their possession. It is alleged that because of the defendants' failure to return said property, the seller's agreement is still in full force and effect. It is further alleged that since February 26, 1923, the date of the making of the closing agreement, there has become due to plaintiff as commission in accordance

with the terms of the sellers' agreement, \$200,000, no part of which has been paid.

A second cause of action is based upon the original partnership between Eri H. Richardson, James W. Hislop, and A. C. Myers, in that by virtue of his interest in the Clay Glow Tile Company, Eri H. Richardson is entitled to 60 per cent. and a salary equal to 10 per cent. of the gross profits accruing to said partnership, Clay Glow Tile Company, from the sellers' contract. It is further alleged that under said sellers' agreement he is entitled to \$200,000 commissions and that he has been damaged to the extent of his interest in the Clay Glow Tile Company to the extent of \$140,000. The third cause of action has been abandoned.

As a fourth cause of action it is alleged that by reason of the failure of the defendants to deliver to Eri H. Richardson special designs, models, and molds made in accordance with the terms of the sellers' agreement, and not delivered to Richardson in accordance with the terms of the closing agreement, and which the defendants have continued to use since February 26, 1923, that the use thereof was and is of the value of \$200,000. They also pray for a return of the models.

By answer the defendants deny the material allegation of the complaint wherein it is alleged that the defendants have violated any of the terms of the several contracts. They also allege that the defendant California Art Tile Company is a corporation and the successor in interest of Hislop & Myers. They also plead laches and estoppel as a defense. A counterclaim in the amount of \$562.02 upon an open book account is alleged. There is a supplemental complaint based upon the same causes of action in the sum of \$20,000 alleged to be due under the sellers' contract, since the filing of the complaint. The allegations of this supplemental complaint are denied by defendants.

The court found that all four causes of action and also the cause of action set forth in the supplemental complaint arose out of the same series of transactions and that the subject-matter is the same; that the first cause of action based on the sellers' agreement above referred to was abrogated by the closing agreement of February 26, 1923; that the original contract of partnership was also terminated by the same agreement; that after the day when the closing agreement was signed neither the Clay Glow Tile Company nor Eri H. Richardson at any time made any effort to sell any of the products of Hislop & Myers or their successors, the California Art Tile Company, nor did they or either of them maintain any office or salesmen for that purpose, nor did they or either of them thereafter offer to buy any products made by the defendants; that immediately after February 26, 1923, the defendant California Art

Tile Company organized its own sales force and through this agency alone were its products sold; that the California Art Tile Company (also Hislop & Myers) performed all the conditions of the closing agreement, except that it did not return to Eri H. Richardson certain molds that were in the possession of the California Art Tile Company at the time the closing agreement was executed; that after signing said last-named agreement Eri H. Richardson kept and retained the 25 per cent. discount referred to in the closing agreement, amounting in all to the sum of \$1,800, and received from the California Art Tile Company tiles at Clay Glow net prices, as provided for in the closing agreement; that E. H. Richardson has never returned nor offered to return to the California Art Tile Company any of the property received or retained by him under the said agreement, and has never demanded the return of the molds or any other property of his in the possession of the California Art Tile Company, but said Richardson did at various times after the execution of the closing agreement demand that the California Art Tile Company pay him for the use of said molds and certain models and designs which he claimed were in their possession. Nor did Richardson before commencing this action notify defendants that the sellers' agreement was in effect, except that he at all times notified them that they had certain models, molds, and designs in their possession by virtue of the closing agreement and demanded compensation for their use; that after February 26, 1923, defendants did not have in their possession any designs or models or any other property belonging to plaintiff except certain molds hereinafter referred to.

The court also found that the plaintiff was by his conduct estopped to deny the force and effect of the closing contract; that he was also guilty of laches in bringing the action. The court further found that certain molds belonging to Richardson under the terms of the closing agreement were retained by the defendants; that their use to the California Art Tile Company was worth the sum of \$727, which was the greatest value to plaintiff or to any other person or concern for any purpose whatever. That the closing agreement had been substantially performed by both parties, except that defendants failed to deliver said molds for which failure plaintiff could be adequately compensated in damages. It was also found that the California Art Tile Company was entitled to recover \$510 on its counterclaim, and it was adjudged that plaintiff recover \$217. The plaintiffs appeal from the judgment.

Appellant claims that the respondents failed to comply with the provisions of the closing agreement and therefore the sales contract is in full force and effect, and that appellant is entitled to recover all sums which would

have been due him as though there had never been any attempt to terminate the sales contract and both parties had fully complied with its terms. The court found that the sales agreement had been abrogated by the closing agreement; that the latter had been substantially performed, but that the California Art Tile Company, the successor of Hislop & Myers, had not returned to appellant certain molds that were in its possession at the time of the execution of the closing agreement; that no demand had been made upon the defendants for the return of said property to the plaintiff; that the value of the use of said molds could be readily compensated by a money judgment; that the value of the use of said molds was \$727. The court also found that the partnership agreement between Eri H. Richardson, James W. Hislop, and A. C. Myers was terminated by the closing agreement. These findings of the court are all attacked upon the ground that they are not sustained by the evidence. The evidence shows without conflict that under the closing agreement appellant received \$1,800 for the assets of the Clay Glow Tile Company, provided for in the first paragraph of said agreement; that the defendants took the Ford coupé and paid to appellant all sums invested in said automobile and made all subsequent payments and all further sums remaining due on said coupé, all as provided in the second paragraph of said agreement. That defendants also delivered to appellant tiles at Clay Glow's net prices for the sum of \$500 advanced to them by Clay Glow Tile Company, all as provided in the third paragraph of said agreement. The dispute between the parties rests upon the alleged failure of the defendants to return to appellant certain designs, models, and molds in accordance with the provisions of the selling agreement. Appellant claims he is entitled to damages for their use by the defendants. Upon this subject the evidence of William Hislop is to the effect that the models made from Richardson's designs were made into molds and the molds were worn out and replaced before the signing of the closing agreement; that the defendants had no original designs prepared by Richardson; that they had models prepared from his designs which were always destroyed in the making of the first mold. The witness never saw any of Richardson's designs that had not been made into molds before February 26, 1923. So far as the witness knew there were none. He was the person who had the matter in charge. The appellant testified that the cost of making the ordinary molds was from three to five or six dollars. A. C. Myers testified that a mold of the seal heads cost eight or nine dollars. Will Hislop testified they had about seventy molds. The court found that appellant was entitled to recover for the use of all the molds, \$727. A. Clay Myers testified the

appellant did not ask that defendants return any designs, models, or molds, but he claimed he was entitled to pay for their use by the defendants. The same witness testified that appellant never offered to assume the burdens imposed upon him by the selling agreement.

There is further evidence to sustain the findings of the court and there is also evidence which raises a conflict, but we are not concerned with the weight of the evidence, that having been resolved by the trial court.

It is claimed by appellant that where a controversy is intended to be settled by a closing agreement, and this closing agreement is violated by one party, the other party has a right to elect to sue for the breach of the closing agreement or to sue upon the original contract or claim, and he cites as the leading case thereon *Scheeline v. Moshier*, 172 Cal. 565, 158 P. 222, 224. However, we are of the opinion that the case cited is not in point. When the closing agreement was entered into, according to plaintiff's complaint, there was no controversy between the parties, the complaint itself alleges that all claims and accounts were settled in full at the time the closing agreement was executed. In the case of *Scheeline v. Moshier*, supra, an action was pending to collect an amount claimed to be due on a promissory note. A stipulation was filed whereby plaintiff agreed to take an amount less than actually due on the note, payable in installments on specified dates, with the provision that if default were made plaintiff might take judgment for the full amount of the note. It was held that as default had been made the plaintiff was entitled to maintain another action on the original note. The court says: "It was by its terms made conditional. The acceptance of \$1,500 (less than the sum admitted to be due) was to take place 'providing' the payment thereof was made in the 'manner' therein specified; not otherwise. * * * Upon failure to pay any installment at the stated time, the condition failed. * * *"

In the case at bar the closing agreement recites that in consideration of \$10 and "the following mutual covenants and agreements," then follows a recitation of the covenants to be performed by each one of the parties and a further covenant that upon the performance thereof, Richardson will and does release defendants to sell their wares to other dealers or other persons without hindrance or claim, and upon completion of said deliveries and payments the contract dated July 14, 1922, will become null and void. In *Williston on Contracts*, § 671, p. 1294, it is held that: "Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed. The reason of this disinclination is that such a construction prevents the court from dealing

out justice to the parties according to the equities of the case." In the same volume, section 665, p. 1282, it is said: "As a matter of construction, it seems better to favor bilateral contracts than unilateral, and in bilateral contracts better, where the meaning of the agreement is doubtful, to construe words as involving a promise by the party who is expected to do the act in question than as words of condition. Such a construction protects both parties to the transaction, and also does not involve the consequences that a slight failure to perform wholly destroys all rights under the contract. The law recognizes the propriety of this rule of construction * * * Especially words appropriate for condition have not been given their natural meaning where the consequence would lead to injustice, and a violation of the probable intent of the parties."

In *Antonelle v. Lumber Company*, 140 Cal. 309, at page 318, 73 P. 966, 969, it is said: "We are satisfied that the stipulations of the parties in the contract upon this whole subject were not conditions precedent, but, in effect, simply covenants. As said by Parsons: 'Words of proviso and condition will be construed into words of covenant when such is the apparent intent and meaning of the parties.' * * * 'The whole context also of the document is to be considered. * * * The construction depends upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates. Whether a provision in a contract is a stipulation * * * or a condition * * * is to be gathered from the whole document.' Wharton on Contracts, § 555." The following cases also pertain to the same point: *Green County v. Quinlan*, 211 U. S. 582, 29 S. Ct. 162, 53 L. Ed. 335; *Kauffman v. Raeder*, 108 F. 171, 47 C. C. A. 278, 54 L. R. A. 247; *First National Bank v. Bowers*, 141 Cal. 253, 262, 74 P. 856.

[1, 2] The evidence discloses that the respondents were endeavoring to terminate the selling agreement; this was testified to by appellant and respondents alike. At the time of the execution of the closing agreement, there was no dispute between the parties; all obligations on both sides had been fulfilled. The closing agreement fixes no dates when payments were to be made or goods delivered. It contemplated an immediate fulfillment of its terms. We are of the opinion that notwithstanding the language of the last two paragraphs of the closing agreement said closing agreement constitutes a "novation." Section 1530 of the Civil Code defines a novation as a substitution of a new obligation for an existing one. Section 1531 of the Civil Code provides that a novation is made "by the substitution of a new obligation between the same parties, with intent to extinguish the old ob-

ligation." In *Beckwith*, as *Administrator*, etc., v. *Sheldon et al.*, 165 Cal. 319, 131 P. 1049, it is held that where there has been a novation the original contract is not revived by a breach of the new one. Before recovery could be had on the old contract the party must rescind and must as a condition place the other party in status quo. In the instant case no such attempt has been made. The contention of the appellant is not well founded.

[3] Defendants plead estoppel. This plea is sustained by the following evidence: The agreement of partnership between *Eri H. Richardson*, *J. W. Hislop*, and *A. C. Myers* (Exhibit A), and the sellers' agreement were executed on July 14, 1922, and were acted upon by both parties until February 26, 1923, when said agreements were superseded by the closing agreement. It was well known to plaintiff that the defendants were seeking an abrogation of the contracts. Upon the execution of the closing agreement the defendants reorganized the business, established their own sales agency, and continued manufacturing clay products. Their business increased from a very small amount previous to the execution of the closing agreement to nearly a quarter of a million dollars in 1925. The appellant was among their customers. According to the testimony of the defendants, plaintiff never hinted or suggested that the sales agreement was still in force. Under the sales agreement the plaintiff was obligated to organize and maintain a sales force to sell the entire output of defendants' factory. None of these things was ever done or attempted to be done after the closing agreement. Plaintiff also received from defendants the balance due on the Ford automobile. He received \$1,800 in cash, profits made by Clay Glow Tile Company, up to February 26, 1923, and \$500 worth of the products of respondents' plant owing Clay Glow Tile Company and has retained all these benefits.

We think under these circumstances he is now estopped to claim the benefit of defendants' skill and labor. 10 Cal. Jur. § 14, p. 626; *Carpy v. Dowdell*, 115 Cal. 677, 47 P. 695; section 1963, subd. 3, Code Civ. Proc.: 10 Cal. Jur. § 18, pp. 633, 634.

[4] It is also contended that under the fourth count of the complaint the plaintiff was entitled to damages for the retention and continued use by defendants of plaintiff's designs, models, and molds; that the designs which were made by him had a particular value as the product of the mind, and a measure of damage equal only to the cost of production of the design is far less than its real value.

The court awarded plaintiff \$727 as damages under this count. The appellant had not copyrighted any of the designs. All of them had been published before February 26, 1923. We are therefore satisfied that the case

comes within the provisions of sections 980 and 983 of the Civil Code. Section 980 provides: "The author of any product of the mind, * * * has an exclusive ownership therein, * * * which continues so long as the product and the representations or expressions thereof made by him remain in his possession." Section 983 provides: "If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned."

[5] In *State v. State Journal Company*, 75 Neb. 275, 106 N. W. 434, 9 L. R. A. (N. S.) 174, 13 Ann. Cas. 254, it is held that it is only through the provisions of the copyright law that the work of authors, designers, and inventors can be protected as their individual property. In the instant case it is argued by counsel for appellant that the relation between plaintiff and defendant is a contractual one and does not arise from the law last cited. However, we have already held that the other contracts were superseded by the closing contract, and therefore the rule of law above stated is applicable here. Complaint is made of the court's refusal to admit evidence to establish the value of the use of the plaintiff's designs. The court allowed evidence and awarded damages for the reproduction cost, but sustained the objection made because plaintiff had no property right in such noncopyrighted designs. We think the court was right in its ruling under the authorities last above cited.

We are of the opinion that no useful purpose would be served in further discussion of the case. Under the holding of this court on the several points passed upon, the judgment must be affirmed.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

109 Cal. App. 463

MUNOZ et ux. v. KENNEDY et al.

Civ. 4082.

District Court of Appeal, Third District, California.

Nov. 10, 1930.

Rehearing Denied Dec. 10, 1930. Hearing Denied by Supreme Court Jan. 8, 1931.

1. Automobiles ⇨242(8).

Defendants had burden of proof as to contributory negligence of plaintiffs, whose automobile left highway while passing defendant's car.

Facts disclosed that, as truck was moving along highway, defendant's and plaintiff's cars approached from the rear, and that, when about 50 feet away, driver of plaintiff's car sounded his horn, and started to pass both defendant's car and the truck; and that, when front wheels of plaintiff's car were opposite the rear wheels of defendant's car, the latter turned out suddenly to the left and across plaintiff's path; and that, to avoid a collision, plaintiff's driver was compelled to leave the highway, whereupon car ran into bank, resulting in injuries to plaintiff.

2. Automobiles ⇨245(81).

Whether plaintiffs, whose automobile left highway while passing defendant's car turning to left, could have remained on pavement, *held* question of fact.

3. Automobiles ⇨245(78).

Whether plaintiffs' automobile, leaving highway while passing defendants' car turning into its path, traveled at excessive speed, *held* question of fact.

4. Negligence ⇨136(9).

Contributory negligence is question of law only where court can say that reasonable men can draw but one inference pointing unerringly to contributory negligence.

5. Automobiles ⇨245(15).

Negligence of automobile driver attempting, without giving statutory signal, to pass truck, and forcing off highway following automobile attempting to pass both cars, *held* question of fact (St. 1923, p. 517, § 125, subd. (b)).

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by A. T. Munoz and wife against Anna E. Kennedy and another. Judgment for plaintiffs, and the defendants appeal.

Affirmed.

Len H. Honey, of Stockton, for appellants.

Everett M. Glenn and Downey & Chester, all of Sacramento, for respondents.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action brought to recover damages for personal injuries received in an automobile accident. The court, sitting without a jury, gave judgment for plaintiffs, and this appeal is taken from the judgment.

Two grounds are relied upon for a reversal. The first is, that the court erred in denying a motion for a nonsuit, based upon the contributory negligence of plaintiffs. The second is, that the finding of the court that defendant

was negligent is not supported by the evidence.

From the record it appears that on January 29, 1929, James Allen Joy, fourteen years of age, was driving an automobile in a northerly direction on the highway, near Arbuckle, Cal. His sister, Althea, aged twenty, was with him. His car was a very old one. It had formerly been a taxicab, and was equipped with a box body built in the rear of the cab. It is referred to in the evidence as a "truck," and was traveling at a speed of some twenty miles per hour. Defendant Kennedy was the owner of a Chrysler coupé which was being driven by defendant Moulton. Miss Kennedy and her grandmother were passengers. The coupé was equipped with a rear view mirror, and the window upon the driver's side was open. The third car involved was being driven by plaintiff A. T. Munoz, who was accompanied by his wife (plaintiff Daisy V. Munoz) and their small child.

As the truck was moving along the highway, the coupé approached from the rear and moved into a position some twenty-five feet behind the truck. Plaintiffs' car now also came up from the rear, at a speed of some thirty-five miles per hour. When about fifty feet away, the driver of plaintiffs' car sounded his horn and started to pass both the car and truck. When the front wheels of plaintiffs' car were opposite the rear wheels of defendants' car, the latter turned out suddenly to the left and across the path of plaintiffs. In order to avoid a collision, plaintiffs' driver was compelled to leave the highway and run upon loose gravel, where his car skidded and ran into a bank, resulting in serious and permanent injuries to Mrs. Munoz. It was admitted by the driver of defendants' car that she did not look into the rear view mirror before attempting to turn out. The occupants of the truck testified that they heard but one signal given from the rear. They were unable to state which car gave that signal. In view of the fact that plaintiffs testified that their horn was sounded some fifty feet in the rear of the coupé, the trial judge could reasonably have inferred that defendants gave no signal when they attempted to pass the truck.

[1-4] It is first urged that the court erred in denying the motion for a nonsuit, for the reason that the evidence shows that plaintiff was guilty of contributory negligence. It is also contended that the finding of the court that plaintiff was not guilty of contributory negligence is without any support in the evidence. The burden of proof upon this issue rests upon defendant. 19 Cal. Jur. 698. "Ordinarily, of course, the question whether a plaintiff has been guilty of contributory negligence is one of fact for the jury. It becomes a question of

law for the decision of the court only where the facts are undisputed, and, even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence." *Globe Indemnity Co. v. Hook*, 46 Cal. App. 700, 189 P. 797, 798. The argument of appellant is "that plaintiff could have applied his brakes and continued on the pavement behind defendants' car, or could have slackened his speed and proceeded upon the dirt and gravel at the side of the road in a safe fashion, where there was ample room for the passage of an automobile." It is well established that negligence is not absolute, but always relative to the particular circumstances upon which it is sought to be predicated. We cannot say here as a matter of law that it was the absolute duty of plaintiff to have followed the course here outlined by appellant. It was the peculiar province of the trial court to pass upon this question of fact. It is also contended that the accident was caused by the excessive speed of plaintiffs' car. There is evidence that plaintiffs were traveling at a lawful rate of speed, and our inquiry ends there. We cannot say, as a matter of law, that the speed at which plaintiffs were traveling was excessive under the circumstances. That was a question of fact, also, for the trial court.

Concluding this phase of the case, we might add that the entire argument of appellant is one which might well have been directed toward the trial court upon the facts of the case, but it presents no question of law for the determination of this court. We cannot say, from the facts of the case, that reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to the injury. *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125.

[5] The other contention made by appellants is that the finding of negligence upon the part of defendants is not supported by the evidence. This point is equally devoid of merit. The driver of defendants' car, without giving the signal required by law (California Vehicle Act, § 125, subd. b [St. 1923, p. 517]), attempted to pass the truck. Acting thus in violation of the law, she turned directly in the path of plaintiffs, who were in a lawful position upon the highway, and plaintiffs were forced off the highway, where their car went out of control. A finding of negligence upon the part of defendants under such circumstances cannot be disturbed by this court. To hold otherwise would be tantamount to a flagrant usurpation of the functions of the trial court.

No meritorious showing for a reversal having been made, the judgment must be affirmed, and it is so ordered.

109 Cal. App. 462

Ex parte YEOMAN et al.
Cr. 2027.

District Court of Appeal, Second District,
Division 2, California.
Nov. 10, 1930.

Habeas corpus ⇨85(1).

Evidence *held* insufficient to connect defendant with offense charged or any other offense requiring discharge on writ of habeas corpus.

Transcript of proceedings at preliminary hearing of petitioners for habeas corpus showed two men ran from bank which was held up and escaped in Ford car driven by woman, but license number of such car differed from license number of Ford car owned by petitioner. None of witnesses identified petitioner as driver of car and did not identify her car as one used by fleeing men to escape.

Application by Alvin Yeoman and another for writ of habeas corpus.

Writ granted in part, and denied in part.

S. S. Hahn and Gordon M. Gale, both of Los Angeles, for petitioners.

ARCHIBALD, Justice pro tem.

In this proceeding a writ was issued as to the petitioner Lillian Yeoman and denied as to petitioner Alvin Yeoman. Return to the writ was made by William I. Traeger, sheriff of Los Angeles county, but no appearance was made for or on behalf of that officer at the time of hearing.

An examination of the reporter's transcript of proceedings had at the preliminary hearing of petitioners shows that two men ran from the bank which was held up and escaped in a Ford car driven by a woman. One witness testified that the license number of the car in which the men were driven away was 1-B-61-27. It appears that petitioner Lillian Yeoman had a Ford car with license number 1-R-43-59. None of the witnesses identified Lillian Yeoman as the driver of the car in question, nor did they identify her car, which was afterwards found, as the one in which the fleeing men escaped.

It is the contention of petitioner Lillian Yeoman that her detention is illegal for the reason that no evidence was introduced tending to connect her with the offense charged, or with any other offense. In view of the foregoing we must agree with the position taken.

The petitioner Lillian Yeoman is discharged from custody.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

COWAN v. HERMAN et al.
Civ. 4207.

District Court of Appeal, Third District,
California.
Nov. 12, 1930.

Rehearing Denied Dec. 19, 1930.

1. Appeal and error ⇨1011(1).

Trial court's finding on conflicting evidence on issue whether work was completed by contractor suing to foreclose lien, in accordance with contract, is conclusive.

2. Mechanics' liens ⇨132(1).

Claim of contractor's lien filed within 10 days after completion of work *held* not premature (Code Civ. Proc. § 1187).

Code Civ. Proc. § 1187, authorizes filing of claim for contractor's lien at any time "within sixty days after the completion of his contract."

3. Mechanics' liens ⇨288(1).

Defendants in action to foreclose contractor's lien *held* not, as matter of law, entitled to credit for payment made and price of suit made for plaintiff.

There was testimony to the effect that the payment made was for extra work, and that the suit of clothes made by defendant for plaintiff was not accepted by plaintiff because unsatisfactory.

4. Pleading ⇨258(3).

In action to foreclose contractor's lien, denying application to file second amended answer when trial was practically completed *held* not abuse of discretion.

Defendants were permitted to amend their answer on day case came up for trial, and subsequently made application to file second amended answer when trial was practically completed. Proposed amended answer made but little change in issues as formerly presented.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by J. Cowan against Harry Herman and wife and another. Judgment for plaintiff, and defendant named and wife appeal.

Affirmed.

William A. Spill, of Pasadena, for appellants.

D. M. Potter and A. J. Getz, both of Los Angeles, for respondent.

Mr. Presiding Justice FINCH delivered the opinion of the court.

This is an action to foreclose a contractor's lien for an amount alleged to be due the plain-

tiff for moving and remodeling a building belonging to the defendants Harry and Esther Herman. The defendant Security Trust & Savings Bank was made a defendant on the ground that it held a mortgage on the property, subject and subordinate to the plaintiff's lien. Judgment was entered in favor of the plaintiff, and the Hermans have appealed.

[1] The complaint alleges and the appellants' answer admits the execution of a contract for the doing of the work for the price of \$1,920. The complaint alleges that the plaintiff did extra work of the reasonable value of \$251. The answer admits that there is due the plaintiff for extra work the sum of \$14. The complaint alleges that the work was completed on the 14th day of August, 1926, and that the plaintiff duly filed his claim of lien on August 18, 1926. The answer denies that the contract was fully performed or completed by the plaintiff, specifying certain particulars in which appellants claim the work was incomplete and defective. The court found in favor of the plaintiff for the amount of the contract price and the admitted sum of \$14 for extras. The evidence is conflicting as to whether the work was completed in accordance with the terms of the contract, and therefore the court's finding on that issue is conclusive.

[2] Appellants contend that "respondent's claim of lien was premature," because filed under ten days after the completion of the work. Under the provisions of section 1187 of the Code of Civil Procedure, such a claim may be filed by a contractor at any time "within sixty days after the completion of his contract."

[3] Appellants contend that they are entitled to credit for \$175 claimed by them to have been paid on the contract price and \$85 for a suit of clothes made by defendant Harry Herman for the plaintiff. There is testimony to the effect that the \$175 mentioned was paid for extra work, and that the suit of clothes was not accepted because unsatisfactory. Under such circumstances it cannot be held, as a matter of law, that the appellants are entitled to the credits claimed.

[4] Appellants contend that the court erred in refusing them permission to file an amended answer. The complaint was filed August 20, 1926. The appellants' answer was filed August 30, 1926. The case came on for trial on December 2, 1927. On that day the appellants were permitted to amend their answer. The application to file an amended answer was made on December 12, 1927, when the trial was practically completed, the testimony covering over 300 pages of the transcript on appeal. The proposed amended answer made but little change in the issues, and it cannot be

held, under the circumstances stated, that the trial court abused its discretion in denying the application.

The judgment is affirmed.

In the Matter of the FARMERS' & MERCHANTS BANK OF IMPERIAL (a Banking Corporation), in Liquidation. *

IMPERIAL IRRIGATION DISTRICT, Petitioner and Appellant, v. Will C. WOOD, as Superintendent of Banks for the State of California, Respondent.

Civ. 440.

District Court of Appeal, Fourth District, California.

Nov. 18, 1930.

Hearing Granted by Supreme Court Jan. 15, 1931.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

On rehearing.

Denied.

For former opinion, see 292 P. 665.

Charles L. Childers and D. B. Roberts, both of El Centro, for appellant.

Albert A. Rosenshine, Elbert W. Davis, and J. H. Hoffman, all of San Francisco, for respondent.

PER CURIAM.

Respondent has petitioned this court for a rehearing. In his petition he asserts that the pledge of bonds was given to secure the deposit of \$54,547.62 only. He urges that, if the former order of this court is carried out, it will result in an overpayment to appellant.

Appellant has filed an answer to the petition for rehearing in which it is asserted that the pledge secured the total deposits in the sum of \$64,285.69, from which it would follow that no overpayment would result.

We have examined the record again, and are not prepared to decide which sum the pledge purported to secure. We believe that this should be definitely determined by the trial court. Therefore the following is stricken from the last paragraph of the opinion in this case filed on October 21, 1930: "With directions to the court below to grant the petition of the District and order the payment to it of the dividend of fifteen per cent upon its claim number four hundred thirty-three for \$54,547.62."

With the opinion thus modified, petition for rehearing is denied.

*Hearing granted 1 P.2d 422.

109 Cal. App. 755

**FEDERAL LAND VALUE INSURANCE
COMPANY v. Forrest D. MITCHELL, Insur-
ance Commissioner of the State of California.**
Civ. 7759.

District Court of Appeal, First Appellate Dis-
trict, Division 2, California.

Oct. 22, 1930.

Simeon E. Sheffey and Corbet & Selby, all
of San Francisco, for petitioner.

PER CURIAM.

The petition (writ of supersedeas) is denied
on the authority of *In re Imperial Water*
Dist., 199 Cal. 556, 250 P. 394.

211 Cal. 77

GRIEVE v. MULLALY et al.

Sac. 4231.

Supreme Court of California.

Nov. 22, 1930.

1. Landlord and tenant ⇨22(1).

Sales ⇨24.

Instrument signed only by landowners
containing agreement to lease land at specified
price and sell cattle, with provision for ex-
piration date of option, was merely offer, not
binding until accepted.

2. Contracts ⇨19.

Offer may be revoked any time before
acceptance, notwithstanding statement that it
shall remain open for designated period (Civ.
Code, § 1586).

3. Assignments ⇨4.

An offer to contract is purely personal to
offeree, and not assignable.

4. Landlord and tenant ⇨22(1).

Landowner's offer to lease property *held*
not accepted by third person's tender of lease
containing name of third person, and not that
of offeree, as lessee.

In Bank.

Appeal from Superior Court, Colusa Coun-
ty; Ernest Weyand, Judge.

Action by J. D. Grieve against Pat Mullaly
and another. From the judgment, plaintiff
appeals.

Affirmed.

Hudson Grant, A. G. Bailey, and Grant &
Bailey, all of Woodland, for appellant.

Chas. K. Atran and C. D. McComish, of Co-
lusa, for respondents.

WASTE, C. J.

On the 21st day of August, 1926, the two de-
fendants signed and delivered to plaintiff a
writing in the following form:

"Davis, Cal. 8/21/26

"We the undersigned, known as John Mul-
laly and Pat Mullaly of Arbuckle, parties of
the 1st part and J. D. Grieve of Davis, Cal.
party of the second part, to-wit:—We Mullaly
Bros. parties of the 1st part agree to lease for
a period of 3 years with privilege of one more
year, all our land west of Arbuckle about 5000
acres in all for price of 65 cents per acre per
year to J. D. Grieve of Davis, Cal. We also
agree to sell to J. D. Grieve all our cattle now
pasturing on above described range price per
head as follows

"Cows 30.00 each Calves 20.00 each

"All yearlings & two year old Heifers &
Steers a. 27.50 Each.

"This option will not expire before Sept.
15/1926.

"10 head of cattle to be cut out by party of
second and price agreed on by Buyer & Seller.

"[Signed] Pat Mullaly

"John Mullaly."

[1] In legal effect, the writing was no more
than an offer unsupported by consideration.

The evidence shows that on September 1st,
fifteen days before the expiration date of the
option, and before it was revoked by defend-
ants, it was accepted by Grieve in so far as
it applied to the cattle. Before September 1st,
Grieve had sold all of his rights under the op-
tion to a lease of the realty to one D. Q.
Adams, under a proposition whereby Adams,
when he consummated the lease with defend-
ants, was to pay Grieve thirty-five cents an
acre profit. The evidence likewise shows that
on September 1st Adams tendered to defend-
ants a check for \$500 as part payment on the
lease, and likewise tendered to defendants for
their signatures a formal lease, naming
Adams as lessee. The defendants refused to
sell the cattle or to enter into the Adams'
lease. Grieve thereupon brought this action,
framing his complaint in two counts. The
first cause of action was for damages sus-
tained by virtue of defendants' refusal to
lease the land, and the second cause of action
was for the damages sustained by virtue of
defendants' failure and refusal to sell the
cattle. The court, sitting without a jury, aft-
er evidence had been adduced substantially
as set forth supra, entered its judgment in
favor of the defendants on the first cause of
action, and in favor of plaintiff on the second
cause of action. Each party appealed from so
much of the judgment as was adverse to him.
The appeal of the defendants was subsequent-
ly dismissed on motion of the plaintiff. We
are now concerned only with the decision of
the trial court with reference to the lease.

[2-4] The result reached by the trial court is undoubtedly correct. The writing of August 21st in no way bound Grieve, and, being unsupported by consideration, it in no way bound defendants until accepted. It amounted to an offer to Grieve to enter into the two contracts any time before September 15, 1926. It is elementary that an offer may be revoked any time before acceptance, and this rule applies in cases where the offer states, as it does here, that it shall remain open for a designated period. Civ. Code, § 1586; 6 Cal. Jur. 51, § 29. It is equally elementary that an offer to contract is not assignable; it being purely personal to the offeree. In this case the offer was made to Grieve. The evidence does not disclose any acceptance by him. Adams attempted to accept the offer, not as the agent or representative of Grieve, but in his own right. This is conclusively shown by the fact that Adams tendered to the Mullalys a lease for their signatures, naming him, Adams, as lessee. This was not an acceptance of the offer made to Grieve. The evidence is likewise clear that, at the time Adams made his purported acceptance, defendants, in the presence of Grieve, clearly revoked the offer that had been made to Grieve. This, as we have seen, defendants had a legal right to do.

The judgment is affirmed.

We concur: LANGDON, J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

109 Cal. App. 522

STEVENS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 7608.

District Court of Appeal, Second District, Division 2, California.

Nov. 14, 1930.

1. Courts ⇨120.

Superior Court *held* without jurisdiction of suit for \$500 for commission arising in city having municipal court.

2. Courts ⇨122.

Allegations as to plaintiff's inability to ascertain amount of business transacted by defendants and praying accounting *held* not sufficient to confer jurisdiction on Superior Court, amount allegedly due being elsewhere stated as definite sum.

Application for mandamus by William T. Stevens to require the Superior Court of Los Angeles County to overrule a demurrer to the jurisdiction of the court in an action arising within the limits of the city of Los Angeles.

Writ denied.

Wm. C. Ring, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondent.

CRAIG, Acting P. J.

[1, 2] By a complaint consisting of several counts or causes of action, the petitioner instituted a suit in the Superior Court for \$500 alleged to have been earned as commission while in the employment of the defendants therein named. A demurrer interposed upon the ground that said court had no jurisdiction of the action was sustained, and the plaintiff has petitioned for a writ of mandamus to require the overruling of the demurrer and a trial of the issues.

The Superior Court is without jurisdiction of the subject-matter of the action. *Scott v. Superior Court* (Cal. App.) 292 P. 290. The complaint contains certain allegations as to the inability of the plaintiff to ascertain the amount of business transacted by defendants, and prays an accounting, but, since the amount alleged to be due the plaintiff is elsewhere stated as a definite sum, the averments are not sufficient to confer jurisdiction. *Kinley v. Thelen*, 158 Cal. 175, 110 P. 513.

The writ is denied.

We concur: IRA F. THOMPSON, J.; ARCHBALD, Justice pro tem.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

103 Cal. App. 733

PEOPLE v. VALLIER.

Cr. 1996.

District Court of Appeal, Second District,
Division 2, California.

Nov. 20, 1930.

1. Homicide ☞116(6).

Threats never justify homicide or attempt to take life, though admissible to throw light on circumstances surrounding moment of affray.

2. Homicide ☞332(3).

Evidence, though conflicting, being sufficient to sustain conviction for murder in second degree, conviction was not disturbed.

3. Homicide ☞254.

Evidence sustained conviction for second degree murder as against contention crime was manslaughter.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Charles Vallier was convicted of murder in the second degree, and he appeals.

Affirmed.

Charles J. Orbison, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

SCHMIDT, Justice pro tem.

Appellant was convicted in the lower court of murder in the second degree, and from the judgment and order denying his motion for a new trial has appealed to this court.

On the evening of February 15, 1930, appellant was engaged in a pool game in a room on Central avenue in the city of Los Angeles with one Jess McDonald, with \$3 wagered on the result of the game. It seems that the decedent, Elijah Wade, was the backer of McDonald, and towards the close of the game injected himself into the game by various remarks addressed to appellant. Upon appellant's remonstrance, the decedent, Wade, used abusive and boisterous language to appellant, resulting in a belligerent attitude between Wade and appellant, each toward the other, the former having picked up a pool ball, apparently with the intent of throwing same at appellant, and appellant taking his cue by the smaller end in an attitude of striking Wade. Before further trouble, however, others in the room stepped between the belligerents, among them one Flournoy, the pool hall manager, who succeeded in having Wade leave the hall. As Wade was leaving, he uttered some threats at appellant, and then, accompanied by a cousin by the name of Miller,

went north on Central avenue. Up to this point there is no substantial conflict in the evidence. Shortly afterwards appellant left the pool hall, and some seventy-five feet northerly therefrom overtook Wade and Miller. The evidence is in conflict as to the length of time that appellant remained in the pool hall before leaving to go north on Central avenue; the evidence is conflicting as to whether appellant overtook Wade and Miller, or whether, as appellant was hurrying northerly on Central avenue, Wade and Miller stepped from between two automobiles in the street and accosted appellant. The evidence also is in conflict as to whether anything was said or done towards appellant by either Wade or Miller immediately prior to appellant's striking Wade with his pocketknife, or whether appellant hurriedly overtook Wade and Miller, and without warning struck Wade with the open blade of his pocketknife. The evidence is undisputed that appellant did strike decedent with his pocket knife about one and one-half inches above the clavicle on the inner third of the right side of the chest, the blade penetrating inwardly and downwardly, cutting between the lungs and the pleura, and causing a deep penetrating wound into the lung; that the blade of the pocketknife used broke off and remained in the body of Wade until later removed by a physician; that as a result of the injury traumatic pneumonia set in, from which Wade died some days afterwards.

[1] Appellant complains that the trial court incorrectly and erroneously stated the law and thereby misled the jury, as follows: "The court instructs the jury that threats alone never justify a homicide or an attempt to take life though admissible in evidence to throw light on the circumstances surrounding the moment of the affray." We cannot agree with this contention. The instruction was a correct pronouncement of the law.

[2] Appellant further contends that the evidence was insufficient to warrant or sustain the conviction of the appellant, claiming that the evidence as a whole was reasonably reconcilable with the hypothesis of innocence. There being ample evidence in the record to sustain the verdict of guilty, this court will not disturb the finding of the jury thereon.

[3] It is further contended that the degree of the crime at best is manslaughter and not second degree murder, and in support thereof appellant cites *People v. Elmore*, 167 Cal. 205, 138 P. 989, 991. The facts in the *Elmore* Case differ from the facts in the case at bar. In the *Elmore* Case the stabbing occurred in the heat of passion during a fight with the deceased in which the decedent was the aggressor. It was said therein: "All the circumstances tend to show that *Elmore* was

acting in good faith and really desired to avoid any quarrel or difficulty."

From all the testimony in the case at bar the jury had a right to believe, and by their verdict evidently did believe, the witness who testified that appellant substantially ran after Wade, and, upon overtaking him and Miller, deliberately and without any necessity stabbed Wade. The evidence being in conflict, and there being sufficient evidence to support the verdict, this court will not disturb same.

No other points need be discussed.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

109 Cal. App. 608

POPE et al. v. WENISCH.
Civ. 7399.

District Court of Appeal, First District,
Division 2, California.

Nov. 18, 1930.

Rehearing Denied Dec. 18, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

1. Appeal and error *↪* 933(4).

Where order granting new trial read, "Motion for new trial granted," it will be presumed it was not based on insufficiency of evidence (Code Civ. Proc. § 657).

Code Civ. Proc. § 657, provides that when a new trial is granted on ground of insufficiency of evidence to sustain verdict the order shall so specify, and that otherwise on appeal it will be presumed order was not based on that ground.

2. Automobiles *↪* 245(14).

In action arising out of automobile collision at intersection, evidence *held* to make case for jury.

3. Trial *↪* 253(4).

"Formula" instruction in action arising out of automobile collision at intersection *held* erroneous because omitting essential element of proximate cause.

4. Negligence *↪* 82.

Plaintiff's negligence to release defendant from liability must contribute proximately to injury.

5. Appeal and error *↪* 978(1).

New trial *↪* 39.

Court granting new trial for erroneous instruction has wide discretion, and order will not be disturbed unless such discretion is abused.

Appeal from the Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by S. H. Pope and another against W. H. Wenisch. After a judgment in favor of defendant, a new trial was granted, and defendant appeals.

Order granting new trial affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondents.

SPENCE, J.

Plaintiffs brought an action against defendant for damages resulting from an automobile collision. After a judgment in favor of defendant on a trial by jury, a new trial was granted. The defendant appeals from the order granting the new trial.

[1] The order read "Motion for new trial granted." It will therefore be presumed that it was not based upon the ground of the insufficiency of the evidence. Code Civ. Proc. § 657. In support of the trial court's order granting the new trial, respondents rely upon error in the instructions to the jury.

[2] Appellant's first contention is that the new trial should not have been granted as there was no evidence to support a verdict for plaintiffs. We cannot agree with appellant in this regard. The accident happened in March, 1928, in a circle at the intersection of five streets in San Francisco. This circle has a radius of eighty feet and traffic from Taraval street, Montalvo avenue, Dewey boulevard, Kensington way, and Claremont boulevard enter upon it. Plaintiffs entered from Taraval street and were proceeding in a general easterly direction almost directly across the circle to Kensington way. Defendant entered from Dewey boulevard proceeding in a general southwesterly direction with the intention of proceeding around the post in the center of the circle and then south on Claremont boulevard. The machines collided near the center of the circle, the front of defendant's Chevrolet striking the left rear portion of plaintiffs' Studebaker. The record presents the usual conflict of evidence which ordinarily appears when witnesses attempt to describe the events surrounding the collision of moving vehicles at an intersection. The testimony relating to the speed of the machines and to their relative positions as they entered and traversed the intersection was in sharp conflict. It will serve no useful purpose to review the testimony in detail. It was plaintiffs' theory that they had first entered the intersection on defendant's right at a lawful speed; that they were entitled to the right of way and entitled to assume that the defendant would yield the right of way; that

after observing the approach of defendant, plaintiff had directed his attention to traffic coming in on his right from Claremont boulevard; that defendant had approached the intersection at a high rate of speed, had failed to reduce his speed or to yield the right of way, and had attempted to turn his machine in the intersection without first seeing that this movement could be made in safety. It was defendant's theory that he had first entered the intersection at a lawful speed; that he had slowed down to permit plaintiffs to pass; that plaintiffs were traveling at a high rate of speed; and that the collision occurred when his machine was practically at a standstill. Under the evidence it is our opinion that a close case was presented to the jury for their determination and that there was sufficient evidence, if believed by the jury, to support a verdict for the plaintiffs and likewise sufficient evidence, if believed by the jury, to support a verdict for the defendant.

[3-5] Appellant next contends that there was no error in the instructions to the jury and further that if error did exist, it was not prejudicial. Among the instructions there was but one "formula" instruction, which instruction was the one complained of by respondents on the motion for new trial. This instruction read as follows: "I instruct you that, if you believe from the evidence that plaintiff, S. H. Pope, saw the automobile of the defendant approach the circle, at the intersection of Dewey boulevard and Kensington avenue, at a high rate of speed, then I instruct you that it was the duty of said plaintiff to be vigilant and to exercise ordinary care to avoid collision with the automobile of defendant and, if you find from the evidence that plaintiff failed to exercise such vigilance and ordinary care, then your verdict will be against the plaintiff and in favor of the defendant." This instruction obviously omitted the essential element of proximate cause. "In order that the negligence of a plaintiff may release a defendant from liability such negligence must contribute proximately to the injury complained of." 19 Cal. Jur. 649, and cases cited. It has been repeatedly held that a "formula" instruction directing a verdict under certain conditions must include all the conditions necessary to support such verdict. *Rush v. Lagomarsino*, 196 Cal. 308, 319, 237 P. 1066; *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 275, 201 P. 599; *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 184, 118 P. 700; *Sinan v. Atchison, Topeka & Santa Fe Ry. Co.* (Cal. App.) 284 P. 1041. In order to entitle defendant to a verdict it was essential that the negligence, if any, of plaintiffs be a proximate cause of the injury and it was error to omit this essential element from the foregoing instruction. There may be some doubt as to whether this error was prejudicial. The trial court evidently

believed that it was. In granting a motion for new trial on the ground of erroneous instructions, it is proper that a wide discretion should be allowed to the trial court, and the order granting the new trial should not be disturbed unless there appears to be an abuse of discretion. *Thompson v. California Construction Co.*, 148 Cal. 35, 82 P. 367; *Associated Fruit Co. v. Marone*, 68 Cal. App. 358, 229 P. 868; 20 Cal. Jur. 140. It does not appear that the trial court abused its discretion in granting the motion.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

109 Cal. App. 649

CURRY et al. v. WILLIAMS.

Civ. 77.

District Court of Appeal, Fourth District, California.

Nov. 18, 1930.

Rehearing Denied Dec. 12, 1930.

Hearing Denied by Supreme Court
Jan. 12, 1931.

1. Trial ⇐163.

Motion for nonsuit for insufficiency of evidence *held* sufficient.

The motion was as follows: "At this time, the defendant again moves for a nonsuit on the ground that the evidence of the plaintiffs being all in, there is not a sufficient case made for a jury."

2. Automobiles ⇐242(1).

Guest suing automobile driver for injuries through negligent operation of car has burden of proof.

3. Automobiles ⇐242(2).

In personal injury action by automobile guest against driver, *res ipsa loquitur* doctrine *held* inapplicable.

4. Automobiles ⇐170(7).

Where automobiles met at cattle gate and cattle guard on highway, rules applicable to highway with obstruction applied, as against contention that rules applying to right of way on single trail roadway applied.

5. Automobiles ⇐170(1).

Motorist approaching cattle gate and cattle guard on highway could assume driver of approaching car would obey law requiring him to travel on right side of highway.

6. Automobiles ⇐245(24).

In automobile guest's personal injury action against driver, evidence justified directed verdict for defendant.

7. Automobiles ⇨168(3).

Speed of 30 miles an hour on 18-foot road in unpopulated country did not constitute negligence, unless driver was warned of danger.

8. Trial ⇨139(1).

Nonsuit may be granted, where evidence viewed most favorable to plaintiff will not support verdict in his favor.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Lee Omar Curry and another against Edgar P. Williams. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Monte C. Fiscus, of La Habra, and Goer & Eaton, of Whittier, for appellants.

Scarborough, Forgy & Reinhaus, of Los Angeles, for respondent.

BARNARD, J.

This is an action for damages for injuries sustained by the plaintiffs while riding as guests in an automobile driven by the defendant. The accident occurred near Deming, N. M., about 10 o'clock on the evening of December 12, 1927. The defendant, driving a Willys Knight automobile equipped with four-wheel brakes, was proceeding west along a main graveled highway, the traveled portion of which was 18 feet wide. At the point where the accident occurred a combination cattle gate and cattle guard was located upon the highway. A post stood in the center of the roadway, on the south side of which was an iron gate, which was closed at the time, and on the north side thereof was a cattle guard so constructed as to permit automobiles to cross. This cattle guard, being seven or eight feet in width, was the only passageway open to automobiles at that time without opening the gate across the south half of the road. The post and gate were painted white, and the defendant had passed over this cattle guard on a previous occasion when he traveled east. As he approached the cattle guard on his right side of the road, defendant was traveling at a speed of 30 miles per hour. He observed the cattle guard when about 200 feet therefrom and at the same time saw the lights of approaching cars on the other side of the gate, one of these cars being somewhat nearer than the others. When he was about 6 or 8 feet from the cattle guard, he saw the first of the approaching cars make rather a straight turn into the north half of the road, and directly into his path. As soon as he observed this, he put on his brakes, but the two machines collided head-on. When the two cars came to rest, the rear wheels of defendant's Willys Knight were from 2 to 4 feet west of the cattle guard, and the other car, a Chevrolet,

stood about 5 or 6 feet away, both cars being badly damaged. Both of the plaintiffs were asleep in the rear seat of defendant's car at the time of the collision. The only evidence as to how the accident occurred was the testimony of the defendant, who was examined under section 2055 of the Code of Civil Procedure, his testimony being then adopted as their own evidence, by the plaintiffs. At the conclusion of plaintiffs' case, the court granted a motion for a nonsuit, and, from the ensuing judgment, this appeal is taken.

[1] Appellants' first point is that the motion for a nonsuit was insufficient, in that it failed to sufficiently state the grounds therefor. Appellants quote the motion as follows: "At this time, the defendant again moves for a nonsuit on the ground that the evidence of the plaintiffs being all in, there is not a sufficient case made for a jury," and cites *Henley v. Bursell et al.*, 61 Cal. App. 511, 215 P. 114; *Belcher v. Murphy*, 81 Cal. 39, 22 P. 264, and other cases. The record shows that, in the motion as made, immediately after the language above quoted, counsel continued as follows: "The evidence clearly shows that the defendant was without negligence in this case. In support of this, Your Honor," etc. Counsel then proceeded to argue the motion. We think the one ground upon which the motion was made and granted was thus sufficiently stated to apprise the other party of the nature of the ground relied upon, in accordance with the reasoning of the cases cited.

[2-6] The next question raised is that the evidence presented a question of fact, as to the negligence of the respondent, which should have been left to the jury. The rule is that, where a driver of an automobile is sued by his guest for injuries sustained by the guest through the negligent operation of the automobile, the burden is upon the plaintiff to show negligence upon the part of the defendant. *Morris v. Morris*, 84 Cal. App. 599, 258 P. 616. There are, of course, cases where, under the doctrine of *res ipsa loquitur*, the negligence of the defendant may be inferred from the circumstances. We think this is not such a case, that no inference of negligence on the part of the respondent here arises from the circumstances shown by the evidence, and that it was incumbent upon the appellants to affirmatively prove such negligence. Appellants argue that negligence is shown by the fact that the only passageway open at the time of the accident was the one over the cattle guard, on the north side of the road; that the respondent continued at a speed of approximately 30 miles an hour after he saw the cattle guard and when he saw the lights of other cars approaching; and that he did not slow down until within 6 or 8 feet of the cattle guard, at which time he put on his brakes. In this connection, appellants argue that the respondent did not have the right of way,

and that each driver was bound "to stop and let the other pass if necessary." This calls to mind a law which was once proposed in a Legislature in another state, to the effect that, when two trains approached an intersection, both should stop and neither should proceed until the other had passed. Appellants argue that the ordinary rules of law as to the right of way did not here apply, but that the situation came under the rules of law applying to the right of way on single-trail roadways. While our attention is not called to any California case upon that point, appellants cite 42 Corpus Juris, page 943, §§ 661-663, as showing the rules of law relied upon. We think the situation, however, was not that of a single-trail roadway, but rather that of an ordinary highway with an obstruction existing thereon. It was established at the trial that the law of New Mexico at that time required a driver of an automobile to travel upon his right-hand side of a highway, unless his left-hand side thereof was clear and unobstructed for a distance of at least 50 yards ahead. We think the respondent, under the circumstances shown by this record, was entitled to assume that the driver of the approaching car would obey this law. In *Gornstein v. Priver*, 64 Cal. App. 249, 221 P. 396, 401, the court said: "The general rule is that one to whom a duty of care is owing by another has the right to assume that the person who owes such duty will perform it; and, in the absence of reasonable ground to think otherwise, it is not negligence on the part of the one to whom the duty is owing to assume that he will not be exposed to a danger which can come to him only through a violation of that duty by the person owing it."

In 19 Cal. Jur. at page 596, the rule is thus stated: "One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another."

In *Robinson v. Clemons*, 46 Cal. App. 661, 190 P. 203, 204, the following language is used: "Any one, the most careful, about to cross a highway and observing another vehicle approaching at a distance of from 100 to 150 feet, would not deem it necessary to stop or to do any particular thing to avoid a collision. He would properly assume and have a right to assume that the other car was not violating all rules of prudence by excessive speed; that he had plenty of time to cross and act accordingly. This would be the attitude of any reasonable man under the circumstances, and therefore the plaintiff was not guilty of a want of ordinary care in pursuing his journey."

[7] Common experience shows that a rate of speed of approximately 30 miles an hour on an 18-foot road in an unpopulated country

is ordinarily not excessive or reckless. The respondent, so proceeding, could not be charged with negligence until something happened to warn him that danger existed. As he proceeded on his right-hand side of the road, the lights of approaching cars on his left-hand side of the road would not be such warning. Had these lights been over on his side of the road they might have constituted a warning, even though he felt they had no right to be there. But as they continued upon their own side of the road, he had a right to assume that they would not at the last minute suddenly turn into his pathway. The only direct evidence shown by the record is that of the respondent, who testified that, when he was within 6 or 8 feet of the cattle guard, the other car made rather a straight turn directly at him. The only circumstantial evidence upon this point is that after the accident there were to be seen skid marks showing that the Chevrolet car had skidded for 20 or 30 feet. This, with the position of the cars after the accident, indicates that the Chevrolet car was coming at some considerable speed, and that, when the driver saw the gate was closed in front of him, he put on his brakes and turned to his left side of the road. We find nothing in the record to show that the defendant was not proceeding in a proper manner up to the point where he saw that the approaching car, in disregard of the law and all common prudence, was turning into his pathway, and it fully appears that when this occurred he put on his brakes and did all he could to stop. Under such circumstances, we think the appellants have failed to meet the burden of proof which is upon them.

[8] A nonsuit may properly be granted where the evidence, viewing it in the light most favorable to the plaintiff, will not support a verdict in his favor. The rule is stated in 9 Cal. Jur., at page 556, as follows: "Although the early practice in England and in this country was otherwise, it is now settled that a mere scintilla of evidence will not justify a judge in leaving a case to the jury. Judges are no longer required to submit a case to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. Therefore, to avoid a nonsuit, the evidence of the plaintiff must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists. The court may grant the motion when, viewing the evidence of the plaintiff in its most favorable aspect for him, it is of the opinion that the evidence will not support a verdict in his favor, or where the evidence does not establish a prima facie case."

In our opinion, the evidence shown by this record would not have been sufficient to sustain a judgment in favor of the plaintiffs, and the motion for a nonsuit was therefore properly granted.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; WAR-MER, Justice pro tem.

110 Cal. App. 88

McAULEY v. BROCKWAY TAHOE VISTA CORPORATION et al.

Civ. 7410.

District Court of Appeal, First District,
Division 2, California.

Nov. 26, 1930.

1. Corporations ⚡432(5).

Plaintiff suing corporation for services cannot recover, in absence of evidence that broker hiring him had authority to bind corporation or attempted to do so.

2. Corporations ⚡432(12).

Claim that corporation's broker had ostensible authority to employ plaintiff suing for services *held* not supported by evidence.

Evidence did not disclose that at any other time or place broker and another ever employed plaintiff in the same or any other capacity, for themselves or for any one else.

3. Appeal and error ⚡1122(2).

Where no estoppel was pleaded and trial court made no finding thereon, reviewing court cannot make finding thereon.

4. Corporations ⚡425(5).

Corporation *held* not estopped to deny liability for services rendered at alleged request of corporation's agent.

Evidence disclosed that talks of plaintiff suing corporation for services took place with corporation's agent at an office immediately adjoining a room occupied by corporation, that corporate officers had their offices in such room, and that at no time did plaintiff examine books of corporation or make any inquiry of corporate officers as to what authority corporate agent had to hire employees for the corporation.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by C. McAuley against the Brockway Tahoe Vista Corporation and others. Judgment for plaintiff, and the named defendant appeals.

Reversed.

Carr & Guiler and Albert C. Aiken, all of San Francisco, for appellants.

Robert P. Cahen, of San Francisco, for respondent.

STURTEVANT, J.

[1-4] The plaintiff, as the assignee of David H. Glickman, commenced an action to recover \$730 alleged to be due and owing for services rendered the defendants at their request for an agreed sum. The defendant Biltz was not served. The defendant corporation appeared and answered. A trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff, and, from a judgment entered thereon, the corporation has appealed and has brought up a typewritten transcript. It was the theory of the plaintiff that he was employed by Norman Biltz, and that the latter was the authorized agent of the defendant corporation, having authority to employ the plaintiff and fix his compensation. On the other hand, it was the theory of the defendant that Biltz was employed by the corporation as a broker, and that his compensation was fixed on a commission basis, and that Biltz had no authority to incur any obligations whatever against the defendant corporation. The defendant contends that there is not one scintilla of evidence to show that Biltz had any authority to bind the corporation nor that he attempted to do so. We think the contention must be sustained. An examination of the record shows that there was no evidence introduced showing, or tending to show, that Biltz attempted to employ the plaintiff on the account of the defendant corporation. No minute entry, resolution, or by-law was introduced. If the corporation has a manager, the record does not disclose the fact, nor who that manager may be. The plaintiff testified that he received a telephone message from Warren Murphy, asking him to call and have a talk with Norman H. Biltz. Neither Murphy nor Biltz was called as a witness or in any manner gave any evidence on the trial. As to what authority either of those men possessed was not testified to by any witness. The plaintiff claims that Norman H. Biltz had ostensible authority to employ the plaintiff. That claim is not supported by any evidence in the record, because the record does not disclose that at any other time or place either Murphy or Biltz ever employed the plaintiff in the same or any other capacity for themselves or for any one else. In this same connection the plaintiff contends that the defend-

ant is estopped, but no estoppel was pleaded by the plaintiff, the trial court made no finding thereon, and this court may not assume to do so. *Blood v. La Serena*, 113 Cal. 221, 41 P. 1017, 45 P. 252. Furthermore, the elements of an estoppel were not present. 1 Cal. Jur. 732, § 34. The plaintiff's talks with Biltz took place at the offices, 693 Sutter street. At least some of the plaintiff's work was done at the same office. That office immediately adjoins a room occupied by the defendant corporation. The record discloses the fact that the president and secretary of the defendant corporation have their offices in the latter room. Presumably the books of the corporation are in that room, but at no time did the plaintiff examine the books of the corporation or make any inquiry of the president or secretary as to what authority Biltz had to hire employees for the defendant corporation.

If we are correct as to what has been said above, and we have no doubt but that we are, it then becomes unnecessary to discuss any other point made in the briefs.

It follows that the judgment should be reversed and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

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109 Cal. App. 467

WILSON v. ANDERSON et al.
Civ. 4204.

District Court of Appeal, Third District,
California.
Nov. 10, 1930.

1. Quieting title ⇨50.

In action to quiet title, court may provide for establishing and enforcing of such trusts in relation to property involved as equities require (Code Civ. Proc. § 738).

2. Quieting title ⇨50.

In action to quiet title, judgment that conveyance be made by defendant upon execution of note and trust deed to him for amount due constituting lien on premises was improper.

3. Mortgages ⇨608½.

Court could not compel one holding deed in legal effect a mortgage to execute conveyance back except upon payment of money due.

4. Mortgages ⇨32(1).

Deed taken as security for payment of debt is "mortgage" (Code Civ. Proc. § 726).

[Ed. Note.—For other definitions of "Mortgage," see Words and Phrases.]

5. Mortgages ⇨380.

Where deed is in legal effect a mortgage, it must be foreclosed as provided in statute (Code Civ. Proc. § 726).

6. Quieting title ⇨50.

Plaintiff holding deed in legal effect a mortgage held not entitled to judgment quieting title which would exclude defendants from right of redemption.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Anton W. Wilson against Helen M. Anderson, individually and as administratrix of the estate of E. M. Anderson, deceased, and another. Judgment for plaintiff, and defendants appeal.

Reversed and remanded, with directions.

Owen C. Emery, of Glendale, for appellants.

C. M. Johnson and H. J. Brady, both of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the above-named defendants and appellants, quieting title to the west one-quarter of lot 732, tract 3126, recorded in book 33, page 51, of Maps, records of Los Angeles county, subject to a mortgage of record thereon for \$2,000. From this judgment the above-named defendants appeal.

The complaint in this action is in the ordinary form of an action to quiet title. The defendants, by way of answer, denied the allegations in the plaintiff's complaint as to his ownership of the real estate involved herein, and alleged that the right, title, and interest of the defendants were superior to the alleged right or title or interest of the plaintiff in and to the lands described. The answers then, by way of further defense and cross-complaint, set forth that on or about the 27th day of April, 1925, a certain judgment was entered in an action begun by Helen M. Anderson as administratrix of the estate of E. M. Anderson, deceased, action numbered 157108, in the county of Los Angeles, wherein and whereby it was decreed that Helen M. Anderson, as executrix of the estate of E. M. Anderson, deceased, was the owner in fee of the real property described in plaintiff's complaint in this action; that it was further ordered, adjudged, and decreed that Anton W. Wilson, the defendant in action No. 157108 and the plaintiff herein, should forthwith execute and deliver to Helen M. Anderson, as executrix of the estate of E. M. Anderson, deceased, a deed of grant in and to said property, subject to a mortgage of \$2,000, and that at the same time, and by

the same judgment, the court decreed that the said Helen M. Anderson, as executrix of the estate of E. M. Anderson, deceased, should deliver to Anton W. Wilson, the plaintiff in this action, and the defendant in action No. 157108, a promissory note for the sum of \$5,360.08, due on or before April 1, 1926, with interest thereon at the rate of 7 per cent. per annum, and, as security for the payment of said promissory note, to simultaneously execute and deliver to said Anton W. Wilson a deed of trust in the usual form of the Title Guarantee & Trust Company, as a second incumbrance on said property. It is further set forth in the answers filed by the defendants that that portion of the judgment just referred to decreeing that Helen M. Anderson, as executrix of the estate of E. M. Anderson, deceased, should execute and deliver to Anton W. Wilson a promissory note and deed of trust covering the property described herein, to secure the payment of the sum mentioned, was, at the time of the rendition and entering of said judgment, contrary to law and the statutes of this state, and void and unenforceable. The answers further set forth that the said sum of \$5,360.08, found to be owing to the said Anton W. Wilson, should have been made payable out of the estate of said E. M. Anderson, deceased, in due course of administration. The defendants further prayed that their title to the property involved be quieted as against all claims of the plaintiff, and for general relief. The plaintiff's answer to the defendants' cross-complaint contains denials of the allegations in the defendants' answers, and sets forth that the deed mentioned in the cross-complaint filed by the defendants was to be executed and delivered simultaneously and conditionally upon said Helen M. Anderson, as executrix of the estate of E. M. Anderson, deceased, executing and delivering a note and trust deed in the amount and for the purposes hereinbefore mentioned. The cross-complaint further alleges that more than one year has elapsed and no payment has been made of the amount found due the plaintiff in this action, and prays that the title or claim of Helen M. Anderson, as executrix of the estate of E. M. Anderson, deceased, be declared forfeited by reason of default in making payment of the amount found due the plaintiff in this action, and also contained a prayer for general relief.

The record in this action shows only a stipulation entered into between the parties and the findings and judgment entered in action No. 157108. The stipulation is as follows: "It is stipulated that Anton W. Wilson has refused to execute and deliver to Helen M. Anderson, as executrix of the estate of E. M. Anderson, deceased, a deed of grant to the west one-quarter of lot 732, tract 3126, Los Angeles county, as per map recorded in book 33, page 51 of maps, as directed in the

action entitled 'Helen M. Anderson, Executrix of the Estate of E. M. Anderson, Deceased, vs. Anton W. Wilson, file No. 157108', for the reason that Helen M. Anderson, the said executrix, has refused to execute and deliver to Anton W. Wilson a note secured by deed of trust on the above-mentioned property in the sum of \$5,360.08, as directed in said action. Further stipulated that none of the sum of \$5,360.08 has been paid. Further stipulated that the file in said action number 157108 shows that the attorneys for both plaintiff and defendant in said action O. K.'d the findings of fact and judgment in said action. It is further stipulated that the file in said action number 157108 be admitted in evidence."

Just what the judgment roll in action No. 157108 discloses does not appear from the record presented upon this appeal, as only the findings and judgment in said action are included within the records before us. From the findings presented to the court, made and entered in said action, and introduced in evidence in this action, we summarize the following:

On or about the 11th day of July, 1927, Helen M. Anderson and Edward M. Anderson, now deceased, executed and delivered to Anton W. Wilson a trust deed covering certain real property situate in Glendale, Los Angeles county, to secure the payment of the sum of \$7,497.31. At the same time the title to certain personal property, consisting of the stock, wares, and merchandise of a certain business known as the Pioneer Electric Company, was vested in the said Anton W. Wilson, as further security for the payment of the above-mentioned sum. Thereafter the title to said personal property by the said Andersons and said Wilson was transferred to one Edna W. Hamilton for certain real property situate in Imperial county, and the title to said real property, with the consent of said Andersons, taken in the name of Anton W. Wilson, with the intent and purpose that he should hold the same as security for the payment of the sum of money hereinbefore mentioned, and, likewise, as security for all expenses and disbursements that should be incurred in the management, control and disposition of said lands in Imperial county. Finding No. V of the court in said action No. 157108, introduced as testimony in this action, reads as follows: "That said defendant Anton W. Wilson received title to the said Imperial land as agent for the said firm of Anderson and Anderson and for the said Edward M. Anderson, since deceased, but with an interest therein and a lien thereon to repay and reimburse himself for all moneys advanced, and for any and all expenses and taxes properly incurred by him in the management, control and transfer of said Imperial land, or of any property or properties received in exchange or substituted therefor;

and said Anton W. Wilson was authorized to make exchanges or substitute other properties for said Imperial land as he might deem advisable, and hold the same as additional security in the same way he held said Imperial land, and had formerly held the said Pioneer Electric Company business; and the court further finds that said Anton W. Wilson has managed and controlled the said properties received or substituted by him, with that due and proper care required of an agent, and has made exchanges therefor and substituted other properties in place of said Imperial land, with the due and proper care required of an agent. That the said defendant Anton W. Wilson informed the plaintiff and Clarence M. Anderson, from time to time, as to the details of the transactions, transfers and other matters in connection with the exchange of the Imperial land and all other properties received therefor, and all of said transactions, transfers and disposals of said properties were either duly authorized by said plaintiff or approved and ratified by her, as stated in the last paragraph." The finding then set forth transactions relating to the real estate, and the coming into the possession and control of said Anton W. Wilson, and in his name, the property involved in this action. The conclusion of the court, after making these findings, and the finding that the estate of E. M. Anderson, deceased, was indebted to Anton W. Wilson in the sum of \$5,360.08, was to the effect that the title to said property vested in said estate, and a deed of conveyance should be made by the said Anton W. Wilson to Helen M. Anderson, as the executrix thereof, upon the execution and delivery by said executrix of a promissory note conditioned for the payment to said Anton W. Wilson of the sum of \$5,360.08, on or before the 1st day of April, 1926, and secured by a trust deed to be executed by the said executrix. Judgment was entered accordingly. As shown by the stipulation hereinbefore set forth, the conditional part of the judgment has never been complied with. The deed conveying the title to the premises has not been executed and delivered by Anton W. Wilson to Helen M. Anderson, as executrix of the estate of E. M. Anderson, deceased, for the reason that Helen M. Anderson, as the executrix of the said estate, has declined to execute and deliver the note and trust deed provided for in the judgment. The record does show that Anton W. Wilson did tender a deed as provided for in the judgment, but compliance by Helen M. Anderson, as executrix of the estate of E. M. Anderson, deceased, with the conditions on her part to be performed, was declined and refused, and the deed, therefore, was never delivered. Thereafter, and after the expiration of a year from the date of the entry of said judgment, this action was begun, based upon the theory that Helen M. Anderson, as executrix of the es-

tate of E. M. Anderson, deceased, was in default, and that the plaintiff, Anton W. Wilson, was entitled to a judgment quieting his title to the premises involved, which judgment was entered and is now before us upon appeal.

[1] It is contended by the appellants that the only judgment which the court was authorized to enter in action No. 157108, in relation to the sum of money in said action found due Anton W. Wilson, would have been one directing payment of said sum out of the funds of the estate of E. M. Anderson, deceased, in due course of administration, as provided for in section 1504, Code of Civil Procedure, and a number of cases are cited where judgments have been entered upon accounts and claims due from and owing by estates. This contention, however, overlooks the essential fact that the property in this action is charged with a lien in favor of Anton W. Wilson. Title was taken in his name with the understanding, as found by the court, that it should be so taken and held by Anton W. Wilson in order to secure repayment to him of the sums of money heretofore referred to. This placed the estate in the position of not being entitled to have its title to the premises quieted, or, rather, as not being entitled to a conveyance of the premises until, and upon condition of making payment to Anton W. Wilson, the holder of the title, of the amount of money owing to him, as found by the court, and constituting a charge upon the premises, and this would be true even though the sum due Anton W. Wilson was barred by the statute of limitations. Only one case needs to be cited in support of what we have stated, to wit, *Boyce v. Fisk*, 110 Cal. 107, 42 P. 473. In that case, where it appears that the debt was barred, the court nevertheless held that judgment quieting title could only be entered upon payment of the debt, and that the form of the judgment should have provided for quieting the title upon payment of the debt within a specified time, and in the event of failure so to pay, the action should be dismissed, and title would remain vested in the one to whom the debt was owing, and in whose name the title stood, just as though no action had been prosecuted.

What we have said is further supported by the case of *De Leonis v. Hammel*, 1 Cal. App. 390, 82 P. 349, 351, where, in an action to quiet title, the court held as follows: "But where, as here, the facts upon which plaintiff's claim is based are alleged, there is authority to grant any proper relief within the limitations of section 580 of the Code of Civil Procedure. And appropriate remedies, such as cancellation, reconveyance, or decrees quieting title, or establishing or enforcing trusts, or determining the priorities of opposing equities, may be had, as between proper parties, under our system, whenever they are re-

quired upon equitable considerations and are justified by the pleadings and proof in the case. *Campbell v. Freeman*, 99 Cal. 546, 34 P. 113; *Tuffree v. Polhemus*, 108 Cal. 670, 41 P. 806; *Collins v. O'Lavery*, 136 Cal. 31, 68 P. 327; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 P. 786; *Rollins v. Forbes*, 10 Cal. 299; *Angus v. Craven*, 132 Cal. 691, 64 P. 1091." The authorities cited abundantly show that under the provisions of section 738, Code of Civil Procedure, the court, in an action involving adverse claims to real property prosecuted upon a complaint seeking to quiet title of the plaintiff, may enter such judgment as the equities of the case require, and provide for the establishing and enforcing of such trusts in relation to the property involved as the equities of the case justify or demand.

The facts set forth in the record in this case show that the trial court, in action No. 157108, was authorized to and should have entered a judgment to the effect that the plaintiff's title to the premises involved be quieted; that a conveyance be made by Anton W. Wilson to the plaintiff in said action upon, and only upon, payment to him of the amount due from the estate of E. M. Anderson, deceased, and which constituted a charge and a lien upon the premises involved, and for the security, the payment of which Anton W. Wilson then and there held the legal title.

[2, 3] We come now to the form of the action before us upon this appeal and the rights therein to which the respective parties may be entitled. The amount of the lien held by Anton W. Wilson against the real property described in the complaint has already been litigated and adjudged by the trial court in action No. 157108. It is therein determined that Anton W. Wilson is entitled to payment of a certain sum; that he has a lien against the described real property to secure the payment thereof; the estate is found to be the real owner of the property, and should have the title thereto transferred to the executrix of the estate of E. M. Anderson, deceased, upon payment of the sum so found due. The form for carrying the judgment into effect is such as to be unenforceable. The court could not compel the executrix of the estate of E. M. Anderson, deceased, to execute the promissory note or the trust deed therein provided for. Nor could it compel Anton W. Wilson to execute a conveyance unless and only upon payment to him of the moneys to secure the payment of which the premises stood charged. Therefore we come now to the question of remedies.

[4-6] The plaintiff in this action holds a deed which is, in legal effect, only a mortgage. We do not need to cite authorities, which are numerous, to the effect that, if a grant, bargain, and sale deed is taken as security for the payment of a debt, the instrument, though couched in the form of an

absolute conveyance, is, in truth and in fact, nothing more than a mortgage, and for the foreclosure of which only one action can be prosecuted, as provided for by section 726 of the Code of Civil Procedure. Thus the right of the plaintiff in this action was not for a judgment quieting title, which would exclude the appellants from any right of redemption or from the opportunity of making payment of the sums due the plaintiff, and therefore the judgment as entered herein cannot stand. However, the answers and cross-complaints of the appellants in this action supply all the necessary facts, together with the evidence introduced by stipulation of the parties, to justify the trial court in directing a reformation or amendment of the plaintiff's complaint, if deemed necessary, and then proceeding as though the action had originally been commenced to foreclose the lien of the plaintiff upon the premises involved, and, in effect, to enforce the judgment in action No. 157108. In so doing, the action of the trial court would have been, and should have been, in line with the opinion in the case of *Randall v. Duff*, 101 Cal. 82, 35 P. 440, 441, an action prosecuted to quiet title, and where, in the original action, all of the parties had not appeared. The court said: "Among the consequences of the omission to make the successors of William R. Duff parties to the foreclosure of the Ritchie and Fiebig mortgages was the necessity of prosecuting another action in some form to bar or determine their right of redemption; and the present action by the purchaser under the foreclosure proceedings, though in form an action to quiet title, is in effect nothing more nor less than a suit to foreclose the mortgages as against the plaintiffs in *Duff v. Duff*, [101 Cal. 1, 35 P. 437] just as their cross complaint is in effect a suit to redeem. In the form which the litigation assumed through the mistake or choice of the plaintiff and his predecessors he was subjected to the necessity of relitigating in this action the validity and amount of the mortgage liens, but the mortgagees could not by their disregard of the regular procedure for the enforcement of their rights compel the defendants to relitigate with them or their successor, in what is practically another suit to foreclose their mortgages, the rights finally determined in the action of *Duff v. Duff*." In the case at bar, the rights of the parties, as we have stated, are fully determined in action No. 157108, and only the question of procedure and form of action to enforce those rights is involved.

Without further citation of authority, it is evident that the judgment as entered in this action, as we have said, must be reversed and the cause remanded to the trial court with directions to permit the amendment of the complaint herein, if the plaintiff is so advised, so as to correspond with and set forth all the

facts which appear in the answers and cross-complaints filed by the appellants, the plaintiff's answer thereto, and the evidence introduced in this cause, showing all that is essential to support an action to foreclose a mortgage, and then proceed to determine whatever additional sums, by way of interest and other expenses, if any, chargeable as a lien against the premises described, and to direct foreclosure and sale in accordance with the provisions of the Code regulating the foreclosure and sale of mortgaged real estate. And it is so ordered.

110 Cal. App. 114

DAVIS v. LOCKWOOD et al.
Civ. 7459.

District Court of Appeal, Second District,
Division 1, California.
Nov. 28, 1930.

Rehearing Denied Dec. 16, 1930.

Hearing Denied by Supreme Court
Jan. 26, 1931.

Homestead §57(3).

Evidence that lot contiguous to lot with dwelling claimed as homestead was used for chicken yard and garden justified holding that it was part of homestead.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by Barbara Davis against C. W. Lockwood and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Caesar A. Roberts, of Los Angeles, for appellant.

Charles P. Johnson, of Los Angeles, for respondents.

HOUSER, J.

The purpose of the action in the lower court was to set aside and to subject to the lien of a judgment theretofore rendered in another action brought by plaintiff against defendants a homestead which, preceding the date of the entry of the said judgment, had been declared by one of the defendants on two town lots, each of which was contiguous to the other and upon one of which lots both of the defendants resided. The size of each of the lots was approximately 42 by 133 feet. The action was predicated upon the asserted ground that the lot other than the one upon which the dwelling of defendants was located could not properly be regarded as a part of the legal homestead of defendants, for the reason that it was not used or occupied by them. Judgment was rendered in favor of defendants, and plaintiff appeals therefrom.

On the trial of the action, among other things, the evidence included testimony given by one of the defendants to the effect that for "at least ten years" next preceding the date when the homestead was placed on the two lots, the so-called vacant lot in question had been used by defendants "for a chicken yard and garden," and that it had "fruit trees on it," which consisted of an orange, a lemon, a walnut and a fig tree. Another witness testified that for "seven years that I know of * * * Mrs. Lockwood has a chicken yard on the back end of it, and every summer, every year, she has a garden there; and in the summer when she is not working she cleans that yard up, cut down all the weeds, and cleans it all up. And she has some fruit trees on it, and the trail from her house on that side is pretty well over in that lot."

The cases of Englebrecht v. Shade, 47 Cal. 627; Arendt v. Mace, 76 Cal. 315, 18 P. 376, 9 Am. St. Rep. 207; In re Allen, 2 Cal. Unrep. Cas. 835, 16 P. 319; and Skinner v. Hall, 69 Cal. 195, 10 P. 406, are authorities which in principle clearly sustain the ruling of the trial court as to the sufficiency of the evidence herein upon which to rest the judgment.

No other point being seriously presented by appellant, it is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

100 Cal. App. 612

BALCONADES BALLROOM, Inc., v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 7528.

District Court of Appeal, First District,
Division 2, California.

Nov. 18, 1930.

Rehearing Denied Dec. 18, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

1. Corporations §665(3).

Superior court had jurisdiction of action by foreign corporation, qualified to do business within state, upon chose in action assigned to corporation in another state before it qualified to do business within state.

It was claimed that the assignment was void because made before time when corporation qualified to do business within state. The assignment, however, made in another state, was not void, and, if it became unenforceable within state, that is question which superior court would have jurisdiction to determine.

2. Corporations ⇨661(1).

Foreign corporation qualified to do business within state obtained right to sue.

3. Corporations ⇨639.

Where assignment to foreign corporation was made in another state, California law respecting transactions by corporation within state was inapplicable.

Mandamus proceeding by the Balconades Ballroom, Inc., against the Superior Court in and for the City and County of San Francisco, E. P. Shortall, Judge, to compel respondent to proceed with the trial of a certain action.

Writ granted.

Edward A. Cunha and Harry I. Stafford, both of San Francisco, for petitioner.

Taaffe & Taaffe, of San Francisco, for respondent.

NOURSE, P. J.

This is an original proceeding in mandamus to require the respondent court to proceed with the trial on its merits of an action instituted in that court by petitioner. The respondent has appeared by demurrer and answer, but has submitted the latter without proof; hence we may confine our discussion to the points of law involved.

Petitioner is a Nevada corporation, incorporated in that state on May 14, 1928. On that date certain individuals residing in California delivered to petitioner at Lovelock, Nev., a written assignment of personal property, including a chose in action. On October 8, 1928, the petitioner duly qualified under the laws of this state to do corporate business in California. On May 24, 1929, it commenced an action in the superior court in and for the city and county of San Francisco to recover upon the chose in action above mentioned. The cause was set for trial before a jury, and, after the plaintiff had presented a portion of its evidence, the defendants moved to dismiss the action upon the grounds that the court was without jurisdiction and that the plaintiff did not have legal capacity to sue. The motion was granted on the first ground only, and, lest it be argued that the order is good if supported by either ground, it is sufficient to say that the petitioner concededly qualified to do business in this state long prior to the commencement of the action, and, as assignee of the claim, manifestly had legal capacity to sue on it.

[1] On the question of jurisdiction, the defendants raised a wholly false issue. It was their claim that the assignment was void because made prior to the time when the corporation qualified to do business in the state.

But the assignment was executed and delivered in another state—delivered to a corporation which admittedly was qualified to receive it. Hence the assignment was not void when made and delivered to the Nevada corporation. If it became unenforceable in this state at some future date because held by a corporation which may have thereafter run afoul of some of the laws of this state, that is precisely the question which the superior court would and should have jurisdiction to determine.

Thus, a court may find that a claim is barred by the statute of limitations, and, if that defense is raised, judgment must go for defendant; it may find that a sale of corporation property was made in violation of the Corporate Securities Act (St. 1917, p. 673), or that an attempted sale of realty was in violation of law and hence unenforceable, but no one would contend that the court did not have jurisdiction to hear and determine those issues.

[2] In the case before the respondent court, the petitioner, having admittedly qualified to do business in this state, thereby obtained the right and capacity to sue. If the assignment upon which it sued was invalid for any reason, or if the assigned claim was invalid or unenforceable for any reason, the court and jury manifestly had jurisdiction to hear and determine those issues. The cause being one in which a trial by jury is a matter of right, the plaintiff was entitled to have those issues submitted to the jury.

This is not a case like *Cahill v. Superior Court*, 145 Cal. 42, 78 P. 467, and others cited by respondent where the question of jurisdiction is a question of fact to be determined by the trial court upon evidence taken for that purpose. Manifestly in such a case an appellate court should not by mandamus override the findings of the trial court based upon the evidence which it has heard. But this is a case like *Temple v. Superior Court*, 70 Cal. 211, 213, 11 P. 699, where the Supreme Court say: “* * * The court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction. * * *” This and many other cases are cited in *Hennessy v. Superior Court*, 194 Cal. 368, 374, 228 P. 862, where a portion of the *Cahill* opinion is cited to the effect that, when the trial court has decided as a matter of law upon its construction of the Constitution and statute that it is without jurisdiction, mandamus to the Supreme Court is the proper remedy.

[3] The assignment having been delivered in the state of Nevada, the “transaction” took place in that state, and the laws of this state relating to the transaction of business by corporations in this state have no bearing upon

that transaction. When thereafter the corporation came into this state and qualified to transact business under the corporate laws of this state, it brought with it the assignment of this chose in action, which was an asset—a property right subject to the laws of property in this state. That the corporation had the legal capacity to sue in an effort to enforce this property right in a trial before a jury, and that the superior court had jurisdiction to hear and determine the cause, is manifest.

Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.;
SPENCE, J.

IN RE BLOOM'S ESTATE.*

Civ. 7511.

District Court of Appeal, First District,
Division 1, California.

Nov. 12, 1930.

Rehearing Denied Dec. 12, 1930.

Hearing Granted by Supreme Court

Jan. 8, 1931.

1. Wills ⇨203.

Proceeding for probate of will is one instituted for purpose of establishing status of written instrument.

2. Wills ⇨427.

Order admitting will to probate is not, except as to parties litigant or for purpose of proceeding itself, conclusive as to facts on which question of will or no will depends.

3. Wills ⇨427.

Order admitting will to probate is not conclusive as decree in rem as to mental condition of testator or other facts on which validity of instrument depends.

4. Wills ⇨423.

Order admitting will to probate is not conclusive as to matters incidental, though necessarily adjudicated therein.

5. Wills ⇨423.

Adjudication on question of testator's residence in proceeding for probate of will is not conclusive on strangers in matter not involving validity of order.

6. Wills ⇨423.

Decree admitting will to probate is, as to all persons interested in will, conclusive for purposes of administration as decree in personam.

7. Judgment ⇨812(3).

Judgments in rem are binding on person not party to, or participant in, proceeding only so far as status, title, or other res is adjudicated.

8. Taxation ⇨856.

Tax imposed by inheritance tax law is on right to succeed to property of estate rather than on property itself.

9. States ⇨191(1).

State, without its consent, express or implied, cannot be sued.

10. Wills ⇨423.

Right of state to collect inheritance tax cannot be prejudiced by findings of court in proceeding for probate of will.

11. Wills ⇨423.

Executor, as respected liability of estate for inheritance tax, was not estopped by his testimony relating to residence of deceased on hearing of petition for probate.

12. Judgment ⇨666.

Estoppel of judgment is operative only when it is mutual.

13. Estoppel ⇨58.

Essential element of "estoppel by conduct" is that party asserting it was injured or misled by conduct of opponent.

[Ed. Note.—For other definitions of "Estoppel in Pais," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of David Bloom, deceased. On objections by Ray L. Riley, as State Controller, and by Jonas Bloom, executor of the estate of David Bloom, to a report filed by the inheritance tax appraiser, fixing the amount of estate tax. From an order that no inheritance tax was due, Ray L. Riley, as Controller, appeals.

Affirmed.

Herbert Kaufman and W. Urie Walsh, both of San Francisco (W. H. H. Gentry and A. W. Brouillet, both of San Francisco, of counsel), for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

PER CURIAM.

This is an appeal by the state controller from an order entered in the above matter determining that no inheritance tax was due the state of California, and directing a refund of the inheritance tax previously paid.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 2 P.2d 763.

David Bloom died testate in the city and county of San Francisco on September 16, 1925. On September 25, 1925, Jonas Bloom, the executor and respondent herein, filed his petition for an order admitting the will to probate, and on October 8, 1925, the same was duly admitted to probate. The petition alleged, and the court found, that the decedent at the time of his death was a resident of said city and county. In due course of administration of the estate, the inheritance tax appraiser appointed by the court filed his report fixing \$64,268.81 as the amount of the tax, of which \$57,145.24 was charged against the distributive share of respondent, and finding that the decedent died a resident of the city and county of San Francisco. On September 7, 1927, the state controller filed objections to the report, alleging that certain corporate stock owned by decedent had been undervalued by the appraiser and that a copartnership interest of decedent had not been included in the report. On December 13, 1928, objections to the report were filed by respondent, following which amended and supplementary objections thereto were filed on his behalf individually and as executor. These objections alleged that the report was incorrect in finding that the decedent died a resident of the above city and county, and that he was a resident of San Salvador at the time of his death; that consequently the stocks and bonds foreign to the state of California and which were owned by decedent were not subject to an inheritance tax in this state. The parties stipulated as to the value of the property in question, and also that the decedent had an interest in certain partnership accounts which were not mentioned in the report. After a hearing, the court found upon the evidence that decedent died a resident of San Salvador, and the order appealed from was entered accordingly. The evidence sufficiently supports the finding that decedent was a resident of San Salvador, but, as stated, the order admitting the will to probate contained a finding that the decedent died a resident of the city and county of San Francisco, and the controller contends that respondent is conclusively bound thereby. The parties also stipulated that the only matter to be determined on appeal is the legal effect of the order in the above respect, but appellant makes the further contention that respondent by reason of his testimony in support of the petition for the probate of the will is also estopped to assert that decedent was not a resident of the said city and county.

[1-5] A proceeding for the probate of a will is one instituted for the purpose of establishing the status of a written instrument. *State of California v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Estate of Parsons*, 196 Cal. 294, 237 P. 744. While the order admitting the same to probate is conclusive in subsequent proceedings as to the ultimate fact of the will, it is not save as to parties litigant (*Clapp v.*

Vatcher, 9 Cal. App. 462, 99 P. 549), or for the purpose of the proceeding itself (*Estate of Relph*, 185 Cal. 605, 198 P. 639), conclusive as to the facts upon which the question of will or no will depends (*Gridley v. Boggs*, 62 Cal. 190), or, quoting from Freeman on Judgments (5th Ed.), § 1524: "When the same issues arise with respect to a different subject matter." As was said in *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265, with regard to such decrees, "strangers though bound to admit the title or status which the judgment establishes are not bound by the findings of fact." Thus it has been held that an order admitting a will to probate is not conclusive as a decree in rem as to the mental condition of the testator or other facts upon which the validity of the instrument depends (*Gridley v. Boggs*, supra), or as to matters incidental, though necessarily adjudicated, such as to relationship of the parties to decedent (*Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455), or the fact of the death as against strangers in a collateral proceeding (*Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238, 23 L. Ed. 314; *Carroll v. Carroll*, 60 N. Y. 121, 19 Am. Rep. 144; *In re Rowe*, 197 App. Div. 449, 189 N. Y. S. 395, affirmed 232 N. Y. 554, 134 N. E. 569; *Day v. Floyd*, 130 Mass. 488; *Steele's Unknown Heirs v. Belding* [Tex. Civ. App.] 148 S. W. 592). It has also been decided in numerous cases that an adjudication upon the question of residence of the testator in a proceeding for the probate of the will is not conclusive upon strangers in a matter not involving the validity of the order granting letters testamentary. *Dallinger v. Richardson*, 176 Mass. 77, 57 N. E. 224; *Colvin v. Jones*, 194 Mich. 670, 161 N. W. 847; *Matter of Horton*, 217 N. Y. 363, 111 N. E. 1066, Ann. Cas. 1918A, 611; *Smith v. Smith's Executor*, 122 Va. 341, 94 S. E. 777; *Thormann v. Frame*, 176 U. S. 350, 20 S. Ct. 446, 44 L. Ed. 500; *Overby v. Gordon*, 177 U. S. 214, 20 S. Ct. 603, 44 L. Ed. 741; *Dunsmuir v. Scott* (C. C. A.) 217 F. 200. *In Tilt v. Kelsey*, 207 U. S. 43, 28 S. Ct. 1, 4, 52 L. Ed. 95, the court, in passing upon this question, said: "Upon principle and authority, that adjudication, though essential to the assumption of jurisdiction to grant letters testamentary, was neither conclusive on the question of domicil, nor even evidence of it in a collateral proceeding."

[6] Appellant, in support of his contention, has cited certain California cases. In *Estate of Dole*, 147 Cal. 194, 81 P. 534, and *Estate of Davis*, 151 Cal. 327, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105, orders admitting wills to probate were attacked on the ground that the testator was a nonresident of the county, and in *Estate of Parsons*, supra, a petition for partial distribution was opposed upon the ground that a portion of the will, the whole of which had been admitted to probate, had been revoked by the testator. Also in *Estate of*

Relp, supra, the proceeding was in effect an attack upon an order granting letters of administration made upon the ground that the decedent was resident in another county. In each of these cases it was held that the orders could not be questioned collaterally, and none is an authority for the proposition that the findings upon which the orders were based were conclusive upon strangers in proceedings not involving the validity of the orders. In *Estate of Barton*, 196 Cal. 508, 238 P. 681, the testator died in San Diego county, where his will was admitted to probate, the finding in the order being that he was a resident of that county at the time of his death. The will was executed in Rhode Island, where the testator was then domiciled. He owned certain foreign corporate stock which by the terms of the will was bequeathed to one Charles E. Blake, a resident of Rhode Island, but who predeceased the testator. Under section 1343 of the Civil Code this legacy lapsed upon the death of Blake. Upon the filing of the petition for distribution, Blake's heirs filed objections to the distribution of the stock to the residuary legatee, alleging that the testator, contrary to the above finding, was domiciled in Rhode Island at the time of his death and that under the laws of that state the legacy did not lapse. A demurrer to the objections filed was sustained, and the stock distributed to the residuary legatee. On appeal from the decree it was held following *Estate of Relp*, supra, that the findings of jurisdictional facts supporting the order were final adjudications in all subsequent stages of the administration; also that, while the fact that the testator died in San Diego county leaving estate therein was sufficient to give the court jurisdiction to make the order (Code Civ. Proc. § 1294, subd. 2), nevertheless Blake's heirs were privileged to appear and oppose the admission of the will to probate on the ground that the testator was a resident of the county, and, having failed to do so after due notice, were concluded by the finding. While a decree admitting a will to probate as a judgment in rem is conclusive only as to the status adjudicated, it is, nevertheless, as to all persons interested in the will who, being notified to appear at the probate, might come in, or who, had they come in, would have been heard on any question which the court might properly determine at the hearing, as conclusive for the purposes of administration as a decree in personam. *Garwood v. Garwood*, 29 Cal. 514; *Estate of Allen*, 176 Cal. 632, 169 P. 364; *Freeman on Judgments* (5th Ed.) § 1524; 15 Cal. Jur. Judgments, §§ 180, 181, pp. 117, 118. This was the gist of the decision in the *Estate*

of *Parsons*, supra, on this question, and all that is necessary to support that decision.

[7, 8] The above cases make it plain that judgments in rem are binding upon persons who are not parties to or participants in the proceeding only so far as the status, title, or other res constituting the subject-matter is adjudicated. *Estate of Blake*, 157 Cal. 448, 108 P. 287. It is well settled that the tax imposed by the Inheritance Tax Law (St. 1921, p. 1500, as amended) is on the right to succeed to the property of the estate rather than upon the property itself. *Estate of Letchworth*, 201 Cal. 1, 255 P. 195. The statute makes no provision for notice to the state or any officer thereof of hearings upon petitions for the probate of wills or for letters of administration, and before the appointment of the inheritance tax appraiser the state is a stranger to the proceeding. Any other rule would afford opportunity for fraud, of which unscrupulous persons would not be slow to take advantage.

[9, 10] While the state may be concluded by a judgment in rem as to the res with respect to which the judgment was rendered, as, for example, the validity of the organization of irrigation districts (*People v. Linda Vista Irr. District*, 128 Cal. 477, 61 P. 86; *People v. Perris Irr. District*, 132 Cal. 289, 64 P. 399, 773), or the genuineness of a will duly admitted to probate (*State v. McGlynn*, supra), nevertheless it has been held that judgments of this character do not conclude the state or its agencies unless the law authorizing the proceeding contemplates such result, since the state, without its consent, express or implied, cannot be sued (*Berton v. All Persons*, 176 Cal. 610, 170 P. 151), and also that the right of the state to collect an inheritance tax cannot be prejudiced by the findings of the court in a proceeding for the probate of a will (*Estate of Holt*, 61 Cal. App. 464, 215 P. 124).

[11-13] We find no merit in appellant's further contention that as between the state and the executor the latter is estopped by his testimony at the hearing of the petition for the probate of the will. The estoppel of a judgment is operative only when it is mutual (34 Cor. Jur. Judgments, § 1407, p. 988), which was not the case as to the state. Moreover, it is an essential element of an estoppel by conduct that the party asserting it was injured or misled by the conduct of his opponent (10 Cal. Jur. Estoppel, § 20, p. 636), which is not contended to be the fact here.

The conclusions of the trial court are supported both by the facts and the law, and its order should therefore be affirmed.

The order is affirmed.

WARE v. McPHERSON et al.*

Civ. 7360.

District Court of Appeal, First District,
Division 2, California.

Nov. 20, 1930.

Rehearing Denied Dec. 20, 1930. Hearing
Granted by Supreme Court Jan. 19, 1931.**Damages** $\Rightarrow$ 131(1).

\$3,000 for physical injuries *held* excessive by \$2,500, where plaintiff did not suffer any broken bones, major lacerations, or permanent disorder.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Howard F. Ware, a minor, by Arthur F. Ware, his guardian ad litem, against Charles McPherson and others. Judgment for plaintiff, and defendants appeal.

Reversed unless modification accepted.

Treadwell, Van Fleet & Laughlin, of San Francisco, for appellants.

Vincent W. Hallinan and James J. Roach, both of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff was injured by being hit by defendants' automobile. He commenced an action to recover damages. The jury returned a verdict in favor of the plaintiff for \$3,000. From a judgment entered on that verdict, the defendants have appealed and claim that the verdict is excessive. In their brief the defendants recite much of the evidence as to the plaintiff's injuries.

The plaintiff testified as follows: He was injured around the knee, and had several cuts on both legs. His right eye had a large cut over it. One arm was strained a bit, and his chest hurt him very badly. His nose was hurt. He bled at the nose very badly, and his arm and eye were bleeding. The accident occurred on April 10, 1927. The action was tried August 22, 1929. At the time of the trial, the plaintiff testified that he still felt the effects of his injury—his knee bothered him, his lungs bothered him, and his head bothered him quite a bit. If he tries to engage in athletics, his knee gives away on him. When he runs down the track, his right knee gives under him, and he has to turn himself about and stop. Occasionally when he walks it does the same thing, or when he stands still. These things happen very frequently sometimes, and at other times just occasionally. At the time of the accident, he was attending the Polytechnic High School in San Francisco. He was active in athletics, and took part in soccer, basketball, and track athletics. After the accident he went

back to school and finished that year, and then took a post graduate course. There is no evidence the plaintiff missed a day at school or that he was laid up as a result of the injury. In May, 1927, about a month after the injury, he took part in the field day exercises and ran in the 75-yard dash and in the relay race. He was unable to indulge in athletics after he went back to school. He could get around on his knee, but it was stiff. He had been running in 100-yard race and the 220. After he returned to school, he could manage to run them, but could not run them fast. His knee would bother him an awful lot. At the time of the trial, he was unable to play basketball. Regarding his chest at the time of the trial, he stated that he had short wind. At the time of the accident there was a sharp pain across the chest. The soreness in the chest was gone after about a week. At the time of the trial, if he exercised himself very much, his wind was short. As to the cut over the eye, no stitches were taken in it. Before the accident, the plaintiff's nose was straight, but at the time of the trial the plaintiff testified when he gets a cold one nostril is very hard to breathe through. His nose does not bother him right now. If he does very violent exercise, he breathes through his mouth. Since the accident, his head bothers him. He has headaches sometimes, and then it is very hard to work at figures. He cannot concentrate for any long period the way he used to do. He is engaged in bookkeeping and billing. He has trouble in concentrating on figures. If he figures on something for a while, he just stares at it, and it means nothing to him. He did not have any trouble like that before the accident occurred. Nor did he have any difficulty in school work. During the last year he did not seem to get down and concentrate on his subjects. He had a nosebleed on the morning of the trial. Prior to the accident he had a few nosebleeds as the average person has. He has a nosebleed every two weeks. He has dizzy spells, but was not bothered that way before the accident. At the emergency hospital the plaintiff received first aid and was then taken to the St. Francis Hospital. At the latter place the doctor examined the plaintiff thoroughly. That was Dr. Green. After making a thorough examination, the doctor washed the cuts, told the plaintiff how to treat himself, and said he would call again. The doctor came to see him once or twice. The plaintiff was sure he came once. That call was within a week after the accident. After the accident, the plaintiff's mother was at the St. Francis Hospital and he visited her there and on some occasions saw Dr. Green. When the plaintiff first saw Dr. Green, he told him about the injury to his knee, and Dr. Green advised him to place it in hot water and put Epsom salts

$\Rightarrow$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 1 P.2d 433.

and hot applications on it. The plaintiff followed that treatment for a couple of weeks. The pain did not leave on the first treatment, and Dr. Green took an X-ray. The doctor did not prescribe any further treatment after the X-ray was taken, except he told the plaintiff to keep on adding hot applications. He continued the treatment for a week or more. The plaintiff complained to Dr. Green of pains in his chest and the difficulty of breathing. The doctor made a thorough examination, and told him to rub his chest with salve and things like that. The plaintiff applied the salves for about two weeks. He did not complain to Dr. Green about any injury to his nose. Within a week after the accident, he suffered a nosebleed, but he did not tell that fact to Dr. Green. He has never consulted any doctor about the bleeding of the nose, has never had any treatment for it. He did not call to the attention of Dr. Green any injury about his head. Neither has he ever called it to the attention of any other physician. Everybody has a nosebleed now and then, and so did the plaintiff before the accident. Sometimes he would not have any nosebleeds and sometimes he would. That had been through all of his life. He gets the dizzy spells every once in a while. Sometimes they come twice a week and sometimes three times a week. He has never consulted Dr. Green about that nor any other physician. When the X-ray was taken, it was taken around the knee. That was the only portion of his body of which an X-ray was taken. On July 12, 1929, when the plaintiff gave a deposition, he was examined regarding nosebleeds and injury to the knee, and was asked if he had any other complaints. He replied, "Just that nervousness." It is more or less where machines are concerned—sudden stopping of machines or squeaking of brakes. He did not mention anything else because he was too nervous.

Dr. Mansfelt examined the plaintiff a day and a half before the trial. He examined the plaintiff's nose, and testified that it showed a deviated septum and apparently a healed fracture. The general appearance of the nose showed it had been fractured. The plaintiff has a rundown condition and seems somewhat nervous. He weighs 125 pounds, and should weigh 145 pounds. In reply to a hypothetical question, the witness stated that the plaintiff's rundown condition was probably due to the shock of the accident. Objectively he did not find very much of an indication of nervousness, but all the witness could assume was what the plaintiff told him. The nosebleed might be the result of trauma to the nose at the time of the accident. In his examination he did not find definite symptoms of the trauma or fracture, but very suggestive symptoms of an old fracture of the nose. The left nostril is very small, due to the deviated septum. To put

the nose in proper condition, it would necessitate an operation of straightening the septum. That operation would require the removal of a part of the bony structure.

Dr. Green testified that after the accident he was called upon to treat the plaintiff. He examined him at the St. Francis Hospital. He examined him thoroughly, and found the plaintiff suffering from contusions on the knees, a laceration over the eye, nothing to indicate any serious nature whatsoever. At the time of the examination, the plaintiff complained that the knees were paining him. His main complaint was as to his knees, and there was a slight cut over his eye. He did not complain regarding his nose. He did not speak about pain in his chest. Under his examination, the witness found there were no fractured bones. The second time the witness went to see him, the witness did nothing. After the first examination, the plaintiff complained again of his knee. The witness took an X-ray and produced the negatives in court and testified regarding them. The X-ray was taken eight days after the accident. One of the pictures shows an old-standing condition in the knee. That condition is what is called "Osgood Slater's disease." That condition was not produced by the accident. It could not have been so produced. It is a condition that a recent injury could not possibly produce. Osgood Slater's disease is not uncommon. It is caused by indirect trauma. You would probably see evidence in the left knee the same as in the right. After he had taken the X-ray and pronounced him as having no fracture, he made no further examinations and did not see him at all. He never complained to me of nosebleeds, nor that a deep breath would cause him pain, nor that he had difficulty in concentration, nor that he had previously been to specialists. The peculiarity shown in the X-ray was not caused by being hit by the automobile. The X-ray shows nothing in the line of fracture or injury to the knee.

Dr. Kyle testified that the X-ray contained no evidence of any recent injury. They do show Osgood Slater's disease. That disease may be due, as far as we know, to continuous small trauma—continuing trauma—such as exercise. That disease is never the result of a direct injury to the knee. There is nothing in the X-rays that shows any evidence of an injury at that time. The disease shown by the X-ray could not have been the result of the injury only eight days prior. The soft tissues could have been injured within eight days without the X-ray showing it, but not the bony tissues. Unless it was at a time when the disease was active, it is very doubtful whether trauma would aggravate the Osgood Slater disease. If a person is endeavoring to run and take violent exercise, Osgood Slater's disease does not tend to have the

leg give way and throw the person to the ground.

The record contained no evidence contradicting the testimony given by Dr. Kyle.

About a week prior to the trial, Dr. Silberman examined the plaintiff. He testified that he examined him with respect to his various injuries complained of. The plaintiff complained of a cut over the eyebrow, of bruises to both elbows, and minor lacerations about the elbows, and lacerations about both knees, and particularly about the right knee, and a contusion of the left chest. The plaintiff stated to the witness that the knee bothered him for about a month and was stiff for about a month, and after that it did not bother him. The chest he said caused him some shortness of breath, caused him pain on taking a deep breath or exercising himself. This was felt in the chest, and it all passed away. The plaintiff further stated to the witness that his nose would bleed on an average of once every two weeks. The witness examined him and found a scar under the right eyebrow hardly visible and no traces of any contusion remaining at that time and very minute scars remaining on both knees. He examined the nose and found a deflected septum. The plaintiff also said he had nosebleeds before the accident, but not as frequently as after. The septum was deflected to the left, and the plaintiff could not breathe on that side. Nearly everybody has a deviated septum in some degree or other. The swollen turbinated and deviated septum was not due to the injury, because an injury severe enough to cause a deviated septum and pronounced turbinated bone would have broken his nose. The condition the witness found present in the plaintiff's nose caused the nosebleeds. The plaintiff made no complaint to the witness that required any other extended examination.

In reply to the foregoing, the plaintiff claims that there is other testimony in the record. He quotes much that has already been set forth above. He quotes the testimony of the plaintiff's mother where she testified that prior to the accident plaintiff's nose was perfectly straight, but that since the accident she has noticed a difference. His nose is enlarged and he has a hump on the nose which he never had before. However, the plaintiff sets forth no part of the

record showing that the condition of the nose at the time of the trial was referable to any injury received in the accident. He quotes the testimony regarding the claim of loss of power to concentrate, but he quotes no part of the record showing that such loss of power was caused by the accident. Continuing, the plaintiff asserts that under all of the evidence the plaintiff could have suffered a knee injury without the X-ray showing it. Conceding such to be the testimony, it is clear that, if the X-rays did not show the plaintiff's injury to be due to the accident, then the plaintiff was bound to show that fact by other evidence. But he did not do so.

The record shows without conflict that the plaintiff did not suffer from any broken bone or bones, any major lacerations, any intense pain of long or short duration, nor any permanent disorder shown to be the direct or indirect result of injury received in the accident. The record does not disclose any evidence of special damages of any kind or nature. A comparison of the evidence with the verdict convinces us that the jury was moved by considerations foreign to the evidence in arriving at the amount of \$3,000 in the verdict. *Barrett v. S. P. Co.*, 207 Cal. 154, 277 P. 481. Moreover the facts are such as to suggest at first blush passion, prejudice, or corruption on the part of the jury. *Morris v. Standard Oil Co.*, 188 Cal. 468, 473, 205 P. 1073. The verdict was clearly excessive in so far as it exceeded the sum of \$500.

We believe that a reversal is required unless plaintiff is willing to consent to a modification of the judgment hereinbefore rendered. It is, therefore, ordered that, unless within thirty days from the filing of the remittitur herein in the lower court the plaintiff shall release all but \$500 and costs of the judgment rendered by the trial court, such judgment shall be and it is reversed, but that, if within such time plaintiff consent to such reduction in said judgment and releases therefrom all but the sum of \$500 thereof and costs such judgment as so reduced shall be and it is affirmed; said judgment for the reduced amount to bear interest at the legal rate from the date of the entry of the original judgment of the superior court and neither party to recover from the other costs on this appeal.

We concur: NOURSE, P. J.; SPENCE, J.

FINN et al. v. SULLIVAN.
Civ. 7378.

District Court of Appeal, First District,
Division 2, California.

Nov. 24, 1930.

Rehearing Denied Dec. 24, 1930.

1. Evidence ⇨478(3).

In action for injuries in automobile accident, exclusion of testimony whether defendant was intoxicated at time of accident *held* error.

2. Evidence ⇨500.

Form of question as to whether defendant in automobile collision case was intoxicated *held* not improper.

The question was as follows: "What was his apparent condition at the time with reference to being intoxicated or otherwise?"

3. Appeal and error ⇨1056(1).

In action for injuries in automobile collision, erroneous exclusion of evidence whether defendant was intoxicated *held* prejudicial.

4. Negligence ⇨89(1).

In action by occupants of automobile for injuries in collision, negligence of one plaintiff would not bar recovery by the other.

5. Damages ⇨185(1).

Evidence *held* to justify award of substantial damages for personal injuries to child.

Medical testimony showed that child suffered fracture of four ribs and depressed fracture of skull.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by James Finn, a minor, by his guardian ad litem, Dorothy Finn, and another, against V. Sullivan. Judgment for defendant, and plaintiffs appeal.

Reversed.

James F. Brennan, of San Francisco, for appellants.

Daniel W. Burbank, C. F. Laumeister, and Henry Heidelberg, all of San Francisco (Pembroke Gochbauer, of San Francisco, of counsel), for respondent.

DOOLING, Justice pro tem.

Plaintiffs and appellants appeal from a judgment against them in an action in which each sought a recovery for personal injuries. Dorothy Finn is the mother of James Finn,

who, at the time of the collision out of which the action grows, was an infant 3½ months old. Appellants were riding in an automobile operated by one George B. O'Neal, which was proceeding northerly on Potrero avenue between Seventeenth street and Sixteenth street in San Francisco on May 6, 1929, at about 12:30 a. m., when a collision occurred with an automobile operated by respondent, Sullivan. There were no eyewitnesses of the collision except the occupants of O'Neal's car and respondent. The testimony was sharply conflicting. Appellants' witnesses testified that Sullivan approached them driving on his left side of Potrero avenue at a high rate of speed, while O'Neal was driving on his own right side at less than 20 miles per hour; that, to avoid a collision, O'Neal turned to his left, and at the same time respondent, Sullivan, swung to his right, and the collision occurred. Sullivan, who was the only witness to the facts on his behalf, testified that he was at all times proceeding on his right side of Potrero avenue at about 5 miles per hour, and that the car driven by O'Neal was on the wrong side of the street and collided with his car head on at a high rate of speed.

[1-3] After the collision, O'Neal was the only member of appellants' party to observe and talk to respondent. He testified that he got out of his car and walked over to Sullivan, who remained seated in his car, and asked him to get out and help take care of the injured people, to which Sullivan made no reply. O'Neal was then asked by counsel for appellants: "What was his (Sullivan's) apparent condition at the time with reference to being intoxicated or otherwise?" An objection that this called for the opinion and conclusion of the witness was sustained by the court. This ruling was error. 10 Cal. Jur., pp. 1003, 1004; Bidwell v. L. A. Ry. Co., 169 Cal. 780, 784, 148 P. 197; People v. Monteith, 73 Cal. 7, 8, 14 P. 373; People v. Sehorn, 116 Cal. 511, 48 P. 495; People v. Hill, 123 Cal. 51, 55 P. 692; 22 C. J. p. 599, § 694. Respondent urges that in the form in which it was asked the question was improper. In People v. Monteith, *supra*, the question approved in the opinion was almost identical in form.

We cannot agree with respondent that this error was not prejudicial. Sullivan's own testimony was that after the collision he left his car and went into a vacant lot and lay down, that he got up and went home about 2 a. m. and there had a drink of whisky and that his dazed condition was caused by injuries received in the collision. He denied that prior to the accident he had had any intoxicants to drink. A policeman who saw Sullivan at 6:30 a. m. testified that he was then drunk. In this state

of the evidence, if O'Neal had been permitted to testify that immediately after the accident Sullivan appeared to be drunk, the jury might not only have concluded that he was intoxicated, but for that reason might have discredited his testimony as to how the collision occurred. As it was, if they believed the policeman's testimony, they may have concluded that Sullivan's intoxication at 6:30 a. m. was caused by the whisky he drank at 2 a. m. and that he was sober at the time of the collision. In a case where the evidence was so sharply conflicting and Sullivan's testimony stood uncorroborated by any other witness, it is apparent that serious prejudice may have been suffered by appellants because of this ruling.

The probability that this may have been so is heightened by the following occurrence: The jury twice returned into court to ask that certain instructions be reread to them. On the second of these occasions the court read to the jury an instruction containing the following language: "If, on the subject of the negligence of the said defendant, the evidence is equally balanced, both in weight, quality and convincing effect, the plaintiffs have failed to make out a case against that defendant, and in that event your verdict must be in favor of the defendant, Vincent Sullivan." The following colloquy then occurred between the foreman of the jury and the court:

"The Foreman: Will you read that instruction again, your Honor, slowly?"

"The Court: Yes, I will read it slowly."

This request of the foreman gives force to the idea that some or all of the jurors may have felt that the scales of proof hung even. If so, the excluded testimony might well have been the added weight which would have swung the balance in favor of appellants.

[4] Appellants complain of certain instructions given at the request of the respondent, of which the following is typical: "If you find that plaintiffs, or any of them, were, or was, guilty of negligence, and that such negligence, however slight, was the proximate cause of, or proximately contributed to the injuries or damages suffered by them, or either of them, I instruct you your verdict must be in favor of the defendant, Vincent Sullivan."

That the instructions on contributory negligence were confusing to the jury is shown by the fact that they twice returned into court and had them re-read.

The instruction quoted and other similar instructions in effect told the jury that the negligence of either plaintiff would bar a recovery by the other. This is not the law. *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 P. 203, 15 A. L. R. 401. We pass by the

obvious observation that a 3½ month old infant cannot be guilty of negligence, because the jury must have known that fact. But the jury may well, under these instructions, have imputed negligence of the mother to her child, if they believed her guilty of any.

[5] Respondent's claim that there was no evidence which would support an award of substantial damages to the child finds its answer in competent medical testimony that the child suffered the fracture of four ribs and a depressed fracture of the skull, which, in the opinion of a physician called by appellants, caused injury to the brain tissue with a reasonable probability of future epileptic attacks or some marked behavior disturbance in later life.

Other claimed errors are not likely to recur on a second trial and need not be discussed.

Judgment reversed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

110 Cal. App. 76
MALCOLM v. TEVIS et al.
Civ. 7427.

District Court of Appeal, First District,
Division 2, California.
Nov. 25, 1930.

Rehearing Denied Dec. 24, 1930.
Hearing Denied by Supreme Court.
Jan. 22, 1931.

1. Master and servant ⇨332(1).

In action by one injured while attempting to ride horse at invitation of owner's servant, evidence justified nonsuit as to owner.

2. Animals ⇨67.

That horse had tendency to run away would not impose upon owner liability of insurer.

3. Master and servant ⇨305.

Employee of owner of horse was not acting within employment in inviting third person to ride horse, contrary to owner's instructions.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Minnie M. Malcolm, a minor, by and through her guardian ad litem, William Malcolm, against William S. Tevis, Jr., and another. Judgment for plaintiff, and named defendant appeals.

Reversed.

Robert R. Moody, of San Francisco, for appellant.

A. J. Stebenne, of Redwood City, for respondent.

SPENCE, J.

This action was brought by plaintiff, a girl fifteen years of age, against defendants William S. Tevis, Jr., and Herbert Gordon, to recover damages for personal injuries. Plaintiff obtained judgment in the sum of \$500 against both defendants upon a trial by jury. Defendant Tevis alone appeals from the judgment.

[1-3] There is a conflict in the evidence in certain respects, but the facts hereinafter set forth appear in the testimony most favorable to respondent. Defendant Tevis was in the business of renting saddle horses, and defendant Gordon was one of his employees. Among the horses owned by Tevis was one called Mickey, which was known as a "cold jawed" horse, or, in other words, one that had practically no feeling in his mouth and was therefore hard to manage. He was not a kicking or biting horse, but would run away if he could. It was one of the duties of defendant Gordon to exercise the horses. On the evening in question, defendant Gordon was directed by the manager of the stable to take this horse out and exercise him by giving him a long, slow ride. Defendant Gordon had been given instructions to permit no person other than himself to ride any horse belonging to defendant Tevis while exercising it. Gordon rode the horse to the place maintained by plaintiff's parents, where he dismounted and entered to purchase a milk shake. While there Gordon talked with plaintiff and her mother and invited plaintiff to take a ride, assuring them that the horse was a gentle animal. Gordon threw the reins over the horse's neck and was assisting plaintiff in mounting when the horse bolted and ran away. Plaintiff was carried some distance and thrown from the horse, receiving her injuries. The foregoing testimony was adduced from the witnesses called by plaintiff, and at the close of plaintiff's case a motion for nonsuit was made on behalf of defendant Tevis, which motion was denied.

On this appeal appellant's main contention is that the court erred in denying the motion for nonsuit. We are of the opinion that the motion for nonsuit should have been granted. Plaintiff's complaint was drawn in two counts differing only in that the first count charged negligence in inviting and permitting plaintiff to mount the horse, while the second count charged negligence in managing the horse while assisting plaintiff to mount. In both counts it was alleged that the horse

was of a vicious disposition, all of which was well known to defendants. The only trait of alleged viciousness shown was the tendency of the horse to run away when mounted. This is not, as contended by respondent, a case analogous to those cases involving attacks by vicious animals. There the liability of the owner knowingly keeping such vicious animal is held to be that of an insurer of the safety of any person injured without fault on the part of the latter and negligence on the part of the owner need not be shown. *Clowdis v. Fresno Flume, etc., Co.*, 118 Cal. 315, 323, 50 P. 373, 62 Am. St. Rep. 238. In the present case it did not appear that the horse had ever attacked anyone nor did he attack plaintiff. The alleged vicious trait was such as to endanger plaintiff only in the event that she mounted the horse. Under these circumstances, the gravamen of plaintiff's causes of action as alleged in both counts was negligence. The fact that the horse had a tendency to run away was material upon this issue of negligence, but would not impose upon the owner the liability of an insurer. It is not contended by appellant that the evidence was insufficient to show negligence on the part of the employee Gordon, but it is urged that appellant cannot be held liable for the negligence of the employee under the doctrine of respondeat superior as it affirmatively appeared that the employee was not acting within the scope of his employment. We believe this contention must be sustained. The general rule is stated in 39 Corpus Juris 1304, § 1502, where it is said: "It is very generally held that a servant has no implied authority to invite or permit a third person to ride on a horse or vehicle in his charge and if, in so doing, the invitee sustains injuries through the negligence of the servant the master will not be liable, as the servant is not acting within the scope of his authority; and especially is this true where the servant is acting in disobedience of express orders not to invite anyone to ride on the vehicle."

In view of our conclusion that the evidence affirmatively showed that the employee was not acting within the scope of his employment and that the motion for nonsuit should have been granted, we deem it unnecessary to discuss the further contentions of appellant relating to alleged error in refusing certain instructions relating to the scope of employment.

The judgment against defendant William S. Tevis, Jr., is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

110 Cal. App. 71

CHAMBERLIN v. GALLUCCI.

Civ. 6912.

District Court of Appeal, First District,
Division 2, California.

Nov. 25, 1930.

1. Appeal and error ⇨1010(1).

Findings will not be disturbed on appeal, if there is any substantial evidence to sustain them.

2. Brokers ⇨46.

Broker's contract for selling furniture *held* not exclusive, entitling him to commission on sales made by owner, where contract contained no exclusive provision.

3. Brokers ⇨86(1).

In broker's action for commissions for sale of furniture, evidence *held* to support findings for owner.

The evidence disclosed that the owner had refused to sign contract giving broker exclusive right to sell in certain territory; that the owner had itself made sales of furniture for which the broker was suing for commissions; and that the owner had paid the broker commissions on all furniture sold by him.

4. Customs and usages ⇨17.

Established trade custom that agent was entitled to commissions on all sales made in agent's territory could not vary contrary terms of written contract.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. A. Chamberlin against N. Gallucci, an individual doing business under the firm name and style of the Universal Manufacturing Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Victor Clarke, of San Francisco, for appellant.

Albert Picard, of San Francisco, for respondent.

BURROUGHS, Justice pro tem.

This action was commenced by the plaintiff to recover the sum of \$6,650 alleged to be due him as commissions upon a contract for the sale of furniture. There is also a second count in the complaint in quantum meruit for the same amount as stated in the first cause of action. The contract sued upon is dated November 9, 1925, and is between the plaintiff A. A. Chamberlin, as the party of the first part, and N. Gallucci, an individual doing business under the firm name and style of

Universal Manufacturing Company, the party of the second part, and hereinafter referred to as the manufacturing company. It is provided in said contract that plaintiff would handle the merchandise line of the manufacturing company in San Francisco for two years excepting the Emporium account; that plaintiff should receive a commission of 5 per cent. on all orders taken and accepted by the factory; that plaintiff should sell not less than \$10,000 per month beginning January 1, 1926, otherwise the contract to be void; that plaintiff should not handle any other line but that of the manufacturing company. There is a further provision, "That upon the resignation of the salesman Mr. McKee, now covering the bay towns and San Jose, that territory will be turned over to A. A. Chamberlin." It is claimed by the plaintiff that between January 1, 1926, and March 25, 1927, being the period of his employment by the manufacturing company, he sold to John Breuner Company stores in Oakland, Sacramento, and Stockton, furniture to the amount of \$132,698.58; that he also made sales to the Better Homes Furniture Company in the sum of \$2,441.94; that he has never received any commissions on said sums and there is now due him as commissions on said sales \$6,756.95. The defendant denied the indebtedness and by way of a counterclaim sought to recover the sum of \$129.65. The court adjudged that plaintiff take nothing by his action and awarded the defendant the full amount of his counterclaim, together with his costs. From the judgment the plaintiff has appealed.

[1, 2] The appeal is taken upon the sole ground that the findings are wholly unsupported by and directly contrary to the evidence. It is too well settled to require citation of authority that if there is any substantial evidence to sustain the findings they will not be disturbed on appeal. Before examining the evidence we deem it necessary to determine the nature of the contract sued upon. It appears to be the contention of appellant that the contract is an exclusive one, and that the defendant on or about the month of March, 1926, having given plaintiff permission to sell to the Breuner stores, he (the plaintiff) was then entitled to a commission on all sales made irrespective of whether he obtained the orders therefor or not. He cites in support of this position the case of *Caro v. Mattel*, 39 Cal. App. 253, 178 P. 537. As we read this case, the contract of employment appointed plaintiff as the sole representative of the defendant and the contract was by its terms an exclusive one. The defendant in that case also agreed to pay plaintiff commissions on all sales of his product made in plaintiff's territory. An examination of the contract in the case at bar shows that neither of these elements is present. We believe that

the true rule applicable to this class of contracts is that laid down in *Golden Gate Packing Company v. Farmers' Union*, 55 Cal. 606, where it is held that under a contract the defendant should have the exclusive agency for the sale of plaintiff's products east of the state of California upon a commission basis and it was proved that plaintiff had sold some of its products to other persons to be sent to the states east of the state of California, the court held: "We are unable to discover anything in the agreement which forbade the selling of its goods by the plaintiff to whomever would purchase them in any part of the world. It could not, under that agreement, establish any other agency than that of defendant for the sale of its goods east of the State of California. And there is no evidence tending in any degree to prove that it did. It is not stipulated that the defendant should have the exclusive sale of the plaintiff's goods within the territory mentioned, and there is nothing in the agreement from which we can infer that such was the intention of the parties." In the contract before us there is nothing that makes it an exclusive one for the sale of the manufacturing company's products. We are therefore of the opinion that it is not an exclusive contract and that the defendant was not precluded from selling his goods whenever and wherever he pleased.

[3] The evidence material to a decision of this case is as follows: The defendant Gallucci testified that the plaintiff came to his place of business and consulted with him about giving him work as a salesman; that he returned later to plaintiff's place of business with a formal contract prepared for their signatures. One of the clauses of the contract was that plaintiff should have an exclusive right for the San Francisco territory; that defendant thereupon told him that he would not give nor had he ever given to any salesman exclusive rights in any territory. He also told plaintiff that he would give him 5 per cent. on all goods that the plaintiff would sell when the sales were accepted by the defendant and on reorders of such sales and not otherwise. Plaintiff thereupon left defendant's place of business and again returned with another contract written in long hand with the objectionable clause stricken out. Whereupon the contract was copied on the typewriter by defendant's stenographer and signed by both parties. This evidence was corroborated by Alexander Harris, who was present when the contract

was prepared and signed. This witness testified that the defendant told the plaintiff that he would not give any salesman the exclusive right to sell his line in any territory, that he would be paid only on orders that he took and brought in, and that he would obtain 5 per cent. commission on such orders. Plaintiff stated that that was agreeable to him. Defendant told the plaintiff that he himself sold to the John Breuner Company stores. The defendant further testified that he sold all the goods to John Breuner Company during the employment of the plaintiff and that none were sold by or through the plaintiff. He further testified that the goods sold to the Better Homes Company were sold by himself and that the only orders for which he paid plaintiff were those brought in by the plaintiff himself or reorders from the customers brought in by plaintiff; that plaintiff received detailed monthly statements of the amount of the commissions due him and on other occasions his overdrafts where his account had been overdrawn, and that plaintiff made no complaint that they were incorrect or of any omissions or that he was entitled to any more money and that he would pay his overdrafts; that, during the time the plaintiff was employed by the defendant, the plaintiff borrowed \$500 from the defendant and repaid the same after leaving the employ of the defendant and at the time of repayment he made no claim for the sums now sought to be collected, but did promise to pay the sum of \$129.65, being the amount of the counterclaim. There is further evidence in the record, but we are of the opinion that the foregoing recital is sufficient to support the findings. Having reached this conclusion, no useful purpose would be served by setting out the remaining evidence either for or against said findings as it would only result in a conflict.

[4] Appellant also claims that under the evidence it has been proved that there is a well-established trade usage according to which an agent is entitled to a commission on sales made in the agent's territory. There is evidence supporting such a custom, but irrespective of such a custom, it cannot vary or alter the terms of a written contract. *Holloway v. McNear*, 81 Cal. 154, 22 P. 514.

We see no reason for a reversal of the judgment, and it is therefore affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

109 Cal. App. 574

WILLIAMS et al. v. HINCKLEY et al.
Civ. 3811.District Court of Appeal, Third District,
California.

Nov. 15, 1930.

1. Landlord and tenant ⇨79(1).

Transfer of whole leasehold, leaving no reversionary interest in transferor, is assignment and not subletting.

2. Landlord and tenant ⇨80(1).

Tenant's transfer of estate in whole premises, less than that which he has himself, leaving reversion in him, is sublease.

3. Trusts ⇨371(1).

In suit to establish trust in oil and gas lease, complaint *held* not to state cause of action.

It appeared from the complaint that the plaintiffs' rights were dependent on the terms of a sublease. The complaint was entirely silent as to the terms of the sublease or the length of the term thereof. Neither was it alleged that the plaintiffs or their assignors had performed any of the terms of the sublease.

4. Appeal and error ⇨236(2).

Plaintiffs cannot amend as matter of right, and, to complain on appeal of sustaining demurrer without leave to amend, he must ask permission to amend, or show there was no opportunity to ask it.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action to establish trust by H. Williams and another against J. H. Hinckley and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Wm. Ellis Lady, of Los Angeles, for appellants.

J. A. Chase, of Visalia, and W. M. Hiatt, of Los Angeles, for respondents.

Mr. Presiding Justice FINCH delivered the opinion of the court.

The trial court sustained demurrers to the amended complaint herein without leave to amend, and thereafter entered judgment in favor of the defendants for costs. The plaintiffs have appealed from the judgment.

The plaintiffs attempted to state a cause of action to establish a trust in their favor in an oil and gas lease given by the defendants E. M. and Elizabeth Carlisle to the defendant Hinckley on the 3d day of December,

1926. The complaint alleges in substance that during the year 1923 the Carlisles executed an oil and gas lease to F. G. Bogle, who was merely a dummy for defendant Hinckley, covering a section of land, excepting 20 acres thereof; that the lease was not delivered until July, 1924; that, as a part of the transaction between the parties to the lease, it was mutually understood and agreed that Bogle would execute to E. M. Steele a sublease covering the south half of the section of land, for which the Carlisles and Hinckley received a valuable consideration from Steele; that the plaintiffs have succeeded to all of Steele's rights under the sublease; that, for the purpose of defrauding the plaintiffs, the Carlisles and Hinckley entered into a plan or scheme, at a time "not later than the 3rd day of December, 1926," to bring about the forfeiture of the Bogle lease, by failing "to perform the terms and/or provisions" of that lease and, "in furtherance of said plan or scheme, * * * on or about the 3rd day of December, 1926, E. M. Carlisle and Elizabeth Carlisle made, executed and delivered to defendant Hinckley an oil and gas lease, * * * covering the south half" of said section.

It clearly appears from the allegations of the complaint that the plaintiffs' rights, if any, are dependent upon the terms of the sublease. It is not alleged that Bogle assigned to Steele any interest in the lease of 1923, but the allegation is that Bogle executed and delivered to Steele "a sublease agreement, covering the south half of said section."

[1, 2] "The distinction between an assignment of a lease and a subletting is important and well recognized. A transfer of the whole leasehold, leaving no reversionary interest in the transferor, is an assignment and not a subletting, no matter what the parties may call it, or what sort of instrument they may employ to give it effect. This is the rule, whether the transfer covers the whole, or only a part, of the premises. On the other hand, a transfer by a tenant of an estate in the whole premises less than that which he has himself, leaving a reversion in him, is a sublease, making the transferee a tenant of the transferor." 15 Cal. Jur. 745.

[3] The complaint is entirely silent as to the terms of the sublease or the length of the term thereof. Neither is it alleged that the plaintiffs or their assignors have performed any of the terms of the sublease. The term of the sublease may have expired long prior to the commencement of the action and prior to the alleged wrongful acts of the defendants. As said in respondents' brief, there is "no allegation in the complaint that the interest claimed by appellants is or was at the time of filing the complaint, a valid, existing and continuing right." It being impossible to

ascertain from the allegations of the amended complaint what the plaintiffs' rights are, if any, it failed to state a cause of action.

[4] Appellants contend that they should have been permitted further to amend, but the record fails to show that they desired or asked permission to make further amendments, nor does it appear that they did not have an opportunity to ask leave to amend after the demurrers were sustained and before the entry of judgment. "A plaintiff may not amend as a matter of right, and in order to be in a position to complain upon appeal of an abuse of discretion in sustaining a demurrer without leave to amend, he must ask permission to amend" (21 Cal. Jur. 119), unless it is made to appear that he had no opportunity to ask such permission. *Metzger v. Vestal*, 76 Cal. App. 409, 244 P. 942.

The judgment is affirmed.

109 Cal. App. 523

PEOPLE v. OLSEN et al.

Civ. 4008.

District Court of Appeal, Third District,
California.

Nov. 14, 1930.

Rehearing Denied Dec. 13, 1930.

Hearing Denied by Supreme Court.

Jan. 12, 1931.

1. Highways ⇨47.

Highway commissioners have discretion in fixing width of public highway which may not be interfered with so long as it is not less than 40 feet and not wider than reasonably necessary (Pol. Code, § 2620).

Pol. Code, § 2620 provides in part that width of all public highways shall be at least 40 feet.

2. Eminent domain ⇨13.

Power to declare what uses of property constitute public benefit rests with Legislature.

3. Eminent domain ⇨19.

Highways constitute "public use" of property of highest character (Code Civ. Proc. § 1238).

[Ed. Note.—For other definitions of "Public Use," see Words and Phrases.]

4. Eminent domain ⇨172.

Highway commission becomes quasi judicial body to determine necessary matters in condemning land for highway (Pol. Code, § 363h, as amended by St. 1927, p. 463, § 9).

5. Eminent domain ⇨68.

Necessity for construction of highway at place designated in manner determined by highway commission, and amount of land required, were matters conclusively established by commission's adoption of resolution, where no fraud, bad faith, or abuse of discretion was shown (Pol. Code, § 363h, as amended by St. 1927, p. 463, § 9).

6. Eminent domain ⇨195.

Answer in condemnation proceedings held inadequate to raise issue of fraud, bad faith, or abuse of discretion on part of highway commission.

The answer merely denied that land described was necessary for public use or any use as right of way.

7. Eminent domain ⇨192.

Facts constituting bad faith or fraud on part of highway commission, adopting resolution for condemnation of land, must be specifically alleged.

8. Eminent domain ⇨195.

In condemnation proceedings, evidence that highway was constructed in whole or in part for benefit of private interests held properly excluded under pleadings.

The pleadings did not raise any issue of fraud, bad faith, or abuse of discretion on part of highway commission in adopting resolution of condemnation.

9. Eminent domain ⇨202(4).

Landowners could not prove, as element of damage resulting from taking land for highway purposes, value of sand and gravel from borrow pits along condemned land.

10. Eminent domain ⇨124.

Landowners had no cause for special damages against state for removal of sand and gravel by power company constructing causeway before institution of condemnation proceedings.

11. Eminent domain ⇨317(2).

Title to land acquired by condemnation for highway purposes vests in public easement or right of way with necessary incidents for construction, maintenance, and reasonable enjoyment of same (Pol. Code, § 2631).

12. Eminent domain ⇨112.

Gravel and sand taken from borders of condemned strip for use in constructing highway held "incidental" to reasonable enjoyment of easement, as regards owner's recovery of special damages for such taking (Civ. Code, § 662; Pol. Code, § 2631).

[Ed. Note.—For other definitions of "Incident; Incidental," see Words and Phrases.]

13. Eminent domain ⇨112.

Landowners *held* not entitled to special damages for sand and gravel taken from borders of condemned strips of land for use in constructing highway (Pol. Code, § 2631, Civ. Code, § 662).

14. Eminent domain ⇨192.

Where no special damages were pleaded, none could be recovered in condemnation proceeding.

15. Eminent domain ⇨243(2).

Award of damages presumably included value of materials taken from condemned land and used for highway purposes (Pol. Code, § 2631; Civ. Code, § 662).

16. Eminent domain ⇨131.

Ordinarily, market value of land at time of commencement of condemnation action is measure of damages.

17. Eminent domain ⇨131.

In estimating market value of land taken, all purposes to which land may reasonably be adapted should be considered.

18. Eminent domain ⇨202(4).

That land taken is reasonably suitable for subdivision purposes may be considered in estimating market value, but mere prospective price of lots should not be considered when subdivision has not been made.

19. Evidence ⇨358.

In condemnation proceedings, court properly excluded unrecorded map of proposed subdivision into town lots.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by the People, by and through the Department of Public Works, against George W. Olsen, Nelson A. Olsen, and others. From the decree, the defendants named appeal.

Affirmed.

Roy L. Daily, of San Francisco, for appellants.

Harry A. Encell, of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal on the part of defendants George W. Olsen and Nelson A. Olsen from a decree in a suit involving eminent domain.

The action was instituted by the state of California through its department of public works to condemn a strip of land in Plumas county for highway purposes. The appellants own a tract of land east of the town of Chester bordering on the northern shore of Lake Almanor in that county. The Great Western Power Company owns most of the land involved in this controversy. It was a party defendant in this action. That corporation had acquired water rights in and about Lake Almanor for hydro-electric power purposes, including the privilege of flooding the lands adjacent to the lake. The power company was about to construct a new dam at the southern extremity of the lake where it empties into the north branch of Feather river. It was anticipated this project would result in raising the water of Lake Almanor to the 4,500-foot contour which would submerge the then existing Red Bluff-Susanville highway along the northern border of the lake and flood most of the land belonging to the appellants. The state therefore planned to improve the highway in that vicinity and construct a causeway from the town of Chester easterly a distance of about a mile and a third across Big Meadows and over a depression of considerable depth where Mud creek empties into the lake. Plans for this causeway were accordingly adopted by the highway commission. The elevation of this causeway was to be constructed at least 6 feet above the level of the 4,500-foot contour. The surface of the roadway was to be 24 feet in width. The fill was to have a uniformly increasing base which reached a maximum of 80 feet in width at the lowest point of the swale. At this locality the fill was 35 feet in depth. The construction of this causeway therefore required an enormous quantity of material. It was to cost approximately \$200,000. The highway commission adopted a resolution declaring the purpose and necessity of improving the highway, constructing the causeway, and acquiring rights of way therefor over the lands of appellants and the Great Western Power Company. This causeway crossed two 40-acre tracts of land belonging to the appellants. The value of this land was estimated at from \$3 to \$400 per acre. The first piece of appellants' land sought to be condemned extends easterly from the town of Chester and is situated above the flood-water contour. It is gore-shaped, 1,300 feet in length, with a maximum width of 175 feet and contains 2.31 acres of land. A quarter section of land belonging to the Great Western Power Company intervenes between this gore-shaped piece of appellants' land and their other tract which is sought to be condemned. This latter strip of land is 1,300 feet in length with an average width of 300 feet and an area of about 10 acres. All of the balance of the land belongs to the power company.

This suit was commenced October 11, 1928. It was tried before a jury. The plaintiff established a prima facie case based upon the right of eminent domain. In an effort to show "that the use is a private use and not a public use," the appellants offered in evidence an agreement between the California highway commission and the Great Western Power Company, dated May 27, 1926. This evidence was excluded on the ground that it was incompetent. The document was marked for identification. From this agreement it appears that the Great Western Power Company was actively engaged in raising the flood line of its Lake Almanor reservoir which would of necessity overflow the highway then in use north of the lake. The state department of public works planned to improve that portion of the highway across the lands in controversy in this action at an expense of \$14,796. The Great Western Power Company agreed to construct the causeway according to adopted specifications, at its own expense except that the state commission agreed to contribute \$15,796 toward the entire cost and, at its own expense, also agreed to surface the roadbed and procure all necessary rights of way. The power company agreed to convey to the state a perpetual easement over its portion of the land for highway purposes and to "defray any cost of said right of way over lands not owned by second party (Great Western Power Company) in the amount over and above the cost of the standard highway width of eighty (80) feet."

Pursuant to this agreement the Great Western Power Company promptly proceeded to construct the causeway "in the summer of 1926." From the record and the briefs of appellants we assume the highway was completed before this cause was commenced. No action appears to have been taken by the appellants to stop the work.

In the construction of the causeway by the Great Western Power Company borrow pits were dug along both sides of the condemned strips of land. These pits were excavated to a depth of about 17 feet at the lowest points. The sand and gravel thus procured were used in the construction of the causeway adjacent to the pits from which they were obtained.

With the purpose of showing special damages to the property condemned, and not on account of severance damages, the appellants asked a witness at the trial "how much material was excavated" from these borrow pits. An objection to this question was sustained on the ground that it was incompetent. The evidence of the value of the land taken ranged from \$3 per acre to \$400. The sum of \$3 per acre was fixed on the theory that the land was suitable only for grazing purposes. One of the appellants testified the largest tract taken was worth \$150 an acre. The estimate of \$400 an acre was based on the theory that

the smaller tract adjacent to the town of Chester might be worth that sum for subdivision purposes for town lots. The jury awarded the power company an aggregate sum of \$500. The appellants were given \$200 for the gore-shaped piece and \$500 additional for the larger strip. In special issues which were submitted to the jury, it was found that no damages accrued by virtue of the severance to any of the land not taken.

The appellants contend that: (1) The condemnation of land for highway purposes is limited to 80 feet in width; (2) the resolution of intention which was adopted by the commission is not conclusive evidence that the proposed condemnation of land is for public use, and that the court erred in precluding them from proving that the highway was intended partially for the private use of the Great Western Power Company and the Red River Lumber Company which subsequently obtained a right of way over the causeway for its tracks; (3) the resolution of condemnation of land was for highway purposes only and not for excavating pits from which to obtain sand and gravel, and the court erred in not permitting them to prove the quantity and value of the materials thus taken.

[1] There is no statutory limitation of 80 feet in width for public highways. Section 2620 of the Political Code merely prescribes 40 feet as the minimum width of a public highway. That section reads in part: "The width of all public highways * * * shall be at least forty feet." This language does not prohibit the acquiring of land for highway purposes in excess of 80 feet in width. The highway commissioners have a discretion in fixing the width of a public highway. This discretion may not be interfered with so long as it is not less than 40 feet in width and is not wider than is reasonably necessary for highway purposes under the circumstances of the particular case which is involved.

It is conceded by the appellants that the resolution which was adopted by the highway commission pursuant to the Statutes of California for 1927, page 463, § 9, which is an amendment of section 363h of the Political Code, is conclusive evidence of the necessity for the construction of the highway in question. It is, however, asserted that this statute is not conclusive evidence of the fact that the proposed improvement is for use as a public benefit; that this is a question for judicial determination. It is therefore claimed that, since the causeway which is involved in this action was constructed partially for the benefit of the Great Western Power Company, and that the Red River Lumber Company was granted a right of way over it for a logging track, the right to condemn the property failed, and that the court erred in refusing to permit the appellants to prove the causeway was not for public use alone.

Section 363h of the Political Code, as amended, authorizes the department of public works to condemn real property for any of the purposes relating to eminent domain which are specified in section 1238 of the Code of Civil Procedure, after first adopting a resolution to the effect that the public interest and necessity require the acquisition of the property described and the construction of the proposed improvements. The statute then provides:

"Said resolution shall be conclusive evidence:

"(a) Of the public necessity of such proposed public improvement;

"(b) That such property is necessary therefor; and

"(c) That such proposed public improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury."

[2, 3] The right to exercise the doctrine of eminent domain is bestowed by the people in their sovereign capacity upon the Legislature. The power to declare what uses of property shall constitute a public benefit rests with the Legislature. 1 Lewis on Eminent Domain, 563, § 238; 10 Cal. Jur. 295, § 12. The maintenance of roads is declared by our Legislature to constitute a public use of property. Section 1238, Code Civ. Proc. Highways constitute a public use of property of the highest character. 10 R. C. L. 39, § 35; County of San Mateo v. Coburn, 130 Cal. 631, 635, 63 P. 78, 621; Rindge Co. v. County of Los Angeles, 262 U. S. 700, 43 S. Ct. 689, 67 L. Ed. 1187; 20 C. J. 559, § 43.

[4] By the terms of section 363h of the Political Code, as amended in 1927, the Legislature has delegated to the highway commission, which thereby becomes a quasi judicial body for that purpose, the exclusive authority to determine (1) the public necessity for a designated highway, (2) that particularly described property is necessary therefor, and (3) that the proposed improvement is planned and located in a manner which is most compatible with the greatest public good and the least private injury. These matters having been judicially determined by the commission in the manner provided by law, a resolution to that effect becomes conclusive evidence which, in the absence of fraud, bad faith, or an abuse of discretion, may not be disputed. County of San Mateo v. Coburn, 130 Cal. 631, 63 P. 78, 621; Rindge Co. v. County of Los Angeles, 262 U. S. 700, 43 S. Ct. 689, 67 L. Ed. 1187; 20 C. J. 626, § 112. Except when the Legislature has limited the authority of the commission, it may determine, within reason, what property and how much is necessary for the designated public use.

Some authorities fail to distinguish between the amount of land and the necessity for con-

demning property as contrasted with the proposed purpose for which it is to be used. 1 Lewis on Eminent Domain, 413, § 163.

[5-8] The necessity for the construction of a highway at the place designated and in the manner determined by the commission, together with the amount of land required therefor, are matters which were conclusively established by the adoption of the resolution. County of San Mateo v. Coburn, 130 Cal. 631, 63 P. 78, 621; Pool v. Simmons, 134 Cal. 621, 66 P. 872; Mendocino County v. Peters, 2 Cal. App. 24, 82 P. 1122. The question as to whether the land was to be devoted to a public use as distinguished from a mere private service may, under adequate pleadings, become a proper issue for the judicial determination of the court. We are, however, of the opinion this issue was not raised by the pleadings in the present case. To raise this issue it is necessary to specifically charge fraud, bad faith, or an abuse of discretion on the part of the tribunal to which the determination of the necessity of resorting to eminent domain is delegated. This was not done in the present case. The appellants' answer does not deny that the property was to be used for a public purpose. The answer contains no affirmative allegation concerning the nature of the use of the property. It merely denies "that all of said land described, or any land * * * is necessary for the public use, or any use * * * as a right of way. * * *" This language does not constitute a denial that the land was intended to be used for a public purpose. It is a mere denial that it is required for that purpose. This language is inadequate to raise the issue of fraud, bad faith, or abuse of discretion. The facts constituting bad faith or fraud must be specifically alleged. The court therefore properly sustained objections to appellants' offer to prove that the highway was constructed in whole or in part for the benefit of private interests.

[9, 10] Nor were the appellants entitled to prove, as an element of damage, in addition to the general damage sustained by virtue of the taking of the condemned strip of land for highway purposes, plus any severance damages which might have been suffered, the market value of sand and gravel which were taken from the borrow pits on the borders of the condemned land. The value of the sand and gravel was included in the general damages assessed in the taking of the land. Moreover, the appellants assert that the causeway was completed before the condemnation proceedings were commenced. The Great Western Power Company constructed the causeway and dug the pits complained of. The appellants took no action to stop the work. They have no cause for special damages against the plaintiff for the removal of the sand and gravel by another party prior to the

institution of the eminent domain proceedings. Their remedy for this alleged trespass was to have enjoined the power company from removing the sand and gravel or to eject the company from the premises.

[11] Title to land acquired by condemnation for highway purposes vests in the public only an easement or right of way, together with the necessary incidents for the construction, maintenance, and reasonable enjoyment of the same. Section 2631, Pol. Code; *Gurnsey v. Northern Cal. Power Co.*, 160 Cal. 699, 117 P. 906, 36 L. R. A. (N. S.) 185. The sand and gravel which were taken from the borders of the land condemned for use in constructing and maintaining the highway at that point were appurtenant and incidental to the use for highway purposes. "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way. * * *" Section 662, Civ. Code.

[12-15] The gravel and sand which were taken from the borders of the condemned strips of land for use in constructing the highway at that point were necessary and incidental to the reasonable enjoyment of the easement for which the land was condemned. The taking of this sand and gravel created no added burden on the fee retained by the owners, and they are therefore entitled to no special damages on that account. 13 R. C. L. 128, § 112. No special damages were pleaded, and none may be recovered in this action. It must be assumed the appellants were fully compensated for the market value of the land taken. Under the circumstances of this case it must be assumed this award of damages included the value of the materials taken from the condemned land and used for highway purposes at that point. No evidence was adduced, and no offer was made to prove there was any market in that vicinity for the sand and gravel which were taken from the pits. The evidence indicates that the land is of small value. No effort was made to show that the fee was injured or the land damaged by the taking of the sand and gravel. Nor was any effort made to show that these excavations would damage the adjoining land from which the condemned strips were severed. The appellants were fully compensated by the general award of damages. They were awarded the market value of the land.

[16-19] Ordinarily the market value of the land which is taken in eminent domain, estimated at the time of the commencement of the action, is the measure of damages for the condemnation thereof. *City of Stockton v. Vote*, 76 Cal. App. 369, 244 P. 609; 10 Cal. Jur. 338, § 54; 10 R. C. L. 128, § 12. In estimating the market value, any and all purposes to which the land may reasonably be adapted should be considered. *Sacramento So. Ry. Co. v. Heil-*

bron, 156 Cal. 408, 104 P. 979. When the land is so situated that it is reasonably suitable for subdivision purposes into city or town lots which adaptability would enhance its value, that fact should be taken into account in estimating the market value of the tract. But the mere prospective price of lots which might be procured by the sale thereof should not be considered when a subdivision of the tract has not actually been made. *City of Los Angeles v. Hughes*, 202 Cal. 731, 262 P. 737. There was no error in excluding the map of appellants' proposed subdivision into town lots, which map had not been recorded. No witness was precluded from considering the availability of the land for subdivision purposes in estimating the market value. Mr. Martin testified in behalf of the plaintiff: "I think that the town lots ought to be (worth) probably around \$400 an acre." Respecting this issue, the court said: "You can cross examine him on that, of course." No other evidence as to the value of the land for subdivision purposes was offered.

The judgment is affirmed, appellants to recover costs on appeal.

109 Cal. App. 589
SUYTAR v. WEINEKE.
Civ. 4209.

District Court of Appeal, Third District,
California.
Nov. 17, 1930.

Rehearing Denied Dec. 17, 1930.

1. Trusts ⇐110.

In action to declare trust in real property defendant purchased at foreclosure sale, on theory defendant promised to redeem property for plaintiff, evidence held not to establish trust ex maleficio.

There was evidence that defendant offered plaintiff \$1,000 for her equity in place in question, but that she refused and asked him to make loan to enable her to redeem property, but that defendant refused to make loan. There was also evidence that plaintiff knew of defendant's redemption of property and frequently met and talked with defendant thereafter, and appeared to be perfectly friendly and did not charge him with violating alleged agreement to finance her redemption of place.

2. Trusts ⇐110.

To establish trust ex maleficio, fraud must be shown by clear and satisfactory proof.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Raphaelita Suytar against C. F. Weineke. From a judgment for defendant, plaintiff appeals.

Affirmed.

Edgar W. Howell, of Ventura, for appellant.

Blackstock & Rogers and Wayne L. Clark, all of Ventura, for respondent.

Mr. Justice ROLFE L. THOMPSON delivered the opinion of the court.

This is an equitable action to declare a trust in real property which was purchased at a foreclosure sale. The respondent is charged with having procured the title by fraud.

The appellant was the owner of a part of lot 39 of the Rancho Santa Ana in Ventura county, consisting of 29.63 acres of farm land. January 17, 1922, she mortgaged the property to the Home Savings Bank of Ventura for \$5,000. For default of payments when they became due, a suit for foreclosure was instituted. The mortgagor failed to appear or answer in that suit, and a decree of foreclosure was rendered October 11, 1924, for the sum of \$6,406.39. The following month the property was disposed of at sheriff's sale to one Chaffee for the amount of the judgment. Five other judgment creditors of the appellant were made parties defendant in the foreclosure action. These claims were included in the decree of foreclosure, preserving their rights of redemption. Within the period of redemption, the respondent purchased the equity of one of the judgment redemptioners which was duly assigned to him. The property was then redeemed by the respondent on November 9, 1925, through his attorney Clark, pursuant to the provisions of section 702 of the Code of Civil Procedure, for the sum of \$7,175.16. A sheriff's deed to the property was executed and delivered to the respondent, who thereupon took possession and made valuable improvements. The appellant had previously abandoned the occupancy of the premises.

This suit was commenced in July, 1927, to establish a trust in the respondent for the benefit of the appellant on the ground that the property was redeemed and acquired by the respondent by means of fraud. It is contended that a trust ex maleficio was thus created by law in favor of Raphaelita Suytar.

The complaint alleges that, prior to the expiration of the time allowed by law for the redemption of the property from the foreclosure sale, the respondent "promised plaintiff that he would loan her the money to make such redemption; that he would take care of the matter and redeem it for her;

*** that she need not look elsewhere for help; that he would take her to the sheriff's office in the afternoon of the last day of the period of redemption (so) that she could redeem said property for herself. ***" It is not alleged that the appellant ever offered to go with the respondent to redeem the property pursuant to his alleged promise to do so. It is not alleged that the appellant could have procured the money elsewhere with which to redeem the property if she had not relied on the foregoing promise of the respondent. There was no offer or tender to compensate the respondent for the money expended in redeeming the property or making the improvements thereon.

The court found that the appellant had complete knowledge at all times of the proceedings for redemption of the property by the respondent; that the respondent did not promise to redeem the property for the appellant or loan her the money with which to do so, and that the respondent did not deceive or defraud her in that regard. Thereupon judgment was rendered to the effect that the appellant take nothing by her action. From this judgment an appeal was perfected.

[1, 2] The appeal is without merit. There is substantial evidence to sustain every necessary finding to support the judgment.

The respondent testified that in December, 1924, after the sheriff's sale of the property in the foreclosure proceedings, he inquired of a real estate agent by the name of Gabbert for a suitable farm to purchase and was then told of the Suytar property, which was quoted at a valuation of about \$8,000. He subsequently interviewed the appellant, and in the course of negotiations offered her \$1,000 for her equity in the place, which she refused. "Q. Was there anything said at that time about your making a loan to her for the *** redemption of it? A. Not a word." He said that subsequently, in July, 1925, "she asked me to make the loan. *** I told her I was not in the loaning business. ***"

"Q. Did you ever at any time *** offer to loan her the money to redeem this property. *** A. Never. *** In March *** of 1925, *** she brought it up again. *** I told her that I would be willing to take an assignment and redeem it in my own name, *** and I agreed to give her a contract to buy it back at a reasonable profit. *** She never accepted it.

"Q. Was there ever a contract made or arrangement reached between you on that basis at all? A. Never."

The respondent went abroad soon after this conversation and did not return until November 5, 1925, which was five days before the equity of redemption expired. During this interval he neither saw nor communicated

with the appellant. On the day of his return, the appellant sent for him and again asked him to finance the redemption of the property for her. In reply to this request, he testified:

"I told her absolutely no. * * * I told her it was out of the question, that I couldn't do anything.

"Q. Did you on that occasion, or any occasion say to her or promise her that you would redeem the property for her? A. Never.

"Q. Did you * * * tell her that she should not worry, that you would take care of it for her? A. I did not."

November 9th was the last day upon which the property could be redeemed. About 3 o'clock in the afternoon of that day the respondent consulted with his attorney, Mr. Clark, who informed him that he might purchase the equity of one of the judgment redemptioners and thus redeem the property. The respondent assumed that the appellant could not and would not redeem the property. On the afternoon of the last day authorized, he therefore obtained an assignment of the interest of one of the judgment creditors who was a party to the action and redeemed the property in the name of his attorney. From the time of his last conference with the appellant on November 5th, the respondent did not again see her until after the redemption had been completed. The respondent took title and immediate possession of the property and proceeded to construct and make valuable improvements.

Among the circumstances which persuaded the respondent that it was financially unsafe for him to advance the money to the appellant for the purpose of redeeming the property was that, during her ownership of the premises, the cultivation and improvements had been sadly neglected, and that no part of the interest on the indebtedness nor taxes were paid. The appellant knew of the redemption of the property by the respondent and frequently met and talked with him thereafter. On these occasions she appeared to be perfectly friendly toward him. She did not criticise his purchase of the property and did not charge him with violating the alleged agreement to finance her redemption of the place. The first intimation of a charge by appellant of bad faith or fraud on the part of the respondent was brought to his attention by the filing of the complaint. By her conduct she seemed to acquiesce in his purchase of the place. She visited the premises and talked with him about the improvements. She endeavored to sell to him machinery and household equipment which had been used on the property. Indeed, she apparently anticipated a loss of the place, for prior to respondent's taking possession

she abandoned the property and secretly removed a bathtub and certain plumbing.

This suit was not commenced until eighteen months after the redemption of the property. The facts of this case do not establish a trust *ex maleficio*. They indicate negotiations which did not culminate in an agreement. Fraud must be shown by clear and satisfactory proof. 12 R. C. L. 436, § 183. The evidence in this case falls far short of that requirement. Certainly the findings are amply supported by persuasive testimony.

The judgment is affirmed.

109 Cal. App. 577

In re McDONNELL'S ESTATE.

FITZGIBBON v. McDONNELL et al.
Civ. 7513.

District Court of Appeal, First District,
Division 2, California.
Nov. 17, 1930.

1. Wills ⇨55(1).

Facts *held* not to show, or justify inference of, lack of testamentary capacity.

There was evidence that decedent was 72 years of age at execution of will; that he had been sick at times and suffered from various ailments, but that at time will was made, and before and after its date, he was not confined to house. There was evidence that he was parsimonious, ill-tempered, peculiar in dress and manners, solitary in habits of living, unpleasant mentally and physically, and that as a young man he had injured his head. Contestant testified that continuously thereafter he was "insane," but did not further explain, though record disclosed that after accident testator engaged in business and acquired estate disposed of by will.

2. Wills ⇨50.

Mental capacity to understand nature of act, understand and recollect nature and situation of property, and remember and understand relations to persons having claims upon testator's bounty and affected by provisions of will, is sufficient testamentary capacity.

3. Wills ⇨52(1).

Testator's soundness of mind will be presumed.

4. Wills ⇨163(1).

In will contest, undue influence will not be presumed, but must be proven by person alleging fact.

5. Wills ⇨326.

In will contest, contestant not calling at-testing witnesses, nonsuit *held* not error as to count charging undue influence; no activity by proponent being shown.

6. Wills ⇨166(2).

In absence of evidence that beneficiary was active in procuring will or participating in execution, claim of undue influence arising from confidential relationship is not well founded.

7. Wills ⇨166(1).

Evidence *held* insufficient to show will was executed under undue influence.

8. Wills ⇨326.

In will contest, where contestant did not make out prima facie case as to lack of testamentary capacity or undue influence, nonsuit *held* properly granted to proponent.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of James McDonnell, deceased. Contest by Nora Fitzgibbon to prevent the probate of decedent's will, opposed by James McDonnell, proponent, and others. From a judgment of nonsuit, contestant appeals.

Affirmed.

Dunne, Dunne & Cook, of San Francisco, for appellant.

John J. Barrett and Frank I. Barrett, both of San Francisco, for respondents.

STURTEVANT, J.

James McDonnell died in San Francisco on December 5, 1927. He was a resident of San Francisco and left estate there. He left him surviving as his only heirs two sisters, Ellen McDonnell and Mrs. Nora Fitzgibbon, and seven nieces and nephews, children of a deceased brother. The decedent left a will in which he named James McDonnell, one of his nephews, as executor. The nephew offered the will for probate, and Mrs. Fitzgibbon, one of the sisters, filed a contest. The contest was answered and a trial was had in the trial court before the court sitting with a jury. At the end of the contestant's case the proponent of the will made a motion for a nonsuit. The motion was granted, and, from a judgment entered thereon, the contestant has appealed. In her contest she set forth two counts. In one count she pleaded that the testator was of unsound mind, and in the other count she pleaded that the testator was acting under undue influence. A hearing was had on both counts, and we will discuss the case as made out as to each count in the order stated.

[1-3] As the heirs of decedent were collateral, it may not be said that the will was unnatural. 26 Cal. Jur. 697. There was evidence that at the time the will was made the decedent was seventy-two years of age; that at times he had been sick and had suffered from bladder trouble, dropsical conditions, dizzy spells, and other ailments, but at the time the will was made and before and after that date he was able to be out and was not confined to the house. There was evidence that he was stingy, ill tempered, dictatorial, and repulsive in personal habits. He entertained perverse opinions and unreasonable prejudices. He was peculiar in his dress and manners. He did not associate intimately with his kith or kin or others. There was some evidence that he had a poor memory. He was solitary in his habit of living. He was not a pleasant person mentally or physically. When he was a young man he injured his head. The contestant testified that continuously after that he was "insane." She did not further explain. However, the record discloses that after that accident the decedent came to America, engaged in business, acquired the estate disposed of by the will, invested his moneys in the stock of the First National Bank of San Francisco, or deposited it in savings banks, or loaned it on notes secured by mortgage on real estate. The foregoing facts do not, whether we take them separately or collectively, show that at the time of making his will the decedent did not have sufficient mental capacity to enable him to understand the nature of the act he was doing and to understand and recollect the nature and situation of his property and to remember and understand his relations to the persons who had claims upon his bounty and whose interests were affected by the provisions of that instrument. He had capacity to make a will. Estate of Smith, 200 Cal. 152, 252 P. 325. It will be presumed that the decedent was of sound mind, and no inference to the contrary may be based on the evidence contained in the record.

[4-8] Before proceeding to discuss the second count, it may be helpful to state that the decedent came to this country, located in San Francisco, and engaged in the saloon business. For a time immediately prior to April 18, 1906, his nephew James McDonnell worked for him as barkeeper. After that date the decedent again opened up a place of business, but the nephew did not return to work for him, but opened up a saloon of his own. When the prohibition enactments went into effect both decedent and the nephew retired from the liquor business. About the time the decedent retired from business he went to live in the house of the contestant and paid her \$2 a week. From the time the decedent came to San Francisco and down to the date

of his death his relations were friendly with his nephew and the nephew acted as a helper in some business transactions. During the same time the decedent made certain loans to his nephew. At the time of the death of the uncle the nephew owed him \$21,000 on a promissory note secured by a mortgage on real estate in San Francisco. In the month of June, 1925, the decedent left the home of the contestant and went to reside with a niece, Mrs. Dasmann. The date of that departure does not clearly appear. In one place the contestant said that it was Sunday, May 31, 1925, and at other places she gave other dates, but in one place she stated that it was Sunday, June 22, 1925. Shortly prior to the time the decedent moved out he and the contestant had something of a dispute. We need not pause to state the exact facts in that connection. The contestant stated that she had turned around a street corner and that she saw the decedent step into an automobile driven by James McDonnell. The will was executed according to the face thereof on June 25, 1925. No direct evidence was given by any witness to the effect that any undue influence was exercised by any person or persons over the decedent at the time the will was executed—nor at any other time. The proponent testified that he did not know that a will was to be executed or was executed until after the death of the decedent. Neither of the subscribing witnesses and no other person gave any evidence regarding the execution of the will, the manner in which it was executed, the place at which it was executed, or by whom it was executed. It will not be presumed that a person has exerted undue influence, but it must be proved by the person alleging the fact. The contestant asserts that under certain circumstances undue influence may be inferred. Conceding that that is so, it is sufficient to state that no fact was introduced into evidence on which undue influence can be inferred in the instant case. As the contestant did not call the attesting witnesses, at least as to the count we are now discussing, the trial court did not err in granting the nonsuit. 26 Cal. Jur. 768. In this connection it should be stated that the contestant asserts that the proponent James McDonnell occupied a confidential relationship to the testator, and that, if the will is upheld, the nephew gains an advantage from the testator, and such transactions are presumed to be entered into by the latter without sufficient consideration and under undue influence. The same attack has been made frequently, but where, as here, there is no evidence that the beneficiary was active in procuring the execution of the will or participating in the execution of the will to any extent the claim is not well founded. Estate of Ricks, 160 Cal. 450, 453, 461, 117 P. 532; Es-

tate of Anderson, 185 Cal. 700, 717, 198 P. 407; Estate of Shay, 196 Cal. 355, 237 P. 1079; Estate of Baird, 176 Cal. 381, 382, 384, 385, 168 P. 561. For the reasons stated, we think the contestant did not make out a prima facie case, and that the trial court did not err in granting the motion for a nonsuit.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

109 Cal. App. 560

TORNEY v. PETERSEN.

Civ. 7309.

District Court of Appeal, First District,
Division 1, California.

Nov. 15, 1930.

Rehearing Denied Dec. 15, 1930.

Hearing Denied by Supreme Court.

Jan. 12, 1931.

1. Malicious prosecution §56.

Plaintiff in action for malicious prosecution must show want of probable cause, as well as malice.

2. Malicious prosecution §32.

In action for malicious prosecution, malice is inferable from want of probable cause.

3. Malicious prosecution §21(1).

In action for malicious prosecution, proof that defendant acted bona fide on counsel's advice, after full and fair disclosure of all facts within his knowledge, constitutes complete defense.

4. Malicious prosecution §71(2, 3).

In action for malicious prosecution, whether prosecution was malicious, or defendant fully and fairly communicated to counsel all material facts within his knowledge, or acted bona fide on advice received, are jury questions.

5. Malicious prosecution §71(2).

In action for malicious prosecution, question of probable cause is for jury, where evidence is conflicting or raises different inferences.

6. Malicious prosecution §64(1).

Evidence held to sustain recovery by tenant, suing for malicious prosecution instituted by landlord for alleged nonpayment of rent (Pen. Code, § 537).

7. Malicious prosecution §64(1).

Plaintiff in action for malicious prosecution could not recover attorney's fees for de-

fending criminal case, in absence of evidence fees were paid or liability incurred.

8. Malicious prosecution ☞69.

\$5,000 held not excessive for malicious prosecution; plaintiff being confined in jail for seven hours.

Evidence showed that plaintiff, who was woman of refinement, was confined with six other prisoners, including immoral women and drug addicts, and that her arrest was given considerable publicity in newspapers, causing great humiliation and mental and physical suffering.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Latane Torney against Chris Petersen. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

Hugh K. McKevitt, of San Francisco, for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

PER CURIAM.

This is an action for damages for malicious prosecution. A jury returned a verdict for the plaintiff in the sum of \$5,250. A motion for a new trial was denied, and the defendant has appealed from the judgment entered upon the verdict. It is contended that the verdict is unsupported, that the damages awarded were excessive, and that the trial court erred in its instructions to the jury.

The defendant was the owner of an apartment house in San Francisco. In February, 1927, the plaintiff rented a furnished apartment therein for herself and her son, who was about 12 years of age. She agreed to pay therefor a monthly rental of \$75 and to make additional payments for electricity, gas, and laundry service. According to her testimony she brought to the apartment wearing apparel for herself and son, with certain toys belonging to the latter. Her former husband was an officer in the regular army, and later an army cot and blankets belonging to the government were sent to the apartment by him and previous to her departure therefrom were openly removed. She occupied the apartment until December 20, 1927, to which date she had paid the defendant the sum of \$723.24. During that month she became ill and was advised by physicians to receive treatment at a hospital. The manager of the apartment house visited the apartment before plaintiff left and was advised of her intentions and also of the fact that she was taking certain clothing and other articles with her. When leaving, plaintiff re-

quested that the apartment be held for two days or until she could ascertain the length of time necessary for her to remain away. The manager refused this request, and plaintiff was told that if she wished to keep the apartment she must send notice from the hospital. This notice was not given, and plaintiff was notified that the apartment was not being held for her. She left therein a coat and other garments which the manager later stated in substance that she was holding as security for the rent. The latter visited the plaintiff at the hospital and was informed as to the probable duration of her stay, and was also told that plaintiff would call at the apartment house with regard to the unpaid balance owing for rent. At this time plaintiff surrendered her key to the apartment, another key which she held having been previously surrendered. She remained at the hospital for six weeks, when after telephoning the manager of her intention she removed to a hotel in San Francisco. Thereafter she visited the home of a friend, where she received a letter from defendant which was addressed to the hotel mentioned, inclosing a statement of account. In this she was charged for the rent of the apartment for the time she was in the hospital, the balance claimed being \$256.87. Upon receipt of the statement she telephoned the manager disputing the amounts charged, particularly the charge for rent during the period last mentioned. She afterwards went to reside in another hotel in San Francisco where a second statement was rendered for a balance of \$327.98, of which the arresting officer demanded payment as the alternative of her being taken into custody. The criminal complaint, which was drawn by an assistant district attorney of the city and county of San Francisco, was sworn to by defendant before a police judge of the municipality, and charged plaintiff with the crime defined in section 537 of the Penal Code, commonly known as defrauding an innkeeper. This complaint alleged in substance that plaintiff with intent to defraud the defendant obtained at his inn, restaurant, and boarding house, food and accommodation without paying therefor; further that having obtained credit and accommodation at his inn and boarding house, she fraudulently absconded and removed her baggage therefrom without paying for her food and accommodation. A warrant was issued thereon and plaintiff was arrested on March 20, 1928. She was confined in the San Francisco city prison from 10 o'clock a. m. to 5 o'clock p. m. of that day when she was released on bail. She was subsequently tried upon the charge and acquitted.

The circumstances attending her arrest and detention were, according to her testimony, as follows: The arresting officer, after demanding payment of the account last ren-

dered, which plaintiff refused, placed her under arrest. Not being dressed for the street she requested permission to change her clothing, which the officer permitted, but insisted on being present. She was then taken to jail and confined in a cell with six other prisoners, among whom were immoral women and drug addicts, whose conduct as she described it was extremely offensive. She further testified that the experience caused her great humiliation and mental distress, and it was shown that the arrest was given considerable publicity in the San Francisco newspapers. According to the defendant he had no personal acquaintance with the plaintiff, but on the day the latter left the apartment and went to the hospital he was advised of the fact. He also knew that after she left the hospital she telephoned his manager with reference to the first statement sent her. He testified that all of the facts were disclosed by him to his attorney and to a deputy district attorney of the city and county, who advised that a prosecution would lie against the plaintiff. Two of the attorneys were unable to recall in detail the statements made to them by the defendant, but they remembered that they were consulted and upon the facts presented advised that a criminal offense had been committed. A third testified that defendant stated that plaintiff left the apartment and went to the hospital with his consent with the understanding, however, that she would return to the apartment, but that he later ascertained that she had taken with her all of her effects of value. The attorney was not told, however, that the bill rendered was disputed or that a second statement differing from the first was rendered, and none of the attorneys testified that defendant made claim that food was furnished or that plaintiff failed to pay for anything other than was set forth in the bills rendered. The manager testified that she was told by plaintiff of her intention to go to the hospital and that she requested that the apartment be held for her; also, that she visited plaintiff at the hospital and there obtained the return of one of the keys to the apartment.

Notwithstanding the allegations of the criminal complaint, it is not contended that plaintiff obtained food at any inn, restaurant, or boarding house conducted by the defendant or failed to pay for anything other than as shown by the statements rendered, which covered rent, gas, electricity, laundry service, charges for cleaning the apartment, and for the breakage and loss of certain household articles.

[1-6] In order to recover, it was incumbent upon the plaintiff to show want of probable cause for the prosecution as well as malice on the part of the defendant. *McKenna v. Heinlen*, 128 Cal. 97, 60 P. 668. Malice, however, may be inferred from a want of probable

cause. *Lacey v. Porter*, 103 Cal. 597, 37 P. 635. For the purpose of justifying a prosecution alleged to have been malicious and without probable cause, a defendant may show that before commencing the prosecution he was advised by counsel after a full and fair disclosure of all the facts within his knowledge that a crime had been committed, and that he acted upon the advice in good faith. *Johnson v. Southern Pacific Co.*, 157 Cal. 333, 107 P. 611. This has been said to be an affirmative defense, by way of confession and avoidance (16 Cal. Jur., *Malicious Prosecution*, § 11, p. 742), and if proved will constitute a complete defense to the action (*Griswold v. Griswold*, 143 Cal. 617, 77 P. 672). Whether the prosecution was malicious (*Lacey v. Porter*, *supra*) or a party has fully and fairly communicated to counsel all the material facts which he knew (*Seabridge v. McAdam*, 108 Cal. 345, 41 P. 409) or acted in good faith upon the advice received (*Potter v. Seale*, 8 Cal. 217; *Ball v. Rawles*, 93 Cal. 222, 28 P. 937, 27 Am. St. Rep. 174; *Murphy v. Davids*, 181 Cal. 706, 186 P. 143) are questions for the jury. And where on the question of probable cause the evidence is conflicting, or different inferences might be drawn from the evidence, it is the province of the jury to determine whether or not the facts sustain an inference of probable cause. *Franzen v. Shenk*, 192 Cal. 572, 221 P. 932. Here the evidence was such that these questions were properly submitted to the jury, and we are satisfied from the facts and circumstances shown that their implied findings thereon are fully sustained.

[7] Defendant complains of an instruction that the jury might consider the reasonable value of the services of plaintiff's attorney in defending the criminal prosecution, not exceeding, however, the amount of damages asked in that connection, namely, \$250. As defendant contends, there was no evidence that any attorney's fees were paid or a liability therefor in that or any amount was incurred by plaintiff in the proceeding. And it is evident from the amount of damages allowed by the jury, namely, \$5,250, that the above claim was included therein.

The jury was also instructed as follows: "If you find from the evidence that the refusal of plaintiff to pay the bill presented to her by defendant for accommodation at the *Marianna* apartments was made in good faith and because she had not agreed to pay rent for the apartment while she was in the hospital and that such claim was known to the defendant and that it was made under such circumstances as would lead a reasonable person to believe that it was made in good faith and if you further find that the defendant instituted the prosecution of plaintiff maliciously with intent to compel plaintiff to pay said bill to escape said prosecution, you may find a verdict for plaintiff even

though you are unable to determine the merit of such bill." As urged by defendant, the instruction ignores the element of probable cause. This, however, was fully covered in other instructions wherein the jury was charged that, before she could recover, plaintiff must prove that defendant prosecuted the criminal action both maliciously and without probable cause.

[8] It is further contended that the damages allowed were excessive and that the same appear to have been awarded under the influence of passion and prejudice. With the exception of the amount which appears to have been allowed for attorney's fees alleged to have been incurred in defending the criminal action, we cannot say that the damages awarded were excessive. The plaintiff was shown to be a woman of refinement, and considering the indignities to which she was subjected, the amount was not more than commensurate with her mental and physical sufferings. Moreover, her physical condition at the time as described by her physician was such that the experience was reasonably calculated to have the effect claimed by her.

The evidence was sufficient to support the verdict, and with the exception of the erroneous allowance of attorney's fees, which will require a modification of the judgment to that extent, the record discloses no error which would justify a reversal. The judgment is accordingly modified by deducting therefrom the sum of \$250, and as so modified is affirmed. It is further ordered that appellant recover his costs on appeal.

109 Cal. App. 409

STELLA et al. v. SMITH.

Civ. 4089.

District Court of Appeal, Third District,
California.

Nov. 8, 1930.

Rehearing Denied Dec. 8, 1930.

Hearing Denied by Supreme Court.
Jan. 5, 1931.

1. Sales ⇨391(1).

Buyers of grapes advancing money on contract were entitled on breach of contract by seller to recover amount advanced.

2. Sales ⇨197.

Agreement to purchase grape crop constituted contract to sell rather than a sale.

The agreement provided that seller was to sell to buyer all grapes of 1927 crop, at a price of \$42.50 per ton, to be delivered at certain station at seller's cost, pur-

chaser to furnish boxes in proper season, all grapes to pass government sugar test for shipping.

3. Sales ⇨266, 272.

Statutory warranties of soundness and merchantability were not implied in respect to sale of grapes in existence at time sale was made (Civ. Code, § 1768).

4. Sales ⇨48.

Buyer of grapes under agreement to purchase total crop had right to reject them if they were so picked and packed as to violate law (St. 1927, p. 1845).

5. Sales ⇨396.

Buyer of grapes, in order to rely upon right to reject them as picked and packed in violation of law, must have so pleaded.

6. Sales ⇨150(2).

Seller of grapes under agreement requiring him to pick grapes and deliver them for shipment was obligated to pick grapes with reasonable care and use ordinary care to avoid injury.

7. Sales ⇨396.

Complaint to recover amount advanced on agreement to purchase grape crop was sufficient, as respected buyer's breach for failure to pick grapes in proper manner.

The complaint, in addition to setting forth the contract for purchase of grapes and payment of amount advanced thereon, stated that defendant refused and failed to deliver grapes according to the terms of agreement and asked that he be required to repay the amount advanced.

8. Evidence ⇨571(6).

Opinion of witness with 20 years' experience in packing and shipping grapes, respecting condition of grapes, was entitled to weight.

9. Sales ⇨181(12).

Evidence supported finding, in buyer's action to recover amount advanced on contract to purchase grape crop, that grapes were unfit for shipping.

10. Evidence ⇨383(4).

Certificates by state and federal authority that grapes were fit for shipment, though competent evidence on such question, were not conclusive (St. 1927, p. 946).

11. Appeal and error ⇨1011(1).

Finding of trial court on conflicting evidence with substantial evidence to support it will not be disturbed.

Appeal from Superior Court, Sutter County; H. D. Gregory, Judge.

Action by Genaro A. Stella and others against E. C. Smith. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Newton A. Johnson and Harris, Willey, Griffith & Harris, all of Fresno, for appellant.

Erling S. Norby, of Marysville, for respondents.

Mr. Justice pro tem. SHIELDS delivered the opinion of the court.

On August 20, 1927, the plaintiff, doing business under the name of Nuestro Fruit Company, entered into a contract with the defendant Smith for the purchase of grapes. Their agreement was sought to be expressed by a brief writing, which provided that E. C. Smith, the defendant, agreed "to sell to the Nuestro Fruit Company, of Yuba City, Calif., all the tons of Zinfandel grapes, 1927 crop, at a price of \$42.50 per ton; to deliver grapes at Alamendra Station on the Sacramento Northern Railway at his own cost; purchaser to furnish boxes in proper season; all grapes must pass Government sugar test for shipping, second crops Zinfandels included." Plaintiffs paid to the defendant \$2,000 as an advance on the purchase price of the grapes. One carload of the grapes was delivered, and accepted and paid for by plaintiffs. Immediately thereafter a large quantity of grapes, about one thousand lug boxes, were tendered by defendant in further performance of his contract. Plaintiffs refused to receive them, claiming that they were unfit for shipment, and that they did not satisfy the terms of the contract between the parties. Much correspondence followed between the parties which need not be particularly referred to herein. Defendant sold the grapes to other parties, and plaintiffs began this action to recover the \$2,000 previously paid to the defendant, this sum having been intended to be applied to the payment for the grapes which plaintiffs refused to receive. By a previous telegram and letter the plaintiffs had notified defendant that because of what they called his breach of the contract they regarded the contract at an end and they demanded of defendant the return of this \$2,000 prepayment.

[1] If plaintiffs were correct in their contention that defendant had breached his contract, they were entitled to this remedy. "An action for money had and received, to recover money paid under a valid contract" can be maintained where it can be shown "that the defendant has been guilty of a breach thereof." 17 Cal. Jur. 614.

Plaintiffs' complaint was in three counts, the first of which, while informal, was substantially for money had and received. The remaining two counts were based upon the

contract, and recognized its existence. At the trial, however, plaintiffs abandoned their second and third causes of action and elected to proceed upon the cause of action first stated. At the trial plaintiffs proposed to show that the grapes as tendered did not comply with the requirements of the contract in that they were soft, mouldy, and that mixed with them in the boxes were leaves, stems, green grapes, and litter, and that, as a consequence, they were unfit for shipment. To such evidence the defendant made much general objection.

[2-5] The case seems to have been tried with some confusion as to the issues. Plaintiff in his complaint, after setting forth the contract, and the payment of the \$2,000 above mentioned, simply states, in reference to the grapes agreed to be delivered, that "defendant refused and failed to deliver said grapes according to the terms of said agreement," and asked that he be required to repay the \$2,000. It will be seen that plaintiffs did not indicate in what particular defendant so failed. So far as the pleading was concerned, the court was left in doubt as to whether the crop of grapes as they matured were not merchantable, or whether they were so improperly picked and packed that they were not fit for shipment, or whether he relied upon the theory that the grapes as packed and offered for delivery failed to comply with the requirements of the "California Fruit, Nut, and Vegetable Standardization Act of 1927." St. 1927, p. 1845. But by elimination the theory upon which it could properly have been tried is easily determined. It could not have been maintained upon the theory first above mentioned. The contract herein was not a sale; it was a contract to sell. The subject of the sale was in existence at the time the sale was made, and as a consequence the warranties of soundness and merchantability provided by section 1768, Civil Code, were not implied. So if the crop of grapes, as grown, had been properly picked and tendered to plaintiffs in the condition in which it had matured, they would have been bound to have accepted them. *Kenney v. Grogan*, 17 Cal. App. 527, 120 P. 433; *Carpenter v. Grogan*, 18 Cal. App. 505, 123 P. 538. The complaint makes no objection to the crop, which was the subject of the contract as the same was grown and matured upon the vines. It is likewise true that, if the grapes were so picked and packed as to violate the requirements of the Standardization Act above referred to, they might properly have been rejected. *MacRae v. Heath*, 60 Cal. App. 64, 212 P. 228. But it would seem that, if this were the ground upon which plaintiffs refused to accept the grapes, they should have so pleaded in their complaint, and the court should have found the facts of such violation. Neither of these things were done, and thus the

third theory suggested above may be disregarded. This leaves the second theory announced above; that the grapes were so picked and packed as to violate the contract and to justify the plaintiffs in rejecting them. We will inquire as to whether or not this question was involved and was put in issue.

[6-8] Under the contract here defendant was to pick the grapes and to deliver them for shipment to the plaintiffs. This obligated defendant to pick the grapes with reasonable care and skill and to take ordinary care to avoid injuring or destroying them. If they were not so picked, or picked in such a manner that when tendered to plaintiffs they were unfit for shipment, plaintiffs could properly have rejected them, and could then have maintained this action. The complaint herein does not in terms declare upon this alleged breach of the contract. But it is broad enough to include it, and the action was tried upon the theory that the fitness for shipment of the grapes was the question in issue. This appears very clearly from the entire record, but specifically from a statement by defendant in his closing brief, where he says: "It is not and never has been our position that the sole duty resting on us in order to comply with the terms of the contract was to furnish grapes of the specified sugar content. We have always recognized that there are certain provisions as to quality which the law implies. One of these is that the grapes must be fit for shipment." So the question of soundness and merchantability of the fruit as picked and tendered became substantially the only issue in the case and this question was very thoroughly tried. The trial court found that the grapes "were unfit for shipping, in that said grapes when so tendered were mouldy, and were mixed with leaves and stems, green grapes and other refuse." It will be noted that it is not found in terms that the picking and packing of the grapes was so improperly or negligently done as to violate the contract. But from the facts found it conclusively appears that it was in the character of the picking and packing of the grapes that the breach occurred, and not in the character of the crop, as in the cases of *Kenney v. Grogan*, and *Carpenter v. Grogan*, *supra*. If this finding, therefore, is supported by substantial evidence, it must be accepted, no matter how convincing the evidence to the contrary may have been. In support of the finding the record discloses the testimony of a number of witnesses called on behalf of the plaintiffs. Genaro Stella, one of the plaintiffs, testified that when defendant's employees started to pick the second carload of grapes (the ones which were rejected) "they were picking everything that was on the vines, green, and water bearing and mouldy and everything that was on the vines." He was asked to "estimate" what

per cent. of mildew grapes were in the boxes. He replied, "Every box there was five or six or seven pounds of mildew grapes or mouldy grapes." Asked as to the condition of the other grapes, he replied: "The water bearing were all cracked and running out, they were really wet." Objection is now made that the "estimate" of the witness is no more than a guess and does not constitute evidence. No objection was made to the question at the time it was asked, nor was any objection made to the competency of the witness, nor to the lack of foundation laid. The answer might well be considered the statement of a fact. But if an opinion, the witness being presumptively competent after twenty years in packing and shipping grapes to express one, his opinion was entitled to such weight as the court saw fit to give it. Another witness testified that he examined fifty or more of the boxes of grapes, and that every one of them had mouldy grapes in them. Another stated that he examined eight or ten of the boxes and that he "found a lot of soft grapes among them, mostly in the bottom, and some mould in them." The witness Strange testified that he examined forty or fifty boxes, "and there were many soft grapes in them, and some mouldy ones." He further testified that he found this condition scattered through the boxes, and that each box contained some soft grapes and some mouldy ones. Helen Stella, another of the plaintiffs, testified that she observed the condition of the grapes tendered for acceptance. She said that there were quite a number of mouldy and cracked berries in each box that she looked at. Asked to estimate the probable percentage of mould that was in each box, she answered again, without objection, "Anywhere from five to six per cent, and some as high as seven per cent of bad grapes." The grapes were purchased for shipping. The contract itself shows this; they were to pass "the Government sugar test for shipping." They were to be delivered in boxes at a railway station. It was testified that defendant had been told that the grapes were to have been shipped "back East."

They clearly should have been picked with a view to this condition. Packed as they were, the plaintiff Stella testified: "If you put water-bearing grapes in the box, it cracks and heats up, and all the box gets in one mash, and mush up."

[9] Clearly, if this evidence were believed, over conflicting and contrary evidence, it was sufficient upon which to found the finding announced by the court. At the trial defendant introduced a number of certificates issued by state and federal authority under the provisions of the "California Fruit and Vegetable Certification Act". *Stats. 1927, p. 946*. These certificates set forth that the grapes were fit for shipment under the conditions pre-

scribed by the Standardization Act above mentioned. But this, as we have seen, was not the issue here. The issue was whether or not the grapes had been picked and packed in a reasonably careful manner and in such a way as to be fit for shipment, as required by the contract.

[10, 11] Undoubtedly these certificates were competent evidence upon this question. But they were not conclusive. By the very terms of the statute under which they were issued they are made only prima facie evidence of the facts certified. Unquestionably they make a most impressive showing. But the rule that where there is a conflict in the evidence, and where there is substantial evidence to support it, the finding of the trial court will not be disturbed, is too old and too well settled for us to disregard it.

The judgment is, accordingly, affirmed.

110 Cal. App. 46

HARRIS v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 7463.

District Court of Appeal, Second District,
Division 2, California.

Nov. 24, 1930.

Master and servant ☞376(2).

Employee sustaining injury causing hernia held entitled to disability indemnity in addition to compensation for operation as against contention injury merely accentuated previous hernial condition.

The Industrial Accident Commission denied compensation for loss of time on theory that strain to which claimant had been subjected caused merely an accentuation of his previous hernial condition. Claimant testified without contradiction that he had never had any hernia before accident, nor any indications of one. Industrial Accident Commission had previously made study of medical aspects of hernia, and on basis of information gathered had concluded that hernia would not occur, especially when incurred under circumstances of apparently slight strain, unless there was pre-existing weakness of the peritoneal sac. However, there was no evidence in record setting forth these medical aspects of the case.

Proceeding under the Workmen's Compensation Law by William J. Harris, claimant, opposed by the City of Monterey Park, employer. The Industrial Accident Commission

awarded only part of compensation claimed, and claimant brings certiorari.

Award annulled.

P. O. Gunness, of Monterey Park, for petitioner.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

WORKS, P. J.

Petitioner was an employee of the city of Monterey Park. According to his testimony, he and others "were putting in a fire hydrant joint. Had it all coupled together, probably three or four hundred pounds of pipe, and I was down in the ditch, and I had a bar running in under the hydrant and pipe, * * * and in slipping it over the bank toward the edge of the bank, the bank caved in, and the bar moved, it [evidently the hydrant and pipe] slipped right down the bar, * * * [and] I had to hold it." He further testified that he then said "to the boys" that he "got an awful strain," and that he felt a "little stinging sensation" in the right groin. It later developed that he was afflicted with a hernia. He testified that he had never had a hernia before the incident we have described, nor any indications of one, and this evidence went undisputed.

At the hands of the respondent Industrial Accident Commission, petitioner was allowed compensation in the form of a surgical operation to correct the hernia, but was denied compensation for the loss of time involved in his troubles upon the theory that the strain to which he had been subjected caused merely an accentuation of a previous hernial condition. He asks that the award be annulled to the end, if we determine that he is entitled to it, that he be allowed compensation also for time lost.

At the oral argument the counsel for the Industrial Accident Commission said: "He was operated on at the expense of the insurance company, and it was found to be a fresh hernia; that is, there were no adhesions indicating that it was of long standing. And there is no doubt but that the man felt that he had never had hernia, or anything resembling hernia, in his life before. My reason for wishing to make a distinction between making full compensation and allowing an operation only is that the Commission has long ago made a thorough study of the medical aspects of hernia, and on the basis of information gathered from professional sources they have concluded that a hernia will not occur, especially when it is incurred under circumstances of apparently slight strain, unless there is a pre-existing weakness of the peritoneal sac. * * * And we admit that there was no evidence in the record setting forth these medical aspects of the case, as there was in the

Bige Case [referring to *Bige v. Industrial Accident Commission* (Cal. App.) 287 P. 577], the reason therefor being that the Commission has so many of these cases that it had forgotten to complete the record in this case."

The following colloquy then occurred:

"Presiding Justice Works: We understood from the argument advanced in support of the petition that the only point is that the record on its face does not sustain any such finding. Justice Thompson suggests the question as to whether or not that assembled information which the Commission has can be used under those circumstances.

"Mr. Allen: That is a question also, and we admit that readily. All that I wanted to make clear was that this inferior tribunal has so many of this very same kind of cases before it that it sometimes slips up when it should have completed the record.

"Presiding Justice Works: If we should follow you on that question we should have to assume that this strain to which the man was subjected in lifting the pipe was so slight that it justified the Commission in relying upon that information that it had assembled, and we would also have to assume that it had assembled that information.

"Mr. Allen: Yes."

Under the circumstances thus disclosed we think petitioner was entitled to compensation for disability indemnity in addition to the compensation by operation. *Singer v. Industrial Accident Commission* (Cal. App.) 287 P. 567.

Award annulled.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

109 Cal. App. 587

HARTFORD v. SILVERMAN et al.
Civ. 6024.

District Court of Appeal, Second District,
Division I, California.

Nov. 17, 1930.

Automobiles ¶160(1).

Motorist obstructing sidewalk at night, refusing to move, may be liable to pedestrian, slipping on curb when attempting to walk around automobile.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Louise Hartford against Sam Silverman and another. A judgment for defendants in the municipal court was affirmed on

appeal to the superior court, and, from such judgments, plaintiff appeals.

Appeal from municipal court dismissed, and judgment of superior court reversed.

Collamer A. Bridge, of Los Angeles, for appellant.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for respondents.

HOUSER, J.

The action upon which the appeal herein is predicated was originally brought in the municipal court of the city of Los Angeles. Among other things, the complaint therein contained a statement of the following facts, to-wit: At night, in the city of Los Angeles, plaintiff was lawfully walking on a public sidewalk, at which time and on which occasion one of the defendants (who was the minor son of the other defendant) was seated in an automobile of which he was in charge and which automobile was parked and stopped upon said sidewalk in such manner as to obstruct the passage of plaintiff upon said sidewalk; and that, although requested by plaintiff to do so, said defendant refused "to propel said vehicle into the driveway * * * and thereby render it possible for plaintiff to proceed along said sidewalk." Thereupon it became and was necessary "for plaintiff to walk around said automobile in the vicinity of the curb line * * * and that in so doing and while using due care and caution in that behalf, plaintiff was caused to fall violently to the pavement by reason of the fact that one of her feet slipped or became caught in a portion of said driveway or curb which plaintiff had been unable to see and discover by reason of the darkness, and notwithstanding the fact that she was proceeding in a careful and cautious manner around said automobile." As a result of the injury thus received by plaintiff, she suffered certain damages, etc. The demurrer of defendants to the complaint upon the ground that it failed to state a cause of action was sustained by the judge of the municipal court without leave to amend the complaint, and judgment was thereupon rendered in favor of defendants. On appeal to the superior court, the judgment theretofore rendered in the municipal court was affirmed. It is from such judgments that the appeal herein is taken.

Although the decisions by the appellate courts of this state with reference to the liability of defendants in circumstances analogous to those which have been hereinbefore set forth are by no means harmonious or consistent one with the other, it is believed that the weight of authority sustains the conclusion that, assuming the existence of the facts as stated in the complaint herein, a jury would be justified in returning a verdict in favor of plaintiff. *McKune v. Santa Clara V. M.*

& L. Co., 110 Cal. 480, 42 P. 980; Sawdey v. Rasmussen Co. (Cal. App.) 290 P. 684; Watwood v. Fosdick (Cal. App.) 290 P. 505; Hanlon Drydock & Shipbuilding Co. v. Southern Pacific Co., 92 Cal. App. 230, 268 P. 385; Flynn v. Bledsoe Co., 92 Cal. App. 145, 267 P. 887; Fisher v. Southern Pacific Co., 72 Cal. App. 649, 237 P. 787; Mitsuda v. Isbell, 71 Cal. App. 221, 234 P. 928; Marton v. Jones, 44 Cal. App. 299, 186 P. 410; Williams v. San Francisco & N. W. Ry. Co., 6 Cal. App. 715, 93 P. 122.

It is therefore ordered that the appeal from the municipal court to this court be, and it is, dismissed. It is further ordered that the judgment rendered by the superior court be, and it is, reversed.

We concur: CONREY, P. J.; YORK, J.

109 Cal. App. 622

PHILLIPS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 7537.

District Court of Appeal, Second District,
Division 2, California.

Nov. 18, 1930.

Rehearing Denied Dec. 9, 1930.

Hearing Denied by Supreme Court.

Jan. 12, 1931.

1. Receivers $\S$ 56.

One not party to action in which receiver was appointed for corporation would not seem to be in position to ask that receivership be restrained.

2. Prohibition $\S$ 17.

Before seeking prohibition to stay contempt proceeding, petitioner must first present claim to lower court.

Petition did not show that petitioner had called attention of court below to his claim that such court was acting in contempt proceeding without jurisdiction by reason of alleged invalidity of orders appointing receiver, and petitioner's remedy was to first present his defense to lower court upon hearing of contempt proceeding.

Application by M. G. Phillips for writ of prohibition prayed to be directed to the Superior Court in and for Los Angeles County, William C. Doran, Judge, to restrain enforcement of an order appointing a receiver.

Writ denied.

Cooper & Collings, of Los Angeles, for petitioner.

Holbrook, Taylor & Tarr & Horton, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

The petitioner asks a peremptory writ of prohibition restraining respondents from enforcing or carrying into effect an order appointing a receiver for the Stock & Realty Assurance Corporation, and also from proceeding in a matter wherein petitioner was cited to appear before respondent to show cause why he should not be punished for contempt in taking from the possession of the receiver so appointed the sum of \$185.35 and for preventing said receiver from taking possession of the books and records of said corporation, of which petitioner is alleged to have been president.

The petition alleges the corporate existence of said Stock & Realty Assurance Corporation under the laws of the state of Nevada and its authorization to do business in this state; that "for a period of one month last past petitioner has been president of said corporation" and one of its directors; that on July 25, 1930, on complaint filed against said corporation, on an ex parte application respondent court made an order appointing A. D. McLeod receiver of said corporation, which order was amended July 28, 1930, on ex parte application to said court and an order was also made directing the sheriff of Los Angeles county to assist said receiver in taking possession of all the assets, books and papers of said corporation; that by virtue of said assistance said receiver took possession and now has the control of said assets, books, and papers. It is further alleged that, in making the order appointing said receiver, said court acted in excess of its jurisdiction, in that no cause of action existed for the appointment of a receiver; that, by reason thereof, petitioner refused to turn over the "books, assets and property of said corporation to said receiver, and that on or about August 1, 1930, petitioner was served with said order to show cause why he should not be punished therefor for contempt. It is further alleged that petitioner "is not a party to said action, except as an officer of said corporation," that said corporation has demurred to said complaint and also moved to vacate and set aside the order appointing receiver, and that said motion and demurrer were argued before respondent Hon. William C. Doran, "who took the same under advisement and has not decided same." The petition was filed herein on August 11, 1930. There is also an allegation in said petition that said court is "illegally and unlawfully proceeding to exercise its jurisdiction and to cite and threaten to punish your petitioner for contempt." There is also the bare allegation that "petitioner has no plain, speedy or adequate remedy at law."

[1] Petitioner not being a party to the action in which the receiver was appointed

would not seem to be in a position to ask that the receivership should be restrained, and the corporation itself has taken the proper steps to raise the validity of such appointment before the court making it.

[2] So far as the contempt proceeding against petitioner is concerned, the petition does not show that he has in any way called the attention of the court below to his claim that such court is acting in such proceeding without jurisdiction by reason of the alleged invalidity of the orders appointing said receiver, and the authorities hold that the remedy in such a case is for petitioner to first present his defense to the lower court upon the hearing of the contempt proceeding. *Wessels v. Superior Court*, 200 Cal. 403, 253 P. 135; *Southern Pacific R. R. Co. v. Superior Court*, 59 Cal. 471, 475; *Chester v. Colby*, 52 Cal. 516.

The Supreme Court in the case of *Commercial Bank v. Superior Court*, 192 Cal. 395, 397, 220 P. 422, 423, in laying down the rule above mentioned, also uses the following language: "However, the trial of contempt proceedings has sometimes been stayed by a writ of prohibition where it is manifest from previous orders or decisions of the court that it will proceed notwithstanding a lack of jurisdiction." Such a situation is not shown by the petition filed herein, and the petition shows on its face that petitioner has a plain, speedy, and adequate remedy in the trial court, which must be taken before application for a writ of prohibition is made here.

The peremptory writ of prohibition is denied.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

109 Cal. App. 745

BEYER v. CARRASCO et al.
Civ. 6120.

District Court of Appeal, Second District,
Division 1, California.
Nov. 21, 1930.

1. Appeal and error ⇨965.

Order granting change of venue should not be reversed, in absence of clear abuse of discretion.

2. Venue ⇨52(1).

Court's discretion in granting change of venue for convenience of witnesses in action on administrator's bond, which arose in county to which action was transferred, held not abused.

It appeared from defendant's affidavit in support of the motion for a change of venue that not only the convenience of witnesses warranted the change of venue, but that certain books in the possession of the deputy state superintendent of banks in the county to which venue was transferred would be introduced in evidence. Plaintiff's stipulation to all the evidence indicated by defendant's affidavit contained several conditions which substantially weakened the effect of the stipulation.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Emma Mina Beyer against Cris Carrasco, as administrator of the estate of Fred Burkhardt, deceased, and another. From an order granting motion for change of venue, plaintiff appeals.

Affirmed.

Hugo Platz and J. M. Chatterson, both of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondent.

YORK, J.

Plaintiff and appellant has appealed from an order of the superior court of Los Angeles county granting a motion for a change of venue to the county of Inyo, on the ground of the convenience of witnesses. The objection of the plaintiff is set forth in the objection filed by appellant in the lower court to the motion for change of venue, which objection also contained a notice of counter motion to retain the cause in Los Angeles county, on the ground of convenience of witnesses, and on the further ground of disqualification of the judge of Inyo county by reason of his interest in said action, and that the ends of justice will not be promoted by such a change.

This counter motion was presented upon the affidavit of one of the attorneys for plaintiff and upon stipulation of the plaintiff as to what the testimony of defendants' witnesses would be.

The affidavit of the attorney for defendant and respondent, filed in support of defendant's motion for a change of venue, recites the fact that the plaintiff's cause of action is based upon the alleged liability of the defendant Fidelity & Deposit Company of Maryland as surety upon the official bond of the public administrator of the county of Inyo; that all of the transactions involved in the cause occurred in the county of Inyo; that certain persons are necessary and material witnesses, and that said defendant intends to call each one of same at the trial of said cause, and that they are each and all residents of Inyo county; that the plaintiff

is not a resident of the state of California, as shown by her complaint, and that a change of the place of the trial cannot work a hardship or inconvenience upon the plaintiff; that the defendant Fidelity & Deposit Company of Maryland is sued herein as surety, and that the person primarily liable to plaintiff, if any, is the defendant Carrasco, a resident of the county of Inyo, and that, notwithstanding the dismissal of the defendant Carrasco filed herein by the plaintiff, Carrasco is the person primarily interested in the defense of this action, and will be liable to reimburse the defendant Fidelity & Deposit Company of Maryland for any judgment rendered against and paid by the defendant corporation; that certain books and records of the Inyo County Bank at Bishop, in the county of Inyo, are in the custody of a special deputy state superintendent of banks in charge of liquidation of the Inyo County Bank; that it is necessary for the defendants in presenting their defense to use the books and records of the county treasurer of the county of Inyo and the books and records of the Inyo County Bank.

The principal point made by appellant on this appeal is that she has stipulated to all of the evidence indicated by respondent's affidavit. The record does not disclose that such a stipulation has been filed. The stipulation that has been filed is a qualified stipulation, which contains several conditions which substantially weaken the effect of the stipulation.

[1, 2] Unless there is a clear abuse of discretion by the trial court, the order should not be reversed. A careful examination of the record fails to disclose any ground for appellant to claim that there was any such abuse of discretion by the trial court.

The order appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

110 Cal. App. 100

COSSI v. SOUTHERN PAC. CO. et al.
Civ. 7226.

District Court of Appeal, First District,
Division 2, California.
Nov. 28, 1930.

1. Death ☞85.

Damages in death cases is pecuniary loss which circumstances establish with reasonable certainty will be suffered by beneficiary of statute because of death of victim.

2. Appeal and error ☞932(1).

On appeal from judgment awarding one dollar damages for death of son, it is assumed that jury determined father would not suffer pecuniary damages.

3. Death ☞77.

Evidence sustained finding that father, separated from wife, did not suffer pecuniary damage from death of son supported by mother.

Evidence disclosed that wife left husband's home in 1925, leaving three children with husband, that husband commenced action for divorce which was never carried out, that wife returned in 1926 for about three weeks, and then left, taking three children with her, that husband saw family only once until 1927 when one son was killed, and that mother supported children with aid of what little money children themselves earned.

4. Death ☞77.

Father had burden of proving by preponderance of evidence that he was reasonably certain to suffer pecuniary injury by death of child.

5. Death ☞24.

Father could not recover for death of child injured by negligence of mother having custody of child with father's consent.

6. Death ☞104(5).

Charge to consider fact that father, suing for death of child, was bound to support child through minority, *held* not error.

7. Death ☞104(5).

Charge relating to father's support of child through minority *held* not misleading by addition of statement that "during such minority child would have been source of expense to plaintiff."

Quoted words followed and were limited by preceding portion of instruction, so that jury must have understood them to mean that to the extent that plaintiff was legally bound to support his child during minority child would be a source of expense.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Frank Cossi against the Southern Pacific Company and others. Judgment for plaintiff for part of amount claimed, and plaintiff appeals.

Affirmed.

Bohnett, Hill & Campbell and L. H. Schellbach, all of San Jose, for appellant.

W. H. Stammer, of Fresno, for respondents.

DOOLING, Justice pro tem.

In this action by a father for the death of his ten year old son the jury brought in a verdict for the plaintiff for \$1. Plaintiff made a motion for new trial, which was denied, and now prosecutes this appeal from the judgment.

On November 11, 1927, mother and son were both killed when an automobile driven by the mother was struck by a railroad train operated by respondents.

In order to pass intelligently upon appellant's claim that the damages allowed are clearly inadequate under the evidence, it is necessary to sketch briefly the fact picture that was before the trial court and jury. Largely from appellant's own testimony it appears that some time in 1925 his wife, who was the mother of his three children, departed from appellant's home in San Jose, leaving the three children with him. Appellant commenced an action for divorce in which he asked for the custody of the children. This action was never carried beyond the point of filing the complaint. Some time in May or June, 1926, appellant's wife returned to his home for about three weeks, and at the end of that time again departed and took the three children with her. This, he testified, was without his consent. From that time until November, 1927, when the boy was killed, appellant saw his family only once. This was some time in 1927 in Sacramento. At this time appellant gave the mother and son each some money, amount not stated. The mother promised to come home some time before Christmas, and appellant went back to San Jose and rented a house in which to receive them. During the year and a half that they were away from him the mother supported the children with the aid of what little money the children themselves earned.

[1-4] The measure of damages in death cases is the pecuniary loss which the circumstances of the particular case establish with reasonable certainty will be suffered by the beneficiary of the statute because of the death of the victim. *Bond v. United Railroads*, 159 Cal. 270, 277, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. We must assume on appeal that the jury in arriving at its verdict determined that the evidence did not establish with reasonable certainty that any pecuniary damage would be suffered by appellant from the death of his son, and that on the motion for new trial the trial court concluded that the evidence was sufficient to support this determination of the jury. We cannot hold under the evidence above summarized that this was error. It was incumbent upon appellant to prove by a preponderance

of the evidence that pecuniary injury was reasonably certain to be suffered by him from the death of his child. The jury may well have concluded from the facts before them that father and son were so little interested in one another that there was no reasonable certainty that the continued life of the son would be of any pecuniary value to the father. *Dean v. Oregon R. & N. Co.*, 38 Wash. 565, 80 P. 842.

[5] Appellant complains of certain instructions that, if the jury found that the mother was negligent, and that the mother's negligence proximately contributed to the death of the son, appellant could not recover. Appellant claims that the rule of *Keena v. United Railroads*, 57 Cal. App. 124, 207 P. 35, does not apply because the mother took the son without the father's consent. The father's testimony that he saw the family in 1927 in Sacramento, at which time the mother agreed to come home before Christmas, disposes of this contention. Whatever may have been the situation theretofore, it appears that from that time forth the mother's custody of the children was with the consent of appellant. The conduct of the son and the question of whether or not he was sui juris do not properly enter into this case. If the mother was negligent and thereby injured the child, the father's recovery is barred because she represented the community. The legal situation is no different than it would have been had the mother or the father negligently run over and killed the son.

[6, 7] It was proper to instruct the jury that they should take into consideration the fact that plaintiff was legally bound to provide for, maintain, clothe, and educate his child through minority. *Metcalf v. Romano*, 83 Cal. App. 508, 515, 257 P. 114. The jury, in our opinion, could not have been misled in view of the instructions as a whole by the addition of the words to this instruction "and that during such minority the child would have been a source of expense to the plaintiff." These words followed and were limited by the preceding portion of the instruction so that the jury must have understood them to mean that to the extent that plaintiff was legally bound to support and provide for his child during minority the child would be a source of expense. The instruction was inartificially drawn, and it would have been better had the language complained of been omitted, but we do not believe that the jury could have misinterpreted it.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

211 Cal. 82

LACOE v. INDUSTRIAL ACCIDENT COMMISSION OF DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY et al.

S. F. 13841.

Supreme Court of California.

Nov. 28, 1930.

Master and servant ☞363.

Farm employee's injuries, received while trimming tree, *held* sustained while employed as gardener and not as household domestic worker, and hence compensable (Deering's Gen. Laws 1923, Act 4749, § 69(a); Deering's Gen. Laws Consol. Supp. 1925-1927, Act 4749a, § 1).

The evidence disclosed that the farm employee and his wife were employed on the farm, that the wife was to attend to housework, and the employee was to perform other farm services, such as putting in crop, garden work, carpenter work, trimming trees, and taking care of the horses, and that, shortly after employee was hired, while attempting to cut off a limb of a tree, he fell from tree and was injured.

In Bank.

Proceeding under the Workmen's Compensation Act by John Swanson, employee, opposed by R. D. Lacoe, employer. The Industrial Accident Commission of the Division of Industrial Accidents and Safety, Department of Industrial Relations, granted an award, and the employer applies for certiorari.

Award affirmed.

Superseding opinion in 284 P. 474.

Sweet & Plank and Franklin A. Plank, all of San Diego, for petitioner.

G. C. Faulkner and Edward O. Allen, both of San Francisco, for respondents.

LANGDON, J.

This is a petition by an employer to review an order of the Industrial Accident Commission awarding compensation to an employee.

R. D. Lacoe, the employer and petitioner herein, was the owner of a 30-acre tract of land in San Diego county. Part of the property was occupied by a residence, an employee's house and a garden. The rest was devoted to agricultural purposes. John Swanson and his wife were hired as general caretakers. Mrs. Swanson was to do the housework and John Swanson the outside work. In the latter's testimony we find the following statement: "My duties were to do farm work, put in the crop when it was the season, and do garden work, and carpenter work which was specified, and that was what I had been doing mostly, carpenter work and trimming trees and taking care of horses." Lacoe testified that he hired Swanson and his wife because he wanted somebody to take care of the place, so that when he came there "it would be running," and "of course that necessitated making a garden and cleaning up the place, and also there was work that would be necessary on it, like all country homes." He wanted Swanson to build fences, trim trees and brush, and, in short, "to do anything that I do."

Shortly after he was hired, while attempting to cut off a limb of a tree, Swanson fell from the tree and was injured. The commission found that the applicant, "while employed * * * as a gardener * * * sustained injury arising out of and in the course of said employment, * * *" and made an award of compensation.

Certain employments are expressly excluded from the benefits of the Workmen's Compensation Act, although a procedure is provided by which the employer and employee thus excluded may jointly elect to come within the act. Workmen's Compensation Insurance and Safety Act, § 70; Deering's Gen. Laws, Act 4749, p. 1755. Prior to 1927, among the excluded employments were "farm, dairy, agricultural, viticultural or horticultural labor." Workmen's Compensation Insurance and Safety Act § 8(a). In 1927, these types of employment were to a large extent brought within the act by the following amendment: "Any employer and his employees engaged in farm, dairy, agricultural, viticultural or horticultural employments or in stock or poultry raising, not subject to the compensation provisions of the 'Workmen's Compensation Insurance and Safety Act of 1917,' as amended, shall, from and after the date this act takes effect, be conclusively presumed to have accepted the compensation provisions of said act and amendments thereto and to have included in their contract of hire or apprenticeship, express or implied, a mutual agreement to accept said provisions, unless either such employer or employee shall, prior to the occurrence of any injury have given notice of rejection of said provisions of said act in the manner herein provided."

Deering's Gen. Laws, Consol. Supp., Act 4749a, p. 1480.

No notice of rejection was given by the employer or the employee in the instant case. The amendment, however, does not cover the excluded employment of "household domestic service," nor was any election to come within the act made in the instant case. The issue is therefore clearly presented. If Swanson was engaged in agricultural or horticultural labor at the time of his injury, he is entitled to compensation; but, if he was engaged in "household domestic service," he is not so entitled.

The argument of petitioner rests mainly upon the proposition that "domestic" duties include any that have to do with the dwelling or adjoining buildings accessory thereto. It is contended that, if they contribute to the maintenance of the home, it is immaterial whether they are performed inside or outside the walls of the dwelling. The case of *Catto v. Plant*, 106 Conn. 236, 137 A. 764, is much relied upon in this connection. The court there held that an assistant gardener, employed to care for the house grounds on a country estate, came within the definition of a "domestic servant." It would be profitless for us to consider the precise effect of the word "household" in the California statute, as a limitation on the meaning of "domestic service." The important problem which this case presents cannot be solved by any definition of the terms in the abstract, but requires a determination of the intent of the Legislature in making them a part of the particular act.

Both by constitutional provision (Cal. Const. art. 20, § 21) and by legislative enactment (Workmen's Compensation, Insurance and Safety Act, § 69(a), Deering's Gen. Laws 1923, Act 4749) it is the duty of the courts to interpret this act with a view toward making compensation as general as may be practicable and reasonable. Examining the sections on excluded employments, we find that from the general compensation provisions certain exceptions are made. The basic exclusion is of labor which is "casual and not in the course of business." The next is of "household domestic service." The intention here is plainly to exclude employments of a personal as distinguished from an industrial character, for domestic service as such is not excluded; such employment in hotels, apartments, and boarding houses is within the act. The exception formerly made of agricultural and similar employment is, since 1927, practically eliminated. This is a persuasive indication of the legislative object of wider operation of the Compensation Law. The amendment of 1927 would also seem to suggest that the scope of the exception of "household domestic service" should be carefully restricted. Formerly it was unnecessary to draw any close line between such em-

ployments as, for example, gardening and housework, since both were excluded. Now, the inclusion of horticultural and agricultural labor necessitates the drawing of such a line, and, since the amendment was designed to increase the group of compensated employments, the interpretation should be one which will carry out that intention. Of paramount importance, however, is the express declaration of the statute: "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." Workmen's Compensation, Insurance and Safety Act, § 69(a).

The foregoing discussion leads us to conclude that, in the solution of problems such as that before us here, our inquiry must be this: Is the employment unmistakably excluded by the terms of the act? If it is not, we are bound to uphold the finding and award of the commission. Under this view, we find no difficulty in deciding the instant case. Swanson's work was, as respondent commission has suggested, in a middle zone; he was doing odd jobs, which had too little connection with the household to be properly classified as domestic, and yet were not of such industrial character as to come within the ordinary meaning of farm, agricultural, or horticultural labor. Such employment cannot be placed squarely in either classification of the statute. The Legislature, no doubt in recognition of the impossibility of laying down any positive rule for such marginal employments, has apparently left it for the commission to determine, in each instance, whether the injured person was at the time of the injury engaged in an included or excluded employment. The case of *George v. Industrial Accident Commission*, 178 Cal. 733, 174 P. 653, is very persuasive in this connection. At the time of this decision, horticultural labor was an excluded employment. George was employed as a janitor and gardener. While cutting a limb of a tree, he was injured. The commission found that at the time of the injury he was engaged in horticultural labor, and dismissed his application. The court said (page 735 of 178 Cal., 174 P. 653, 654): "Whether or not George, at the time of his injury, was engaged in horticultural labor was a question of fact to be determined by the commission. Its finding thereon, if supported by any rational view of the evidence, is beyond review here. On the testimony in the record, it cannot be said that the conclusion of fact drawn by the commission was an unreasonable or improper one. George's employment was dual in character. In so far as he acted as a gardener, his work was horticultural and beyond the purview of the Compensation Act. In so far as his duties were those of a jani-

tor, his employment was not exempt from the terms of the act."

The conclusion seems irresistible that, where the employee has various duties and performs labor of widely different types, the employment is not to be forced, by a strained definition of terms or an artificial rule of construction, into the excluded or the included classes. The proper characterization of the employment in such cases presents a question of fact for the commission to determine. The evidence in the instant case amply supports the finding that, at the time of the accident, the employee was engaged in horticultural labor, and, on the basis of this finding, the award should be, and is hereby, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.

in the juvenile court were incomplete. It does appear from this record, however, that proceedings were instituted in the juvenile court in Santa Clara county on December 8, 1916, asking the court to assume jurisdiction over the minor, who was then a little over one year of age and destitute; that for the past fourteen years she has been in the custody of persons other than her parents under orders of that court made from time to time during that period; and that said proceedings are still pending and undetermined.

At the time of the hearing in this court we directed petitioner's attention to her failure to traverse the return and to the incompleteness of the record. The court then notified petitioner's counsel that the burden of proof was on her and time was allowed to enable her to complete the proof and to file her opening brief. The cause was heard on August 12th of this year, and since that time the petitioner has done nothing in the way of presenting either proof or brief. We are not required to assume counsel's burden of presenting a matter before the court for decision, hence the cause should be dismissed for lack of prosecution.

Ordered proceedings dismissed.

109 Cal. App. 617

Ex parte BEVENS.

Cr. 1593.

District Court of Appeal, First District,
Division 2, California.
Nov. 18, 1930.

Appeal and error ⇐773(2).

Where party failed to complete proofs and file opening brief as required by Court of Appeal, cause should be dismissed for lack of prosecution.

Application for writ of habeas corpus to secure the release of June Bevens, a minor.
Proceeding dismissed.

Crail, Shutt, Penprase & Crail, of Los Angeles, for petitioner.

Bohnett, Hill & Campbell, of San Jose, for respondents.

PER CURIAM.

Petitioner sued to secure the custody of June Bevens, a minor, on a petition alleging that the minor was illegally restrained by L. D. Bohnett and Mrs. Bohnett. The respondents answered, alleging that the minor was held in their custody by virtue of an order of the juvenile court. No traverse was made to the answer, but, when the matter was first presented to this court, portions of the records of the county clerk were offered in evidence tending to show that the proceedings

COUNTY OF SAN BERNARDINO (a Political Subdivision of the State of California), Plaintiff and Appellant, v. GATE CITY CREAMERY COMPANY (a Corporation), Defendant and Respondent.

Civ. 50.

District Court of Appeal, Fourth District,
California.
Nov. 6, 1930.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

George H. Johnson, Dist. Atty., and M. O. Hert, both of San Bernardino, for appellant.

Walter E. Byrne, of San Bernardino, for respondent.

PER CURIAM.

In order to correct clerical omission in the opinion of this court in the above-entitled cause, it is hereby ordered that the words "is against public policy" be inserted after the word "require" in the fifth line of the fourth paragraph of said opinion on page 328 of 61 California Appellate Decisions, 284 P. 457, 459.

110 Cal. App. 10

BRUMHALL v. SUTHERLAND et al. (PACIFIC EMPLOYERS' INS. CO.,

Intervener).

Civ. 4214.

District Court of Appeal, Third District,
California.

Nov. 22, 1930.

Rehearing Denied Dec. 22, 1930. Hearing Denied by Supreme Court Jan. 19, 1931.

1. Appeal and error ⇨930(1).

Conflicting evidence is immaterial on appeal; facts being viewed most favorably to prevailing party.

2. Master and servant ⇨301(1).

General contractor's hoistman operating hoist, which injured subcontractor's employee, under agreement whereby subcontractor paid for hoisting, *held* employee of general contractor, and under its control.

3. Negligence ⇨121(3).

Res ipsa loquitur doctrine *held* applicable where hoist under general contractor's exclusive control fell, notwithstanding brake was set, injuring subcontractor's employee.

4. Evidence ⇨506.**Trial ⇨45(1).**

Offer to prove custom among construction operators to rely on brakes on hoist *held* insufficient; evidence of custom which merely constitutes opinion of negligence is inadmissible.

Offer of proof in question omitted evidence regarding capacity of hoist, weight of load thereon, condition of brakes, and whether brakes were properly set, all of which affect question whether it is safe in any given case to rely on brakes.

5. Negligence ⇨124(1).

Industrial Accident Commission's general construction safety order served on general contractor, sued by subcontractor's employee injured by hoist, *held* properly admitted.

6. Damages ⇨132(3).

\$6,000 to construction workman, whose principal injury was fracture of dorsal vertebra, probably causing continued pain and inability to do heavy lifting, *held* not excessive.

At time of trial, eighteen months after accident, plaintiff was able to pursue his usual occupation only about one-third of time.

Appeal from Superior Court, of Los Angeles County; Walton J. Wood, Judge.

Action by Ben H. Brumhall against D. Sutherland and another, in which the Pacific

Employers' Insurance Company intervened. Judgment for plaintiff, and defendants appeal. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellants.

F. Britton McConnell, of Los Angeles (J. L. Kearney, of Los Angeles, of counsel), for respondent.

Kenneth J. Murphy, of Los Angeles, for intervenor.

FINCH, P. J.

This is an appeal by the defendants from a judgment for damages in favor of the plaintiff for personal injuries sustained by him in the fall of a hoist or elevator which was being used in the construction of a building.

[1] At the time of the accident the plaintiff was engaged in unloading from the hoist platform, which was then stationary at the ninth floor of the building, steel pans, or forms, into which to pour concrete. While the plaintiff was so engaged, the elevator platform fell with him to the ground, thereby causing the injuries in question. The defendant J. V. McNeil Company was the general contractor for the construction of the building. The defendant Sutherland was employed by the general contractor as hoisting engineer. The plaintiff was an employee of a subcontractor and, at the time of the accident, was working as such. The subcontractor had entered into a contract with the general contractor to install and remove the steel forms, or pans. The general contractor had constructed and was using four hoists. At the time of the accident the defendant Sutherland was the only hoistman, and he was alternately operating all four hoists, including the one which fell with the plaintiff. At that time that hoist was being operated under an agreement by the terms of which the subcontractor was to pay the general contractor for hoisting the forms at the rate of \$2.25 an hour, including the services of Sutherland, the maximum load not to exceed 500 pounds. Immediately before the accident the hoist had been stopped at the ninth floor with a load of eight forms, weighing about fifty-eight pounds each. Sutherland, who had charge of all the hoists at that time, set the brake on the loaded hoist and went to another hoist, about fifteen or twenty feet therefrom. The plaintiff and a fellow workman then commenced to unload the hoist, it being necessary for them to step upon the hoist platform. Two forms were removed successfully, but when the plaintiff stepped on the platform to remove a third form the platform fell with him to the ground. The brake was still set when the platform reached the ground. The foregoing facts are stated in the light most favorable to the re-

spondent; conflicting evidence being immaterial on appeal.

[2] Sutherland was clearly an employee of the defendant company and under its control. *Umsted v. Scofield Eng. Const. Co.*, 203 Cal. 224, 263 P. 799; *Moss v. Chronicle Publishing Co.*, 201 Cal. 610, 258 P. 88, 55 A. L. R. 1258; *Billig v. Southern Pacific Co.*, 189 Cal. 477, 209 P. 241; *Stewart v. California Improvement Co.*, 131 Cal. 125, 63 P. 177, 724, 52 L. R. A. 205; *Valdick v. Le Clair* (Cal. App.) 289 P. 673.

[3] The hoist being under the exclusive control of the defendants, and the accident being such as in the ordinary course of things does not happen, the maxim *res ipsa loquitur* applies and, in the absence of explanation by the defendants, an inference of negligence on their part arises. *Ragin v. Zimmerman*, 206 Cal. 723, 276 P. 107; *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480; *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; *Brown v. Davis*, 84 Cal. App. 180, 257 P. 877.

[4] The defendant offered to prove that "it is customary and usual practice among all construction operators who make elevators and skips and hoisting machines to rely generally upon the brakes when the machine has elevated the cage and stopped for unloading, and that it is never the custom of the engineer to watch the machine while not in motion and the brakes are set, or to remain with it during that time." The plaintiff's objection to such proof was sustained. Whether it is safe in any given case so to rely on the brakes necessarily depends upon the capacity of the hoist, the weight of the load thereon, the condition of the brakes, and whether they are properly set, all of which factors are left out of consideration in the offer of proof quoted. "Where evidence of a custom merely amounts to an opinion of the ultimate fact of negligence, such evidence is not admissible." 25 Cal. Jur. 428; *Redfield v. Oakland C. S. Ry. Co.*, 112 Cal. 220, 224, 43 P. 1117. See, also, *Perera v. Panama-Pacific Int. Exp. Co.*, 179 Cal. 63, 67, 175 P. 454; *Carroll v. Central Counties Gas Co.*, 96 Cal. App. 161, 165, 273 P. 875, 274 P. 594; *People v. Crossan*, 87 Cal. App. 5, 16, 261 P. 531; *Phoenix Assur. Co. v. Texas Holding Co.*, 81 Cal. App. 61, 75, 252 P. 1082.

[5] The trial court did not commit error in admitting in evidence a general construction safety order of the Industrial Accident Commission which had been served on the defendant Company. *McKeon v. Lissner*, 193 Cal. 297, 304, 223 P. 965; *Barbieri v. Law* (Cal. Sup.) 287 P. 464.

[6] The judgment is for \$6,000. Appellants contend that the amount is so exces-

sive that the verdict appears "to have been given under the influence of passion or prejudice." The principal injury suffered by the plaintiff was a fracture of the eighth dorsal vertebra. At the time of the trial, eighteen months after the accident, he was able to pursue his usual occupation only about one-third of the time. A physician called by the plaintiff testified that pain from the injury would probably continue "indefinitely." A physician called by the defendants testified: "Any fractured vertebra leaves a certain amount of soreness and certain amount of limitation of movement at the seat of the fracture which disables him so far as heavy lifting is concerned, so far as heavy back work is concerned." Appellant's contention is not supported by the record.

The judgment is affirmed.

All concur.

109 Cal. App. 548

RICHERT v. CITY OF SAN DIEGO.

Civ. 441.

District Court of Appeal, Fourth District,
California.

Nov. 14, 1930.

Rehearing Denied Dec. 12, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

1. Trial $\hookrightarrow$ 388(4).

Where facts set forth in agreed statement were probative in character, findings were necessary.

2. Trial $\hookrightarrow$ 395(5).

In action to quiet title, finding of ultimate fact of ownership in plaintiff *held* sufficient; no finding of necessary elements necessary to make possession adverse being necessary.

3. Adverse possession $\hookrightarrow$ 114(1).

Agreed statement in quiet title action *held* to support findings that plaintiff was owner, in possession, and entitled to possession, of property.

The agreed statement recited in part that for period of twelve years portion of premises involved had been used continuously by plaintiff for pasturage purposes, and that another portion had been closed by fences for twelve years and had been occupied by plaintiff continuously and cultivated by him and his tenants, and, when not used in actual cultivation, land was used for pasturage purposes, that possession of property had been under claim of right and had been exclusive of all other persons, and that plaintiff's claim of title was known throughout period to occupants of adjoining and nearby lands.

4. Adverse possession ☞8(1).

Land held by state or subdivisions which has been reserved or dedicated to specific public use can not be taken by adverse possession.

5. Adverse possession ☞7(2), 9.

Land held by state or subdivision which is neither reserved nor dedicated to public use and may be alienated may be taken by adverse possession.

6. Adverse possession ☞9.

Pueblo lands of city of San Diego not reserved for specific public use and subject to alienation held subject of adverse possession (Freeholders' Charter of San Diego adopted in 1889 [St. 1889, p. 656, art. 2, c. 2, § 1, subd. 50, as amended by St. 1909, p. 1147]).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by J. J. Richert against the City of San Diego. From a judgment for plaintiff, defendant appeals.

Affirmed.

M. W. Conkling, City Atty., and H. C. Hopkins, Deputy City Atty., both of San Diego, for appellant.

Herbert C. Kelly, of San Diego, for respondent.

CARY, P. J.

Plaintiff brought this action against the city of San Diego to quiet title to certain land within the city limits of the city of San Diego. The complaint contains the usual averments. The answer denies plaintiff's ownership and right to possession, and admits that the defendant claims a right to the property in question.

The cause was tried upon an agreed statement of facts. The court found that plaintiff was the owner, in possession, and entitled to the possession, of the property in question; that defendant claimed title to said property, but that the same was without right. Judgment was given in favor of plaintiff.

The defendant, City of San Diego, urges as grounds for reversal (1) that the statement of facts contains only probative, as distinguished from ultimate, facts, and therefore findings are necessary; that the findings as made are insufficient because the elements of adverse possession are not severally found; that, even if the court's findings are sufficient, the agreed statement is insufficient to support them because the agreed statement contains no sufficient facts regarding the hostility of the possession or the notice to defendant of such possession; (2) that defendant city of San Diego holds these pueblo lots in trust for the use of the public, and does not hold them in a propri-

etary capacity, and hence the land may not be taken from the city by adverse possession; and (3) that, since the Legislature directed that these pueblo lands be reserved from sale until 1930, that fact in itself shows a clear intention of the state to except this land from adverse possession.

Omitting the formal parts, the agreed statement is as follows:

"Reference is hereby made to Plat of the City of San Diego filed herewith marked Exhibit 'A' upon which diagram the property adjacent to that involved in this action is marked with the letter 'R' in red ink in such cases as the Pueblo lot so marked is owned by the plaintiff and is marked with the word 'city' in print in such cases as the Pueblo lot so marked is owned by the defendant. On said diagram the property involved in this action is cross-hatched in blue ink and the red lines shown on said diagram represent the approximate location of fences as the same now exist and have existed for twelve (12) years last past. Of said fences so shown on said diagram those along the Right-of-Way of the Santa Fe Railway were constructed many years ago by said Railroad Company. The fence surrounding the enclosure including the Northerly portion of Pueblo Lot 1292 and adjacent tracts was built by plaintiff. The most Southerly, East and West fence line shown on said diagram was built by the owners of the land lying South thereof. The two cross-fences indicated by wavy lines running from said most Southerly fence line Northerly to the Santa Fe Railroad were built by plaintiff about 1914. By agreement between plaintiff and Max Watson, then City Forester in charge of the City Pueblo Lands, plaintiff built the fence indicated by red line following the Highway from the Northerly line of Pueblo Lot 1299 Northerly and thence Easterly along the Linda Vista Highway to the City Limits and defendant City built the two cross-fences indicated on said diagram running Southerly from said Highway, marked on said diagram as Linda Vista Road, to the Santa Fe Railroad Right-of-Way; at the same time defendant City constructed the fence along the Northerly boundary of the tract in dispute in this action from the Westerly line of Pueblo Lot 1278 to the Easterly boundary of Pueblo Lot 1292. About seven years ago plaintiff constructed two cross-fences dividing into three parcels the land involved in this action lying North of the Railroad Right-of-Way, the approximate location of which cross-fences is shown on this diagram by red lines. Since the construction of said fences about twelve years ago the portion of the land involved in this action lying North of the Railroad Right-of-Way has been continuously enclosed by the fences previously mentioned and has been occupied by the plaintiff continuously throughout said period hav-

ing been cultivated by him and his tenants with crops of beans and hay raised thereon during eight or nine consecutive years of said period, since which time and during the portions of said years in which cultivation occurred while the land was not used in actual cultivation the land has been used continuously for pasturage purposes by plaintiff. Throughout said period of the twelve years last past the portion of said premises in controversy lying South of the Railroad Right-of-Way has been used continuously by plaintiff for pasturage purposes. Throughout said period plaintiff has owned and operated a dairy and cattle ranch, the headquarters of which are indicated on Exhibit 'A' by the words 'ranch houses' and the land enclosed as shown on said Exhibit 'A' has, throughout said period been used by him continuously for pasturage for cattle varying in number from approximately one hundred fifty to approximately three hundred head.

"It is further stipulated that no taxes of any nature whatsoever have been assessed upon or against the property involved in this action at any time during said period of the last twelve years; that plaintiff has made application to pay both city and county taxes upon said property in dispute but that payment of said taxes has been refused upon the ground that said land did not appear upon the assessment rolls.

"Throughout said period of approximately twelve years last past, the possession of the property in dispute by plaintiff has been under claim of right and has been exclusive of all other persons and hostile to the claims of defendant City and all other persons; that no person other than plaintiff has occupied any of said property in dispute herein at any time during said period of twelve years and that the use and occupancy of said property by plaintiff and plaintiff's claim of title thereto was known throughout said period to the occupants of adjoining and nearby lands.

"It is hereby further stipulated that the copy of the Pascoe Map of the Pueblo Lands of the City of San Diego on file in the office of the Recorder of San Diego County as Miscellaneous Map No. 36 is deemed to have been duly admitted in evidence in this action.

"It is further stipulated that all of the property in dispute in this action lies within the Pueblo lands of the City of San Diego as shown on said Pascoe Map and that all of the property involved herein lies North of the San Diego River and that the record title to said Pueblo Lands was acquired by grant to the Pueblo of San Diego and confirmed by United States patent."

When construed with the plat Exhibit A it reveals the following: The land in controversy is approximately rectangular in shape, its length from east to west being some four times its depth from north to south. Running from east to west through this land are the tracks

of the Santa Fé Railway, which divide the land into a north and south half of nearly equal size. As the facts regarding these two halves are different, they may best be described separately.

The parcel lying north of the tracks had, for twelve years, immediately preceding the commencement of this action, been completely inclosed by a fence. It is bounded on the north by land belonging to the defendant city, on the south by the Santa Fé Railway right of way, and on the east and west by land belonging to plaintiff. This northerly tract has for said twelve years been occupied by plaintiff continuously, having been cultivated with crops of beans or hay for eight or nine consecutive years, and, when not so cultivated, used by plaintiff continuously for pasturage.

The tract lying south of the Santa Fé right of way, while fenced on its northern boundary by the right of way fence of the railway, has no fence erected on its eastern, southern, or western boundaries. However, it forms part of a larger area, the rest of which is owned by plaintiff, and around the outer limits of which there has been a fence for said 12-year period. Regarding this tract of land, the statement of facts recites: "Throughout said period of the twelve years last past the portion of said premises in controversy lying south of the railroad right of way has been used continuously by plaintiff for pasturage purposes."

[1] Regarding the question of findings, plaintiff concedes that the facts set forth in the statement are probative rather than ultimate. Findings are therefore necessary. *Crisman v. Lanterman*, 149 Cal. 647, 654, 655, 87 P. 89, 117 Am. St. Rep. 167; *Zimmerman v. Continental Life Insurance Co.*, 99 Cal. App. 723, 727, 279 P. 464.

[2] The court's findings follow the language of the complaint, and find the ultimate fact of ownership in the plaintiff. This is sufficient, no finding of the several elements necessary to make the possession adverse being necessary. *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 594, 77 P. 1113; *Cooley v. Miller & Lux*, 156 Cal. 510, 523, 105 P. 981; *Aronson & Co. v. Pearson*, 199 Cal. 295, 304, 305, 249 P. 191; *Colver v. W. B. Scarborough Co.*, 73 Cal. App. 421, 433, 434, 238 P. 1096.

[3] Does the agreed statement support the court's findings? Defendant urges particularly that it is insufficient, first, because it contains no showing of the hostile character of plaintiff's occupancy; second, because it contains no showing of notice to defendant; and, third, because it contains no showing that the land had been cultivated or improved or protected by a substantial inclosure. In support of its contention defendant cites: *Saecker v. Cohn*, 180 Cal. 151, 179 P. 890; *Pacific Gas & Electric Co. v. Crockett L. & C. Co.*, 70 Cal. App. 283, 233 P. 370; *Cory v. Hotchkiss*, 31

Cal. App. 443, 160 P. 841; *De Frieze v. Quint*, 94 Cal. 653, 30 P. 1, 28 Am. St. Rep. 151; *Brandon v. Umpqua Lumber Co.*, 26 Cal. App. 96, 146 P. 46; *Secret Valley Land Co. v. Perry*, 187 Cal. 420, 202 P. 449; *San Francisco Credit Clearing House v. Wells*, 196 Cal. 701, 239 P. 319, and *Kern County Land Co. v. Nighbert*, 75 Cal. App. 103, 241 P. 915. We have carefully examined the authorities cited by defendant, and have concluded that there is no merit to this contention.

Regarding the contention that the lands are of such character that they may not be taken from the defendant city by adverse possession, it may be noted at the outset that certain principles have been well established by our courts.

[4] Where land held by the state or any of its subdivisions has been actually reserved for or dedicated to some specific public use, there can be no adverse holding thereof which can give title to the adverse claimant. *Board of Education v. Martin*, 92 Cal. 209, 213, 217, 28 P. 799; *County of Placer v. Lake Tahoe Railway Co.*, 58 Cal. App. 764, 783, 209 P. 900; *City & County of San Francisco v. Bradbury*, 92 Cal. 414, 418, 28 P. 803; *Holladay v. San Francisco*, 124 Cal. 352, 57 P. 146; *San Diego v. Cuyamaca Water Co.* (Cal. Sup.) 278 P. 840; *San Diego v. Cuyamaca Water Co.* (Cal. Sup.) 287 P. 475; *Hoadley v. San Francisco*, 50 Cal. 265; *Mills v. City of Los Angeles*, 90 Cal. 522, 532, 27 P. 354; *County of Yolo v. Barney*, 79 Cal. 375, 378, 379, 21 P. 833, 12 Am. St. Rep. 152. And this is the law regardless of whether or not the land be of pueblo origin. *County of Placer v. Lake Tahoe Ry. Co.*, *supra*; *County of Yolo v. Barney*, *supra*.

[5] The law is likewise clear that, if land held by the state or any of its subdivisions is neither reserved for nor dedicated to some public use and may be alienated by its owner, title may be wrested from it by adverse possession. *Board of Education v. Martin*, 92 Cal. 209, 213, 28 P. 799; *Ames v. City of San Diego*, 101 Cal. 390, 393, 394, 35 P. 1005; *Humboldt County v. Van Duzer*, 48 Cal. App. 640, 643, 644, 192 P. 192; *People v. Banning Co.*, 167 Cal. 643, 649, 140 P. 587; *Orack v. Powelson*, 3 Cal. App. 282, 285, 85 P. 129; *San Francisco v. Straut*, 84 Cal. 124, 24 P. 814.

[6] The agreed statement of fact does not show that the lands in question are either reserved for, or dedicated to, some specific public use. It does show, however, that the property lies within the pueblo lands of San Diego at a point north of the San Diego river, and that the record title thereto was acquired by grant to the pueblo of San Diego and confirmed by United States patent. The question is then presented: May the pueblo lands of the city of San Diego which are neither reserved for nor dedicated to some specific pub-

lic use be taken from that city by adverse possession?

Appellant contends that all land owned by the former pueblo, now city, of San Diego, except such land as is held by it in trust for the mere purpose of conveying the legal title thereto to its true owner, is held by it in trust for the benefit of the inhabitants of the city, and that such fact, in and of itself, puts the land on a parity with land expressly reserved for or dedicated to a particular public use, and therefore exempts it from claim under adverse possession. In a brief, which gives evidence of extended research, practically every one of the many cases to be found in the reports of our own state and those of the United States Supreme Court bearing on the origin and history of the Mexican pueblo and the many interesting questions which have arisen peculiar to the nature of the pueblo lands has been cited. Any extensive quotation from these authorities or a repetition of this history as there disclosed would extend this decision unduly, and we shall therefore confine ourselves to a brief statement of such facts or legal principles as have been established, together with a citation of the cases in support thereof.

The question of the origin of the pueblo lands and their precise status has been the subject in this state of numerous decisions, many of which are of great length and have traced the history of the pueblo back to Spain, the country of their origin. In *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237, 245-247, 39 P. 762, we find the essential differences between the ownership of lands within the limits of the pueblo or town under the Spanish and Mexican law and land ownership within the typical town or city of our country set forth in a singularly clear manner. The four square leagues of land usually granted to pueblos were by the latter's authorities divided into classes, most of which were for the common use of the inhabitants. But there were some classes of these lands which might be reduced to private ownership, such as the solares, upon which were built dwellings and stores, and the suertes, used for cultivation or planting. *Hart v. Burnett*, 15 Cal. 530, 553, 555. The land within the pueblo limits, except such solares and suertes as had been reduced to private ownership, was held by the pueblo in trust for the benefit of the inhabitants. *Townsend v. Greeley*, 5 Wall. 326, 18 L. Ed. 547, 549; *Hart v. Burnett*, *supra*, at pages 557, 568, 569, 573 of 15 Cal.; *San Francisco v. Canavan*, 42 Cal. 541, 555, 557. The pueblo, however, did not have the absolute control of these lands, even for the purposes of the trust under which they were held, for, while under the Mexican system the pueblo might dispose of the land in pursuance of the trust under which it was held, yet the Mexican government had the power to direct how the trust,

should be executed and to enlarge or limit the power of the pueblo with respect to its disposition of these lands. The Mexican government further had the power to dispose of these lands itself without the consent of the pueblo authorities. *San Francisco v. Canavan*, supra, page 555 of 42 Cal. When the United States took over what is now California, no change in the status of privately owned land occurred. *Teschemacher v. Thompson*, 18 Cal. 11, 22, 24, 79 Am. Dec. 151; *Ward v. Mulford*, 32 Cal. 365, 372. In fact, under the terms of the treaty of Guadalupe Hidalgo, it became the duty of the United States to protect all rights of property emanating from the Mexican government previous to that treaty. *Knight v. United Land Association*, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974, 982. In due course, the power formerly lodged in the Mexican government regarding the management, control, or disposition of these pueblo lands became vested in the state of California, to be exercised by its Legislature, and has there since remained, except in such instances as that body has in turn delegated it to the municipal authorities. *San Francisco v. Canavan*, supra, page 557 of 42 Cal.; *City of Monterey v. Jacks*, 139 Cal. 542, 73 P. 436.

With this general background we now address ourselves to the precise situation of the Pueblo lands of the city of San Diego. The Freeholders' Charter of San Diego adopted in 1889 (St. 1889, p. 643) provides (art. 2, c. 2, § 1, subd. 50) that the common council shall have power "to provide for the sale and conveyance, or lease, of all lands now or hereafter owned by said City not dedicated or reserved for public use." In 1909, by an amendment to this subdivision 50 (St. 1909, p. 1147), all pueblo lands owned by the city in the district where the lands here in controversy are situated (north of the San Diego river) were reserved from sale by the city until 1930, "provided, however, that at any time should it be desired to sell any part or portion of such public lands prior to the year 1930, the sale thereof may be authorized by an ordinance duly passed by the common council and ratified by the electors of the city of San Diego at any special or general municipal election." As to all other land owned by the city not dedicated or reserved for public use, the common council retained the same power of sale, conveyance, or lease as was given by the 1889 charter. St. 1909, p. 1147. Both the 1889 Freeholders' Charter and the 1909 amendment thereto had, of course, received the vote of the electors of San Diego before being submitted to, and approved by, the legislature. It will thus be seen that for a period of twenty years—1889 to 1909—the city of San Diego through its common council was empowered to sell the pueblo lands which are the subject of controversy here. It will further be seen that for twenty years thereafter—1909 to 1929—the

power of sale of the lands here involved was still retained by the city, but with the added provision that any ordinance authorizing a sale must first be ratified by the electors of the city. The adverse possession in the case at bar occurred during the last twelve years of this second twenty-year period.

Briefly to sum up the situation as developed thus far, we find that the lands in question, while of pueblo origin, have never been either dedicated to, or reserved for, a specific public use. Furthermore, in the days when San Diego was a Mexican pueblo, the government of Mexico had plenary power to control the manner of sale of these pueblo lands by the municipal authorities, and the Mexican government could also, without consulting the municipal authorities, dispose of the pueblo lands of San Diego as its judgment might dictate. Also the state of California—the sovereign power which had succeeded to the plenary powers over pueblo lands formerly possessed by the government of Mexico—had, through its Legislature in conjunction with the vote of the electors of San Diego, given to the city of San Diego the power to alienate or sell these pueblo lands, and the city of San Diego had possessed that power absolutely for the twenty years from 1889 to 1909 and qualifiedly for the succeeding twenty years from 1909 to 1929.

In three cases our Supreme Court has heretofore passed directly on various questions incident to the pueblo lands of San Diego.

The earliest of these is *Ames v. San Diego*, 101 Cal. 390, 35 P. 1005, decided in 1894. There plaintiffs, solely by virtue of adverse possession, claimed title to certain pueblo land on which they had erected a house and in which they and their grantors had lived continuously since 1846. The findings of the trial court did not attempt to define the nature of the title which defendant city of San Diego had in this land beyond a mere statement that in 1874 the title of the city of San Diego as successor to the Mexican pueblo of San Diego had been confirmed by the United States "as the pueblo lands of said defendant and in trust for municipal purposes." In its decision our Supreme Court, recognizing that such property was held in trust by San Diego for its inhabitants to the extent that it could not be sold under execution issued upon a money judgment against the city then quoted from *Hart v. Burnett*, supra, to the effect that the solares, i. e., building lots, and the suertes, tracts for cultivation or planting, could be disposed of by the pueblo to the settlers for their individual and exclusive benefit. It then held that pueblo lands held by the city, not dedicated to some specific public use, and which were capable of alienation by the city, were subject to acquisition by adverse possession. As showing the significance which our Supreme Court

attached to the fact that the city possessed the power of alienation, we quote the following from page 394 of 101 Cal., 35 P. 1005, 1006:

"As to land which is the subject of alienation, we are clearly of the opinion that the title of the city thereto may be lost by the adverse possession of another for the requisite period of time; and in regard to pueblo lands of this latter character, such as house lots, we see no reason why the statute of limitations should not apply in favor of an adverse possessor, precisely the same as if such land had been acquired by the city by purchase, and for purposes of sale, or for any other use not strictly municipal."

The second of these is *San Diego v. Linda Vista Irrigation District*, 108 Cal. 189, 41 P. 291, 35 L. R. A. 33, decided in 1895. In that case certain pueblo lands of the city had been included within the limits of the defendant irrigation district. The district made an assessment on all lands in the district, including the pueblo lands in question. Upon failure of the city to pay the assessment on these pueblo lands, they were sold to the district, whereupon the city brought action to quiet its title in the land. The Supreme Court, referring to the provisions of the 1889 charter which empowered the city to sell or lease such of its land as had not been dedicated or reserved to public use, and stating that the lands then being considered were among those which could be sold by the city, held them subject to the irrigation district tax, and refused to quiet the city's title.

The third and most recent case is *San Diego v. Cuyamaca Water Co.* (Cal. Sup.) 287 P. 475, decided in 1930. There the rights of the former pueblo, now city, of San Diego in the water of the San Diego river were under consideration, and it was held that the rights of the city in this water could not be lost by adverse possession, but in commenting on *Ames v. San Diego*, supra, the court at page 493 of 287 P., points out clearly the distinction between pueblo lands held by the city of San Diego in trust for a specific public use and pueblo lands which might be alienated by the city showing that the former could not, while the latter could, be taken from the city by adverse possession.

Defendant city of San Diego contends that the decision in *Ames v. San Diego*, supra, did not deal with pueblo lands in the sense that that term is used in the case at bar, but merely dealt with a solare or house lot which had theretofore been set aside by the pueblo for the private ownership of the then plaintiff; the legal title thus being held by the city of San Diego in trust for the then plaintiff. Defendant argues that, if the language used in the *Ames Case* should be held to apply to pueblo lands such as we are now considering, the *Ames Decision* is incorrect, since it vio-

lates the fundamentals of the Spanish and Mexican law with reference to pueblo lands. We have carefully considered defendant's attempt to differentiate the decision in the *Ames Case*, but are constrained to hold it to be without merit.

Counsel for defendant makes the additional point that the 1909 amendment to the Freeholders' Charter prohibiting the sale of the pueblo lands until 1930 would be nullified were squatters allowed to acquire the land simply by going on it and staying there. A somewhat similar contention was made in *People v. Banning Co.*, 167 Cal. 643, 647, 648, 140 P. 587, and it was there held that the land was subject to adverse possession nevertheless.

We hold therefore that, even though the lands in question be pueblo lands of the city of San Diego, nevertheless the fact that they have not been reserved for or dedicated to a specific public use and are subject to alienation by the city renders them, under the decisions heretofore cited, subject to the law of adverse possession.

The judgment is affirmed.

We concur: BARNARD, J.; MARKS, J.

109 Cal. App. 593

TOPHAM et al. v. HUNTINGTON et al.
Civ. 161.

District Court of Appeal, Fourth District,
California.

Nov. 17, 1930.

1. Appeal and error ⇐965.

Venue ⇐52(1).

Retaining cause for convenience of witnesses is within discretion of trial court, whose finding cannot be disturbed unless there is abuse of discretion.

2. Venue ⇐52(1).

In determining whether cause should be retained in county where instituted on ground of convenience of witnesses, number of witnesses residing nearby is not alone decisive.

3. Appeal and error ⇐900.

All presumptions favor ruling of trial court.

4. Venue ⇐52(1).

Retaining cause in county where instituted for convenience of witnesses held not abuse of discretion.

Plaintiffs intended to call four witnesses other than the parties, and defendant in-

tended to call five. The action involved a contract relative to the purchase of certain real property in which defendant claimed plaintiffs were in default in payment, and that plaintiffs had fraudulently induced defendant to enter agreement for termination of contract.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by T. E. Topham and another against D. C. Huntington and another. From an order denying a motion for change of venue, defendant Mathilde S. Huntington appeals. Affirmed.

Hugo Platz, of Los Angeles, for appellant.

Walter C. Davison, of Riverside, for respondents.

WARNER, Justice pro tem.

The appeal herein is from an order denying a motion for change of venue. Plaintiffs T. E. Topham and Jessie A. Topham, husband and wife, brought their action in the superior court of the state of California in and for the county of Riverside. The defendants D. C. Huntington and Mathilde S. Huntington, husband and wife, were residents of the county of Los Angeles, Cal., at the time plaintiffs instituted said action. D. C. Huntington, one of the defendants, was not served with summons in said cause, and the proceedings herein were and are on behalf of the defendant Mathilde S. Huntington alone. Said appearing defendant filed her notice of motion, affidavit of residence, affidavit of merits and demand for a change of place of trial, alleging as a ground for her demand for change of place of trial her residence in said county of Los Angeles; she also filed her answer and cross-complaint in said action at the same time, to wit, November 22, 1929. The sufficiency of the proceedings are not challenged. Said motion was noticed for hearing December 9, 1929, and came on regularly to be heard at said time. At the time of or immediately before said hearing the plaintiffs gave notice of motion to retain said cause in said superior court, alleging as a ground therefor the convenience of witnesses, and filed therewith an affidavit naming the witnesses plaintiffs expected to call, stating what plaintiffs expected to prove by each of said witnesses. When the said motion of said defendant was called for hearing the said motion of the plaintiffs came on for hearing before said court also. The court continued the hearing of each of said motions to December 16, 1929, in order to give the said defendant time within which to file affidavits opposing the motion to retain said cause in said court. On December 16, 1929, the said defendant filed a notice of motion for change of place of trial to the said county of Los Angeles, the grounds of said motion

being the convenience of witnesses. She also filed an instrument designated "Offer of and Stipulation" and an affidavit setting forth the names of witnesses whom said defendant expected to call in said cause and the matters she expected to prove by their testimony. Plaintiffs filed their answer to the cross-complaint. Each of said motions came on regularly to be heard on the said 16th day of December, 1929, and were argued by counsel for the respective parties. The court denied the motion for change of place of trial, at which time defendant gave notice of appeal from the order denying the motion. The plaintiffs, respondents herein, ask for an affirmance of the order appealed from because of the failure of appellant to comply with the rules of this court in the preparation of her brief, and while the defendant has failed to print any of the evidence in her brief or in an appendix thereto, the record being short, we have decided to pass upon the merits of the appeal. It is admitted that this action is one that under proper proceedings taken and had must be tried in the county of the residence of the defendants unless the cause was properly retained on the ground of convenience of witnesses.

The cause of action involved the sale of citrus property a few miles from the city of Riverside, but within the county of San Bernardino. The affidavit filed by plaintiff shows that plaintiff intended to call for his witnesses two persons who reside in the city of San Bernardino, a distance of approximately 12 miles from the city of Riverside and approximately 60 miles from the city of Los Angeles; also three persons who live in the city of Riverside and one E. M. Lash, a resident of Rialto, Cal.; that the said city of Rialto is approximately 12 miles from the city of Riverside in the county of San Bernardino, and approximately 55 miles from the city of Los Angeles. The instrument designated as "Offer of and Stipulation" is as follows:

"Offer of and Stipulation. It is hereby offered as a stipulation and hereby stipulated that the testimony of certain witnesses of the plaintiffs as set out in the affidavit of T. E. Topham on file herein, may be used at the trial of this action, in the same manner as if the said witnesses were actually present in court, subject, however, to any objection that defendant may make to such testimony if the same had been given by the witnesses if present, save as to the form of the testimony. The testimony thus stipulated to is the testimony of Robert Topham, as set out on page 2 of said affidavit of T. E. Topham; the testimony of H. L. Thompson, as set out on page 3, of said affidavit; the testimony of W. G. Ehlert, as set out in page 3 of said affidavit; the further testimony of Robert Topham as contained on page 4 of plaintiff's affidavit; the testimony of E. M. Lash, as set out on page

4 of said affidavit. Hugo Platz, attorney for M. S. Huntington."

[1, 2] By referring to the affidavit of T. E. Topham as disclosed by the transcript, we find no such numbered pages in the transcript as are referred to in the "Offer of and Stipulation" above quoted, in any wise referring to the said affidavit. Hence it is impossible for this court to determine whether or not all or what portion of the testimony of Robert Topham, H. L. Thompson, W. G. Ehler, or E. M. Lash is intended to be stipulated to. The affidavit filed by the appellant herein in support of her motion for a change of place of trial on the ground of convenience of witnesses, and as opposed to the motion for the retention of said cause in the said court by the respondents herein, contains the names and residences of the witnesses defendant expects to call and a statement as to what said defendant expects to prove by their testimony, but as to the witness D. C. Huntington, defendant herein, who has not yet been served, it does not appear where the said D. C. Huntington resides. However, it does appear that he does not reside in Riverside county, and that the defendants are living separate and apart. The motion for retention of said cause in the court where the same was instituted on the ground of convenience of witnesses and the said motion of the defendants for change of place of trial to Los Angeles county are addressed to the discretion of the court, and the finding of the court thereon cannot be disturbed on appeal unless there is an abuse of discretion. *Tait v. Midway Field Oil Co.*, 28 Cal. App. 107, 151 P. 378; *Hanchett v. Finch*, 47 Cal. 192; *Blevins v. Blevins*, 178 Cal. 318, 173 P. 402.

The number of witnesses who reside in a county or in close proximity thereto is not alone decisive of the issue. In the case of *Bird v. Utica Mining Co.*, 2 Cal. App. 672 at page 673, 86 P. 509, the court says: "The refusing or granting of a motion for a change of venue upon the ground that the convenience of witnesses and the ends of justice would be promoted thereby lies in the sound legal discretion of the trial court. * * * The mere preponderance in the number of witnesses does not necessarily control the matter; and unless it appears that the trial court has abused its discretion the appellate court will not interfere with the action of the lower court. * * * It is true that the witnesses for appellants, 17 in number, resided in Calaveras county; but it is also true that the plaintiff and his witnesses, six in number, resided in San Francisco."

Again in *Scott v. Stuart*, 190 Cal. 526 at page 529, 213 P. 947, 948, the court says: "There is no merit in the suggestion that the larger number of witnesses reside in or near the county of Monterey. A mere preponderance in number of the witnesses which either

party expects to produce will not necessarily determine the order to be made."

[3, 4] In the instant case it appears that the plaintiff intended to call four witnesses other than the parties, and the defendant intended to call five witnesses other than the parties herein.

From the record it appears that the plaintiff and defendant had a contract relative to the purchase and sale of certain real property situated within a few miles of the said city of Riverside but within the county of San Bernardino; that the defendant claims plaintiffs were in default in certain payments under said contract; that said plaintiffs by certain false and fraudulent representations induced said defendants to enter into an agreement for the termination of said contract of purchase and sale and for the disposition of the crop of oranges then matured on said premises. All presumptions are in favor of the ruling of the trial court. *Grant v. Bannister*, 145 Cal. 219, 78 P. 653.

Appellant has failed to point out any abuse of discretion, and upon such ground the order appealed from should be affirmed. *Grant v. Bannister*, supra. We will, however, assume for the argument only that the "Offer of and Stipulation" did in fact admit all of the testimony of all of the witnesses named therein. There are two witnesses whose testimony was not attempted to be admitted by said "Offer of and Stipulation" and the defendant intended to call five witnesses. However, the number of witnesses is not decisive of the question. *Bird v. Utica Gold Mining Co.*, supra; *Scott v. Stuart*, supra. Under the issues herein the fraud claimed consisted in false representations both when said property was first purchased by the plaintiffs from the defendants and when the said premises were returned to said defendants by said plaintiffs.

In *Hanchett v. Finch*, 47 Cal. 192 at page 193, the court said: "The Court below must necessarily to some extent exercise its discretion in such cases, and has a better opportunity than we to determine whether the application is made in good faith, and whether the ends of justice will be best subserved by granting or refusing the motion. The mere preponderance in the number of witnesses on the one side or the other is not necessarily decisive of the application; and unless there is reason to believe that the Court below has abused its discretion or injustice has been done, we are not inclined to interfere."

In *Blossom v. Waller*, 30 Cal. App. 439, at page 441, 158 P. 509, 510, the court said: "Regard may be given to the character of the proposed testimony; and the court may therefore determine for itself from the showing made whether or not there be any necessity for the testimony of any or all of the desired witnesses. [Citing cases.]"

Applying these rules to the instant case, the character of the testimony, the number of witnesses, and all the facts and circumstances, even though the "Offer of and Stipulation" be considered to admit all the testimony of certain witnesses that it purports to affect, yet we find no abuse of discretion.

The order appealed from is affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

Action by William F. Adams, as administrator of the estate of Leo R. Schwanekamp, deceased, against the Southern Pacific Company, James W. Cole, Charles Long, and the County of San Bernardino. Judgment for the defendants, and plaintiff appeals.

Judgment for James W. Cole and Charles Long affirmed, and judgment for the County of San Bernardino reversed.

William F. Adams, of Los Angeles, for appellant.

Swing & Wilson, of San Bernardino, for respondents.

MARKS, J.

This is an action brought by the administrator of the estate of Leo R. Schwanekamp, deceased, for damages resulting from the death of deceased as the result of an accident which occurred while he was driving his automobile on a public highway of the county of San Bernardino connecting the cities of Redlands and San Bernardino. The case came before the court below upon the demurrers of respondents to appellant's second amended complaint, which demurrers were sustained as to respondents Cole and Long without leave to amend, and the county of San Bernardino with leave to amend. A judgment was entered in favor of Long and Cole following the sustaining of their demurrer to the second amended complaint, and in favor of the county of San Bernardino upon the failure of appellant to file an amended complaint within the time fixed by the trial court. Appellant filed separate notices of appeal from each of these judgments, but the case comes before us on a single record.

It is alleged in the second amended complaint that James W. Cole and Charles Long were highway commissioners of the county of San Bernardino having jurisdiction over the particular road in question. The Southern Pacific Company maintained a crossing over this highway. The county of San Bernardino had for a long time maintained a pavement in the center of the highway. Some time prior to the accident the paved portion of the highway had been widened for a distance of a few blocks by the construction of additional pavement fifteen feet in width on the north side of the former pavement. This new pavement extended up to the right of way of the Southern Pacific Company until it reached a point about fifteen feet from the most easterly rail of the four tracks of the Southern Pacific Company, leaving this space unpaved and unimproved and upon which the rails of the Southern Pacific Company were permitted to stand at least eight inches above the ground. On the night of August 24, 1927, the deceased was traveling westerly

109 Cal. App. 728

ADAMS v. SOUTHERN PAC. CO. et al. Civ. 119.

District Court of Appeal, Fourth District,
California.

Nov. 20, 1930.

1. Appeal and error ⇨232(1½).

Contention causes of action were improperly joined and not separately stated, not made by demurrer, cannot be urged in reviewing court for first time.

2. Appeal and error ⇨883.

Party consenting thereto cannot object to judgment, order, or ruling.

3. Appeal and error ⇨883.

Reviewing court will not disturb order or judgment on appeal taken by party consenting thereto.

4. Appeal and error ⇨882(5).

Plaintiff, requesting that defendants' demurrer be sustained without leave to amend, consented to judgment for defendants, which could not be questioned on appeal.

5. Parties ⇨27.

Action against railroad, highway commissioners, and county, for death of motorist in automobile overturning when striking railroad tracks in unpaved portion of intersection, did not show misjoinder of parties defendant (Code Civ. Proc. §§ 379a, 379b, 379c).

6. Automobiles ⇨301(3).

County held liable for death of motorist in automobile overturning when striking railroad tracks in unpaved portion of intersection, under allegations that county knew of dangerous condition of highway and had available funds to repair same.

Appeals from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

upon the new pavement and proceeded across the unpaved portion of the intersection, striking the rails of the Southern Pacific Company with such force that his automobile was overturned and he suffered injuries which resulted in his death. It is further alleged that before the time of the accident respondents had notice of the defective and dangerous condition of the highway and that the county of San Bernardino had available funds with which to pay the cost of remedying the same.

Apparently three separate grounds of negligence are alleged: First, the failure to maintain a safe highway crossing over the railroad tracks; second, the failure to pave a portion of the Southern Pacific Company's right of way between the end of the new pavement and the railroad tracks; third, the failure to post any notices, signs, lights, or barriers at the end of the pavement warning travelers of the dangerous condition of the unpaved portion of the crossing over the right of way.

[1] Respondents demurred to the second amended complaint upon the grounds: First, that it failed to state a cause of action against them or any of them; second, a misjoinder of parties defendant; and, third, that it was uncertain, ambiguous, and unintelligible. In their briefs respondents urge a further ground of objection in that they maintained that two causes of action are improperly united and are not separately stated therein. While there might be considerable merit in this last contention, it was not made by demurrer in the court below and cannot be urged here for the first time.

The record shows that on October 27, 1928, the demurrer of the defendants Cole and Long was sustained, giving appellant ten days in which to amend. It further appears that on the 2d day of November, 1928, at the request of the attorney for appellant this order was amended by the court to read as follows: "Demurrer of Defendants Cole and Long to second amended complaint sustained without leave to amend." Judgment in favor of these respondents followed the entry of this minute order.

[2-4] It is well-settled law in California that a party cannot object to a judgment, order, or ruling consented to by him. *Ackerman v. Schultz*, 178 Cal. 190, 172 P. 609; *Baker v. Eilers Music Co.*, 175 Cal. 652, 166 P. 1006. This court will not disturb an order or judgment on an appeal taken by a party who consented thereto. *Hibernia Savings & Loan Society v. Waymire*, 152 Cal. 286, 92 P. 645. Appellant having requested that the demurrer of Cole and Long be sustained without leave to amend, he must be held to have consented to the judgment entered in their favor, which followed as a matter of

course. The judgment in favor of these defendants must be sustained.

Respondents urge with much seriousness that there was a misjoinder of parties defendant. Since the adoption of sections 379a, 379b, and 379c of the Code of Civil Procedure in 1927 (St. 1927, pp. 477, 478, 631), we cannot agree with this contention. These sections provide as follows:

379a. "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

379b. "It shall not be necessary that each defendant shall be interested as to all relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

379c. "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties."

[5] Under the provisions of these sections as construed in the cases of *Nelson v. Marsh*, 100 Cal. App. 578, 280 P. 695; *Teeter v. City of Los Angeles* (Cal. Sup.) 290 P. 11; and *McPhetridge v. Smith*, 101 Cal. App. 122, 281 P. 419, we cannot hold that there was a misjoinder of parties defendant.

[6] Respondents seriously contend that appellant's second amended complaint fails to state any cause of action against the county of San Bernardino. Since this case was decided in the lower court, the case of *Brooks v. City of Monterey* (Cal. App.) 290 P. 540, has been decided by the First District Court of Appeal. In the *Brooks* case the complaint alleged negligence on the part of the city of Monterey in failing to post warning signs or barriers at the terminus of a paved street which ended on a bluff overlooking the ocean. Plaintiff's decedent drove over the bluff and was killed, and a judgment against the city was founded upon its negligence in failing to maintain lights, barriers or signals to warn travelers of the dangerous condition at the end of the street. The judgment against the city was sustained. Upon the authority of this case we must hold that the second amended complaint of appellant stated a cause of action against the county of San Bernardino and that the judgment rendered in favor of the county must be reversed.

The judgment rendered in favor of respondents James W. Cole and Charles Long is affirmed. The judgment rendered in favor of the County of San Bernardino is reversed.

We concur: CARY, P. J.; BARNARD, J.

109 Cal. App. 625

Ex parte GROSSMAN.
Cr. 1991.

District Court of Appeal, Second District,
Division 2, California.
Nov. 18, 1930.

1. Contempt ☞6.

Attorney *held* in contempt for language and conduct in repeatedly insisting on making further argument or statement respecting affidavit on which court had already ruled (Code Civ. Proc. § 1209).

It appeared that attorney, replying to question of court regarding nature of proposed statement, said that he could not indicate its nature without making such statement, and that he had a number of things in mind; that he did not feel court could be enlightened any further; that he intended to proceed with case as he thought it should be handled; and that, although it was time to examine jury for cause, he was not precluded from doing other things.

2. Contempt ☞52.

Court, having acted within reasonable time, *held* to have retained jurisdiction to enter contempt judgment against attorney, continuously present (Code Civ. Proc. § 1211).

It appeared that conduct of attorney in trial court was at once recognized as offensive when made, on June 17; that he was continuously present until trial concluded, when he was adjudged guilty of contempt of court, and directed to appear on day following, at which time he appeared, submitted to jurisdiction, and requested that sentence be continued until June 25. Code Civ. Proc. § 1211, provides that contempt committed in court's presence may be punished summarily, but does not specify limitation of time within which final order must be made.

3. Contempt ☞63(4).

Contempt judgment against attorney *held* not void as failing to recite on face alleged contemptuous language or conduct, or obstruction of justice.

It appeared that commitment for contempt recited title and proceedings in case on trial, and contained stenographic report of all remarks of court and attorney, including full statement by court of grounds on which attorney was adjudged in contempt, and that order describing facts "as aforesaid" was made and entered on minutes of court, which were also set forth. Immediately following verbatim recital of attorney's statements and conduct, it was stated that such conduct interrupted proceedings, brought court into disrepute, and impaired its authority, and that attorney was guilty of contempt.

Application by Jason B. Grossman for a writ of habeas corpus against the Sheriff of Los Angeles County to secure release of petitioner from custody under a commitment for contempt.

Writ discharged, and petitioner remanded.

Pacht, Pelton & Warne, of Los Angeles, for petitioner.

Charles P. Johnson, City Prosecutor, and Joe W. Matherly, Deputy City Prosecutor, both of Los Angeles, for respondent.

CRAIG, Acting P. J.

At the time set for the trial of a criminal case pending in the municipal court of the city of Los Angeles, the petitioner, an attorney at law, was inducted into the proceedings as associate counsel. An affidavit of bias and prejudice had theretofore been filed, and counsel for the defendant then requested that the case be transferred to another department of said court. After argument, the affidavit was ordered stricken from the files, and the bailiff was directed to call the jurors from adjoining rooms. Following the ruling of the court denying a transfer, and while jurors were entering the courtroom, petitioner insisted upon being heard further upon the matter. He was repeatedly reminded of such ruling, and ordered to desist from argument, which mandates were ignored. Following the trial and discharge of the jury, petitioner was informed that the court adjudged him in contempt on account of his statements and conduct at the inception of the trial, and he was directed to appear on the following day for sentence. A continuance having been granted at his request, he appeared at a later date, at the time fixed by his counsel by permission of the court, when he was fined \$100, and ordered committed to jail in default of payment thereof. By a petition to this court, following denial of relief in the superior court, the petitioner recites that he is imprisoned under the provisions of said order, and prays that he be restored to his liberty.

[1] There is no controversy as to the occurrences leading to the final order of the municipal court. It is urged that the language and conduct of the petitioner "is not in any sense contemptuous and the petitioner was within his rights as an attorney at law in the trial of a case to conduct himself in the manner and to utter the language as indicated by the record." We do not deem a quotation of the entire colloquy requisite to a proper consideration of the matter. Since the jurisdiction of the municipal court is questioned upon the ground that its order is without legal foundation, the following is accordingly recited from the record before us as substantially constituting the basis therefor, in the view of the committing magistrate. While the bailiff was proceeding to comply with the order recalling the jury, the asserted contemptuous interruptions ensued:

"Mr. Grossman: Perhaps it might be better to wait until later, as I have a few remarks to make concerning this affidavit which is here on file. However, if you prefer to have the jury present, that is up to you. * * * Do you still insist I cannot make a statement?"

"The Court: What is the nature of your statement?"

"Mr. Grossman: Well, the nature of the statement could only be made when I make the statement. I have a number of things in mind.

"The Court: I have ruled on the affidavit and I do not believe that any further statement would enlighten the court any further. The affidavit is before the court; I have considered it very carefully, and I do not believe that I care to hear any further argument on the affidavit itself.

"Mr. Grossman: The statements which I intend to make are not made, as far as I am concerned, with the purpose of enlightening the court. I do not feel the court could be enlightened in that regard. * * * I say, your Honor, I do not think the court could be enlightened, not because I would not try to enlighten the court, but I mean the statement I am about to make pertains to this affidavit. * * *

"The Court: If you want to feel that way, the court does not care to hear from you any further. Please let us go along in an orderly manner. * * * I am always very glad to extend courtesies to lawyers. I am glad to hear anyone, but this is a matter that the court has passed on. So far as what the court has done is concerned, I don't care to reverse my ruling, I do not believe that anything you could say would enlighten the court any further on the affidavit. The affidavit is now before me. I have studied the affidavit; I am satisfied that the conclusions I have come to with regard to it are reasonable, right, just and lawful. Then, why continue the matter? * * *

"Mr. Grossman: Your Honor, I have a question to ask. I am just wondering concerning this procedure, if the counsel for the defendant and the defendant himself would refuse at this time to abide by the ruling of the court, what would the court do in such a case? * * *

"The Court: I do not feel called upon to answer such a question under all the circumstances of the case. Will you please allow the clerk to call a jury? * * *

"Mr. Grossman: If your Honor please, at this time I request the court to have the jury and the other jurors which may serve in this case excluded from the courtroom, as I have a number of statements I would like to make in this matter, which I feel should be made in their absence. * * *

"The Court: The motion will be denied. There is no reason for excluding the jury. You are to examine the jury for cause and not make a statement at this time.

"Mr. Grossman: If the court please, I intend to proceed with this case in the way I intend it should be handled; and at this time I intend to make a statement. If your Honor wants the jurors to hear it, very well; I suggest that the jurors be removed. If your Honor rules that it should not be done, then I will make it with the jurors here. * * * I concede it is time for me to examine the jury for cause, and that is my privilege. The fact that it is time for me to examine the jury does not preclude me from doing other things—I may have the privilege of doing a number of things in this courtroom, as your Honor has the privilege of doing a number of things; and I am only asking to make a statement to your Honor; if I felt I was asking for something which was out of order, if I felt I was asking to make a statement to this jury, or in the presence of this jury, which I thought would prevent my client—

"The Court: Do you care to examine the jurors?"

"Mr. Grossman: Not at this time; I care to make a statement to the court."

The foregoing was followed by further persistent and determined effort by counsel to handle the case as he intended it should be handled, in disregard of repeated rulings and in defiance of the court's endeavors, both by courteous advice, and finally by stern and emphatic but dignified reprimand, to obtain a jury in an orderly manner. Counsel was at least five times thereafter admonished to abstain from argument upon the decided question, and reminded that, if error be committed, "there is a court higher than this court that can correct any errors that I may make and give your client any redress for any wrong that he may have suffered."

Petitioner cites no authority in this state which materially aids in determining wheth-

er or not an offense was committed by such unauthorized and infractious exercise of a self-imposed "privilege of doing a number of things in this courtroom," insisting that he could make a statement of a "number of things" that he had in mind, not "with the purpose of enlightening the court" when he did "not feel the court could be enlightened in that regard," either before the court or jury, which was "up to you." In support of this petition are cited *In re Shortridge*, 5 Cal. App. 371, 90 P. 478; *Platnauer v. Superior Court*, 32 Cal. App. 463, 163 P. 237; *Curran v. Superior Court*, 72 Cal. App. 258, 236 P. 975, 977, and *Hallinan v. Superior Court*, 74 Cal. App. 420, 240 P. 788, 790. No apology was offered, and the petitioner seeks to rest upon a justification. The cited cases are not urged with great enthusiasm as authoritative in this case, and it is conceded that none within this jurisdiction are in point. In *Re Shortridge*, supra, the familiar rule that presumptions are in favor of one charged with contempt of court is followed, and the petitioner was discharged, for the reason that the asserted contemptuous statements and circumstances were not set forth. In *Platnauer v. Superior Court*, supra, it appearing that the petitioner had ceased addressing the court as ordered, and nothing having occurred except at a gratuitously and unnecessarily suggested controversy by the judge, it was held improper to incarcerate and deprive the client of his counsel during the trial. In *Curran v. Superior Court*, supra, it was held in certiorari that it was necessary and proper for counsel to assign remarks of the court as error, and that "no reason appears from the record for the order of the court requiring the petitioner to be seated." The general statement of facts upon which the petitioner had been held in contempt was found to have been untrue. In *Hallinan v. Superior Court*, supra, the petitioner, an attorney representing a defendant then on trial, had objected to a question, and, when ordered to desist from extended argument, he persistently refused to comply with the order. This case seems more clearly in point, though the contemptuous conduct consisted solely in insisting upon argument of a question immediately in issue, rather than upon a question which had been decided, as in the instant proceeding, and it was wholly devoid of other aggravating factors. However, the order of the trial court was sustained, and a hearing by the Supreme Court was denied. Following a thorough review of the authorities above mentioned, it was there observed that an attorney has certain rights and privileges, the exercise of which may not be denied him, but that the right to argue even a pending matter is not unlimited. And it was concluded: "When the court reaches the point that it feels that it is fully advised as to the question under discussion and ready to rule upon the same, and therefore requires no fur-

ther enlightenment from counsel, it is surely clothed with adequate power and authority to order the argument at an end, and, when necessary, in order to enforce its order, to punish the attorney guilty of its infraction. Under such circumstances, the action of counsel in persisting in arguing a matter to the court, after the court has repeatedly ordered him to desist, amounts to disorderly behavior towards the judge of the court, which directly tends to interrupt the due course of the trial, and is also disobedience of the lawful order of the court. Such acts are defined as contempt by the provisions of section 1209 of the Code of Civil Procedure."

This conclusion upon the record before us is strongly supported by authorities from other jurisdictions which are more nearly analogous. 2 *Bishop, Crim. Law* (8th Ed.) §§ 242, 243; *State v. Crum*, 7 N. D. 299, 74 N. W. 992; *In re Cooper*, 32 Vt. 258; *Dodge v. State*, 140 Ind. 284, 39 N. E. 745, 746. In the case last cited it was appropriately said: "It is always to be regretted that a case should arise that renders it necessary for a court to inflict punishment for contempt against a member of its bar. Attorneys at the bar are properly termed the 'court's constituency,' to aid it in the due administration of justice. Each one is required to take an oath that he will honestly and faithfully discharge his duties as such attorney, and one of the cardinal duties enjoined upon him by law is to maintain the respect that is due to the courts of justice and judicial officers. * * * In the determination of the question as to whether a contempt has been committed, it does not depend upon the intention of the offending party, but upon the act he has done. A disclaimer of intentional disrespect or design to embarrass the administration of justice is no excuse for the person charged with the offense, when the contrary appears, from a fair interpretation of the language used. * * * It is the imperative duty of an attorney to respectfully yield to the ruling and decisions of the court, whether right or wrong, reserving the rights of his client by proper and necessary exceptions thereto. A remedy for the correction of the court's errors, if any, is fully provided by law."

[2] The petitioner next asserts that, if his conduct was contemptuous, delay of the proceeding and failure to issue a citation forthwith deprived the trial court of jurisdiction to act. It is argued that the intent of the Code provision is that the court shall deal summarily with disorderly conduct and the utterance of insolent and contemptuous language, that offending counsel may be warned of his misconduct and afforded an opportunity to desist or to apologize, and that a failure in this respect might indicate that the court did not view such conduct as worthy of further consideration. It appears that the per-

sistent argument and innuendos in the trial court were at once recognized as offensive when made, on June 17, 1930. Petitioner was continuously present until the trial concluded, when he was adjudged guilty of a contempt of court and directed to appear on the day following, at which time petitioner again appeared, submitted to the jurisdiction, and requested "that the sentence in said matter be continued until June 25th, 1930." *Curran v. Superior Court*, supra, is cited and relied upon by both parties, the only distinction being that Curran was at once directed to remain after adjournment, whereupon the matter was continued to the conclusion of the trial, and counsel was summoned by order to show cause after withdrawal and continued absence from the case on trial. The rule was there announced that "the action of the court thereafter was timely. The order to show cause was based on facts within the immediate knowledge of the court, and needed no affidavit to support it, and the court, as to the form and manner of its procedure, retained jurisdiction to act." Section 1211 of the Code of Civil Procedure provides that a contempt committed in the presence of the court "may be punished summarily," but it specifies no limitation of time within which a final order shall be made. That the court deemed the occurrences of moment requiring summary action is manifest, and the petitioner does not attempt to indicate what, if any, injury to his rights resulted from a failure to afford him further opportunity to desist or to offer an apology for language and conduct which he insisted, and still insists, was wholly justified. Under the circumstances, we think the court retained jurisdiction so long as it acted within a reasonable time. *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *People v. Board of State Canvassers and Rice*, 74 Hun, 179, 26 N. Y. S. 345.

[3] The judgment is criticized as "void and without jurisdiction because it fails upon its face to recite * * * the alleged contemptuous language or conduct * * * or that they constituted an obstruction of the orderly administration of justice." The commitment for contempt recites the title and proceedings in the case on trial, contains a stenographic report of all remarks of court and counsel, including a full statement by the court to petitioner of the grounds upon which he was pronounced in contempt; that the court "caused an order to be made describing the facts * * * as aforesaid and caused the same to be entered upon the minutes of said court," which minutes are also set forth. Immediately following a verbatim recital of the statements and conduct which we have detailed in part herein, it is further stated that "said conduct and disobedience on the part of the said Jason B. Grossman tended to

directly interrupt proceedings and impair the respect due the authority of said court and tended directly to bring said court and the judge thereof into disrepute and that said Jason B. Grossman is guilty of contempt of court." Since the language and acts, as we have observed, were contemptuous, and the commitment presents them in full, declaring them to be an offense, and committing the petitioner therefor, we think it is not insufficient in this respect.

The writ is discharged and the petitioner remanded.

I concur: IRA F. THOMPSON, J.

Owing to the absence of Presiding Justice WORKS, he does not participate in this decision.

109 Cal. App. 567

CARLISLE et ux. v. LADY et al.
Civ. 3808.

District Court of Appeal, Third District,
California.

Nov. 15, 1930.

1. Contracts ☞297.

Condition of contract, fulfillment of which is impossible, is void only to extent that it cannot be performed (Civ. Code, § 1441).

2. Mines and minerals ☞78(1).

Lessees in oil and gas lease delivered after specified time to commence drilling were obligated to commence drilling within reasonable time (Civ. Code, § 1657).

Although provision in lease in respect to time to commence drilling was inoperative by reason of fact that delivery was not made until after expiration of such period, the grantee was not entitled thereunder to omit to drill and develop and hold grant for speculative purposes purely.

3. Mines and minerals ☞58.

Clause of oil and gas lease authorizing lessee to quitclaim before discovery of oil converted instrument into mere option.

4. Mines and minerals ☞78(3).

Provision of oil and gas lease requiring notice before declaring forfeiture related to covenants of lease, and not to condition relating to time to commence drilling.

The provision requiring notice for forfeiture was to effect that interest of lessee should be subject to forfeiture only in case

he should be in default in performance of any covenants or agreements to be done or performed thereunder, and such default should be of a kind curable with reasonable diligence within 30 days and continue uncured for period exceeding 30 days after having had written notice of default and character thereof.

5. Pleading ⚡263.

Refusal to permit amended answer made up largely of evidentiary matter with all material issues raised thereby properly triable under original answer was not error.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by F. M. Carlisle and wife against W. E. Lady and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

W. E. Lady, of Los Angeles, for appellants.

J. A. Chase, of Visalia, and W. M. Hiatt, of Los Angeles, for respondents.

FINCH, P. J.

The plaintiffs filed their complaint herein, in the usual form, to quiet their title to a section of land. The answer alleges that on May 3, 1922, the plaintiffs executed and delivered to F. G. Bogle "an oil and gas lease" of all but twenty acres of the land and that the defendants have acquired and are the owners of all the rights granted to Bogle by the terms of the lease in and to the south half of the section. Judgment was entered in favor of the plaintiffs quieting their title to all the lands in controversy, and the defendants have appealed from the judgment.

The plaintiffs are husband and wife and the property in suit is a part of their community property. In the year 1921 the husband executed an oil and gas lease covering the whole of the land to Wm. H. Shry and L. E. Prestage. Thereafter, by mesne conveyances, E. M. Steele acquired whatever rights the lessees had under the lease. May 2, 1922, Mrs. Carlisle instituted an action to cancel the lease on the ground that she had not joined in the execution thereof. At the time of the delivery of the Bogle lease, Steele executed and delivered to the plaintiffs a quitclaim deed to the land, Mrs. Carlisle dismissed the aforesaid action and Bogle assigned to Steele all of his rights under the lease in and to the south half of the section of land. Although the court made no finding on the question, there is a possible inference from the evidence that the plaintiffs and Steele understood that the quitclaim deed was executed in part consideration for the Bogle lease and the assignment to Steele, and for the purposes

of this opinion it will be assumed that such is the fact. Having reached that conclusion, the Shry lease may be dismissed from further consideration, because it can have no other bearing on the issues in the case.

The court found, on sufficient evidence, "that on the 7th day of October, 1923, the plaintiffs * * * signed and duly acknowledged a lease and agreement with F. G. Bogle; that said lease and agreement was signed and acknowledged by F. G. Bogle on the 2nd day of November, 1923; that said lease and agreement was delivered and recorded on the 24th day of July, 1924." A copy of the lease is then set out in full and a finding that the aforesaid assignment from Bogle to Steele was made. The court then, on evidence without substantial conflict, found as follows:

"That the defendants are assignees and successors in interest of E. M. Steele; that neither defendants nor F. G. Bogle nor E. M. Steele nor any successor in interest of E. M. Steele, nor any sublessee of F. G. Bogle, nor any successor in interest of F. G. Bogle, nor any successor in interest of any sublessee of F. G. Bogle, or E. M. Steele nor any sublessee or assignee of either of them ever performed any of the conditions or obligations, nor any of the agreements, terms, conditions or obligations of said original lease required of the lessee in said original lease;

"That no rental provided by the terms of said original lease was ever paid to plaintiffs; that no well was ever drilled or ever commenced to be drilled on the land described in said original lease, or within the territorial limits provided in said lease, by F. G. Bogle, or by anyone holding any interest in said lease, or by any successor in interest of F. G. Bogle, or anyone claiming under F. G. Bogle;

"That neither F. G. Bogle nor anyone claiming under him ever entered upon the land described in said lease, or any land prescribed by the terms of said lease for the purpose of performing or complying with any of the terms of said lease; and the terms and conditions of said lease to be complied with by the lessees therein have not been complied with, performed or kept by anyone."

The lease contains the following:

"For and in consideration of \$10 by the lessee in hand paid to the lessor, receipt of which is hereby acknowledged, and in further consideration of the performance by the lessee, of the covenants and agreements hereinafter contained, the lessor has leased, let and demised, and by these presents does lease, let and demise unto the lessee, the lands hereinafter described, with the sole and exclusive rights to the lessee, to drill for, produce, extract and take oil, gas, asphaltum and other

hydro-carbon substances and water from, and store the same upon said land, during the term hereinafter specified, * * *

"(a) The lessee shall hold said lands with the appurtenances for the period of 20 years from the date hereof, and so long thereafter, as oil, gas, asphaltum or other hydro-carbon substances are produced thereon and therefrom in paying quantities by the lessee, unless otherwise surrendered or forfeited by the lessee; and the lessee hereby leases, from the lessor the hereinbefore described lands for the purposes and term aforesaid and upon the consideration hereinafter set forth.

"(b) It is understood and agreed that this lease is executed by the lessor upon and subject to the condition that the lessee shall within 6 months from May 3, 1922, commence the drilling of a test well on said demised premises, or at some point within 2 miles from the exterior boundaries of the premises herein described with complete rig, and thereafter prosecute the drilling thereof with reasonable diligence and in good faith until oil, gas or other hydro-carbon substances are found in paying quantities by the lessee or until said well has been drilled to a depth of thirty-five hundred feet; provided, however, that said lessee may extend said period 3 months by paying to said lessor herein a cash rental of 50 cents per acre per month, monthly in advance. And provided further, that in the event the lessee does not commence the drilling of said test well within said additional 3 months, this lease shall ipso facto terminate.

"This lease shall be upon the further terms and conditions following, to-wit:

"1. In the event the lessee does not commence the drilling of a well for oil on the premises herein described, with complete standard or rotary rig, within 90 days from the completion of said test well, then and in that event the lessee shall pay to the lessor herein named a monthly cash rental for the premises herein described at the rate of two dollars per acre per month, monthly in advance but in no event, however, shall drilling be delayed on the premises herein leased for a period of more than 1 year from completion of the test well mentioned in Paragraph 'B' above.

"2. Lessee may at any time before the discovery of oil on the demised premises, quitclaim the said property to the lessor, his successors or assigns and thereupon all rights and obligations of the parties hereto, one to the other, cease and determine. * * *

"25. The interest of the party of the second part under this indenture shall be subject to forfeiture only upon the conditions and in the manner herein set forth, to-wit: In case the lessee shall be in default in the performance of any covenant or agreement by him to be done or performed hereunder, and such de-

fault shall be of a kind curable with reasonable diligence within 30 days, and shall continue uncured for a period of exceeding 30 days, after he had had written notice of said default and the character thereof, or if the lessee shall not have begun in good faith to remedy any such default, within said period of 30 days after such notice, then and in such case, this lease shall become void at the option of the lessor and the lessee shall thereupon vacate said premises. * * *

[1, 2] The complaint in the action was filed January 28, 1927. The trial was commenced April 13, 1927, and completed in the following month, nearly three years after the lease was delivered. During all that time neither the lessee nor any of his assignees made any effort to perform the terms of the lease and none of them did anything to indicate an intention even to comply with its terms. Referring to the condition in paragraph (b) of the lease, requiring the lessee to commence the drilling of a test well within six months after May 3, 1922, appellants contend that since it was manifestly impossible to commence such drilling after the delivery of the lease on July 24, 1924, and within six months after May 3, 1922, the provisions of that paragraph "were not obligatory on any one." Based on this argument, appellants state in their opening brief: "When the court found that the lease * * * was not delivered until July 24, 1924, by the same finding the court found there were no obligations to be performed by the lessee, and the lease would thereupon run for twenty years without the doing of any matter or thing." It is clear that the facts stated do not lead to any such inequitable result. Section 1441 of the Civil Code provides: "A condition in a contract, the fulfillment of which is impossible, * * * is void." This is only a legislative declaration of a rule of the common law. *Vanderslice v. Hanks*, 3 Cal. 28, 42. The rule can mean only that such a condition is void to the extent that fulfillment is impossible. In case of a grant on condition that the grantee pay a note or bond on the day it falls due it would be absurd to hold that the grantee can hold the property conveyed and escape the obligation to pay on the ground that the due date had already passed at the time the grant was executed. *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142. In a case analogous to this, where the grantor had prevented performance of a condition subsequent at the time specified in the condition, the court held, quoting from the syllabus: "Where the owner of land conveyed it to a society on condition subsequent that a building be erected thereon before a certain date, the fact that the grantor prevented the completion of the building by unwarranted claims of title would not authorize a judgment vesting the fee in the grantee unconditionally, but the condition should be

performed within a reasonable time thereafter." Baker v. Woman's Christian Temperance Union, 57 App. Div. 290, 67 N. Y. S. 949. The equitable rule applicable to this case is that the lessees were obligated to commence drilling within a reasonable time after the execution and delivery of the lease. Civ. Code, § 1657. This they utterly failed to do. Under the terms of such a lease, "the grantee cannot omit to drill and develop and hold the grant for speculative purposes purely." Hall v. Augur, 82 Cal. App. 594, 600, 256 P. 232, 235.

[3] There is another feature of the lease which is not discussed in the briefs. Clause No. 2 releases the lessee from doing anything whatever and converts what would otherwise constitute a lease into a mere option, with no time expressed within which the option may be exercised, except that the lessee was to become bound by the terms of the lease upon the discovery of oil on the demised premises. It would be unreasonable to hold the lessors bound by the lease after the lessee and his assigns have failed for so long a time even to commence drilling or to do anything which would bind them to perform the terms of the lease. At the time of the execution of the lease other persons were drilling for oil on an adjoining section of land. A representative of the lessee prepared the lease. It was evidently designed to give the lessee all the benefits which would flow from the discovery of oil on such adjoining land without incurring any obligation in the event of failure to discover oil thereon.

[4] The provision of paragraph 25 of the lease requiring notice before declaring a forfeiture clearly relates to the covenants of the lease and not to the condition set forth in paragraph (b). Taylor v. Hamilton, 194 Cal. 768, 774, 230 P. 656.

[5] Appellants contend that the court erred in denying them permission to file an amended answer. The proposed amended answer is extremely long, made up largely of evidentiary matter. All material issues raised thereby were properly triable under the original answer, unless it be the alleged estoppel attempted to be set up in the proposed amended answer, and the defendants were permitted to attempt the proof of such estoppel; such proof, however, being insufficient to establish any element of an estoppel against the plaintiffs. The nearest approach to such proof is the testimony of a witness that, prior to the delivery of the lease, the assignment to Steele and the quitclaim deed, he saw a letter, signed he thought by both of the plaintiffs, although he was uncertain as to the signatures, in which it was stated that "the plaintiffs were satisfied with the progress of the work on the lease," and the witness testified,

the several instruments were thereupon placed on record by him, who was the escrow holder thereof. It does not appear to whom the letter was directed or the purpose thereof. Neither does it appear in what manner there could have been a compliance with the terms of a lease which at that time had not become effective by delivery.

The defendants offered in evidence a long affidavit signed by Steele, which follows closely the substance and the language of the proposed amended answer. Appellants claim that it was received in evidence, while respondents contend to the contrary. While the record is not clear, it may be conceded, for the purposes of this opinion, that, by stipulation of the parties, such parts of the affidavit as are not hearsay were received in evidence. Excluding the hearsay parts of the affidavit, there is nothing therein which, with the other evidence relied on by the appellants, would justify findings and judgment in favor of the appellants.

The judgment is affirmed.

All concur.

109 Cal. App. 747

OSCAR KRENZ COPPER & BRASS WORKS
Inc. v. ENGLAND et al.

CHARLES M. BAILEY CO. v. SAME.

Civ. 7219.

District Court of Appeal, First District,
Division 1, California.

Nov. 22, 1930.

Rehearing Denied Dec. 22, 1930. Hearing Denied by Supreme Court Jan. 19, 1931.

1. Partnership ⇨218(3).

Where evidence is open to more than one inference, existence of copartnership is question for jury, or for court sitting as jury.

2. Partnership ⇨17.

Parties may incur liability of partners, notwithstanding their intention.

3. Partnership ⇨20.

Law will not countenance contrivances for obtaining advantages of partnership, without its liabilities.

4. Partnership ⇨5.

Sharing of profits, although element of partnership, does not necessarily constitute partnership relation (Civ. Code, § 2395).

5. Partnership ⇨22.

Although partnership relation may be established even if words partner or partnership are not used, their presence or absence

may be significant, where existence of partnership is doubtful.

6. Partnership ⇨49.

That one party had no voice in control of business is relevant in determining whether copartnership exists (Civ. Code, § 2395).

7. Partnership ⇨55.

Evidence held to support conclusion that no partnership existed, precluding creditors' recovery, where alleged partner granted right to manufacture under patent, and received royalty (Civ. Code, § 2395).

Evidence showed that defendant, alleged to be M.'s partner, granted to M. exclusive right to manufacture and sell paint-spraying machines, and agreed to advance certain sum for advertising, to be repaid from first profits; that all manufacturing, buying and selling was done by M.; that defendant took no part in arranging for location of business or leasing of premises; that M. purchased office equipment and engaged and directed employees; that defendant was not authorized to draw checks on bank account of concern, and had no access to books; and that he exercised no supervision over business, and gave M. no instructions respecting its management.

8. Appeal and error ⇨996.

Where evidence is not conflicting, but inferences fairly deducible therefrom are such that different conclusions may rationally be drawn, judge's decision cannot be disturbed.

9. Appeal and error ⇨1008(1).

Judge's interpretation of ambiguous writing, if tenable, and apparently, under circumstances, consistent with parties' intent and meaning, cannot be disturbed.

10. Appeal and error ⇨1011(1).

Weight of conflicting testimony, in trial without jury, is for court (Code Civ. Proc. § 1847).

11. Appeal and error ⇨1011(1).

Where testimony in trial without jury is conflicting, court's determination is conclusive (Code Civ. Proc. § 1847).

Appeals from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Actions by the Oscar Krenz Copper & Brass Works, Inc., and by the Charles M. Bailey Company, against W. A. England and another, doing business under the firm name and style of the Dunn Painting Machine Company.

From respective judgments for defendant named, plaintiffs appeal.

Affirmed.

Byron Coleman, of San Francisco, for appellants.

Sloss & Ackerman, of San Francisco, for respondents.

PER CURIAM.

The above actions were brought to recover for goods alleged to have been sold and delivered to defendants W. A. England and H. E. Moss. The trial court found in favor of England, who will be hereinafter referred to as the defendant, and the plaintiffs have appealed from the respective judgments entered in his favor.

About the year 1916 the defendant with one Dunn became interested in developing a paint-spraying machine, upon which Dunn subsequently procured letters patent. The business of manufacturing and selling the machine was, pursuant to an agreement with the patentee, conducted under the name of Dunn's Paint Machine Co. In 1917 defendant filed in the office of the clerk of the city and county of San Francisco a certificate, in which he declared himself to be the only person interested in the business. The business was continued until 1922, when Dunn died, whereupon defendant ceased to manufacture. It appears, however, that he continued to sell such machines as had been previously manufactured until, according to his testimony, the demand ceased. In June, 1925, defendant entered into an agreement with Dunn's widow, who had become the owner of the patent, whereby he was granted the right upon the payment of certain royalties to manufacture and sell the machines. Thereafter, in October, 1925, an agreement was made between defendant, therein called the licensor, and H. E. Moss, called the licensee, whereby defendant granted to Moss the exclusive right to manufacture and sell the machines, the latter agreeing to perform the contract between defendant and Mrs. Dunn. It was further agreed that defendant should advance to Moss the sum of \$750, which was to be expended for advertising, the same to be repaid from the first profits realized. Moss was also granted the right to use the name "Dunn Painting Machine Company," it being agreed that he would file a certificate, as required by statute, showing that he was doing business under that name. The latter further agreed to direct the sales and devote his entire time to the development of the business, and pay to the defendant monthly as a royalty 50 per cent. of the profits thereof. The agreement provided that whenever the net profits of the business should amount to \$30,000 then the business should be incorporated, the assets transferred to the corporation and the capital stock of the

corporation divided, defendant to receive 51 per cent. and Moss 49 per cent. thereof. It was also stipulated that the arrangement should continue for one year, and if at the end of that period the business showed a profit of not less than \$600 per month the contract, at the option of Moss, should continue for another year, and thereafter as long as the same minimum profit should be maintained.

It appears that Moss, who had been employed as secretary for a trade association, of which the Eng-Skell Company was a member, was without capital. Defendant, who was president of the company last named, testified that when the contract was made he did not contemplate the advancement of any money to Moss, as the latter assured him that arrangements had been made for funds to carry on the business. Shortly after Moss commenced operations, however, he applied to defendant for advances to cover his living expenses, stating that he had been unable to procure the capital expected. These defendant agreed to make, and monthly payments were made to Moss for this purpose by the Eng-Skell Company at defendant's request. No capital appears to have been procured by Moss, and at his request defendant continued to make advances for the purpose of carrying on the business. There was advanced between October 14, 1925, and May 14, 1927, sums aggregating \$7,820. This included the advances for living expenses and the amount which, under the contract, was to be advanced for advertising purposes. These amounts were unsecured and no part thereof was repaid.

In addition to the above there were advanced by defendant between June 7 and September 2, 1927, sums aggregating \$8,914.62. These advances were made upon the security of assigned accounts due the concern, and of these accounts Moss collected and defendant was repaid therefrom the sum of \$8,795.49. Defendant also indorsed two notes executed by Moss, one for \$2,000, which Moss paid, and another for \$1,250, which remains unpaid.

In June, 1926, Moss, without advising the defendant until after the arrangement had been made, granted to one Charles W. Harris the exclusive right to sell the machines on commission under the name of Dunn Painting Machine Company, Sales Division. Defendant, however, did not disapprove, and the testimony shows that Harris expended approximately \$5,000 in furthering the sale of the machines. This arrangement, however, was terminated by Moss in January, 1927, and Harris continued as an employee until May, 1927. The defendant then paid Harris a balance of \$400 owing him for commissions and charged the amount to Moss. In October, 1927, Moss became a bankrupt, and his assets were insufficient to pay the claims against the business.

The testimony also shows that all the manufacturing, buying and selling was done by Moss; that defendant took no part in arranging for the location of the business or the leasing of the premises where the same was conducted; that Moss purchased the office equipment and engaged and directed the employees; that defendant was not authorized to draw checks upon the bank account of the concern and had no access to the books; further, that he exercised no supervision over the business or gave Moss instructions respecting its management, nor did the agreement give him the right to do any of these things. It was testified by defendant that he did not intend to form a partnership, and by Moss that he was conducting the business under the described contract.

Except as shown by the documentary evidence mentioned, the above facts were developed by the testimony of Moss and the defendant.

[1] It is urged by appellants that there being no conflict in the evidence the question of the existence of a copartnership is one of law and not of fact, citing *Westland v. Post Land Co.*, 115 Wash. 329, 197 P. 44, 45. While this is the rule when the facts are undisputed, or the question depends upon the interpretation of an unambiguous written instrument, where the evidence is open to more than one inference, the question is one for the jury, or the court sitting as a jury. *Stenian v. Tashjian*, 178 Cal. 623, 174 P. 883; *McNab v. Mills*, 199 Cal. 231, 248 P. 657; *Eggleston v. Wilson*, 211 Ala. 140, 100 So. 89; *De Long v. Whitlock* (Iowa) 210 N. W. 791; *Mathis v. Taylorsville Bank*, 136 Ky. 634, 124 S. W. 876; *Mersick v. Bilafsky*, 205 Mass. 488, 91 N. E. 889; *Benoliel v. Homac*, 87 N. J. Law, 375, 94 A. 605; *Call v. Linn*, 112 Or. 1, 228 P. 127; *McCoy v. First Nat. Bank of Cleveland*, 123 Okl. 170, 252 P. 404; *Arava v. Bebe*, 48 R. I. 478, 189 A. 302; 47 Cor. Jur., Partnership, § 542, p. 1004.

[2] As contended by appellant, the intention of the parties in transactions of this character is not controlling; and they may, notwithstanding, incur the liability of partners.

[3, 4] It has been held that the mere form of the agreement between them is immaterial if the transaction be in fact a joint adventure for mutual profit; and that the law will not countenance contrivances for giving parties the whole advantage of a partnership without subjecting them to its liabilities. *San Joaquin Light & Power Corp. v. Costaloupes*, 96 Cal. App. 322, 274 P. 84. On the other hand, it has been held that, although the sharing of profits is one of the elements of the partnership relation, a mere participation in profits does not necessarily constitute a partnership relation. *Coward v. Clanton*, 122 Cal. 451, 55 P. 147. As stated in *Martin v. Sharp & Fellows Co.*, 34 Cal. App. 584, 168 P. 373, after quoting

the Code definition of a partnership (Civ. Code, § 2395): "Under this definition, a mere participation in profit and loss does not necessarily constitute a partnership, for, as said in *Dwinel v. Stone*, 30 Me. 384, 'there must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, * * * a right which, upon the dissolution of the partnership, * * * passes to the survivor, and not to the representatives of the deceased.' * * * The association must be for the purpose of jointly carrying on the business." To the same effect are the cases of *Prince v. Lamb*, 128 Cal. 120, 60 P. 689, and *Auditorium Co. v. Barsotti*, 40 Cal. App. 592, 181 P. 413.

Moreover, it has been held that it is the sharing of profits as such which constitutes prima facie evidence of a partnership, and that the relation is not established by a mere promise to pay a share of the profits as compensation for services (*Coward v. Clanton*, supra), or for the use of property (*Nofsinger v. Goldman*, 122 Cal. 609, 55 P. 425; *Vanderhurst v. De Witt*, 95 Cal. 57, 30 P. 94, 20 L. R. A. 595), or, as in the case of *Wheeler v. Farmer*, 38 Cal. 203, where one party in consideration of a right granted by the other, who was the inventor of a machine, agreed to make and vend the machine at his own expense, procure letters patent thereon to the inventor, and pay the latter a percentage of the profits of sale.

[5, 6] A partnership relation was not mentioned in the agreement; and while the existence of the relation may be established though the words partner or partnership are not used, the presence or absence of such words may be significant, where the circumstances leave the question in doubt. *Smith v. Schultz*, 89 Cal. 526, 26 P. 1087. And it has also been held that the fact that one party was given no voice in the control of the business is relevant. Another fact, which doubtless had weight with the trial court, was that defendant was under no obligation to advance anything to Moss other than the \$750 which was to be used for advertising purposes and repaid.

[7-9] The evidence taken as a whole is sufficient to support the conclusion of the trial court that no partnership existed. Though there is no conflict in the evidence, the inferences fairly deducible therefrom were such that different conclusions might rationally be drawn; and where this is the case the conclusion reached by the trial court cannot be disturbed on appeal. *MacDermot v. Hayes*, 175 Cal. 95, 170 P. 616. The same rule applies where a writing is ambiguous and the interpretation given thereto by the trial court is tenable, and one which under all the circumstances appears consistent with the true in-

tent and meaning of the parties. *Manley v. Pacific Mill & Lumber Co.*, 79 Cal. App. 641, 250 P. 710.

[10, 11] One of the plaintiffs, namely, *Oscar Krenz Copper & Brass Works, Inc.*, sought to show that it extended credit on the representation that defendant was a partner. Its president testified that for several years before the contract between Moss and the defendant was made this company had sold merchandise ordered by defendant, whom they knew, for the account of *Dunn Painting Machine Company*; that they were told by Moss that defendant was the sole owner of the business; that no notice to the contrary was received, and that credit would not have been extended to Moss except through the belief that defendant was interested in the concern. Moss denied making these statements, and testified that before any merchandise was purchased by him he informed the president of the plaintiff above named of the character of his relations with defendant and showed him the contract between them. The weight to be given to this testimony was a question for the trial court (Code Civ. Proc. § 1847), and where the testimony is conflicting its determination is conclusive on appeal (*Crawford v. Stove Pipe Works*, 83 Cal. 629, 24 P. 836).

The judgments appealed from are affirmed.

110 Cal. App. 15

HUMPHREY v. STAR PETROLEUM CO.

Civ. 4217.

District Court of Appeal, Third District,
California.

Nov. 22, 1930.

1. Appeal and error ◊760(1).

Court will not search through long type-written transcript to discover erroneous rulings not pointed out.

2. Master and servant ◊278(10).

In welder's action against oil company for injuries suffered on account of defendant's negligence when gas escaping from casing exploded during welding, evidence held to support judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Walter W. Humphrey against the Star Petroleum Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Nell S. McCarthy, Geo. J. Stoneman, and Earl L. Banta, all of Los Angeles, for appellant.

Lloyd O. Miller and Hooper & Miller, all of Los Angeles, for respondent.

110 Cal. App. 79

GILBERT v. KRAUSS.

Civ. 166.

FINCH, P. J.

[1] This is an appeal by the defendant from a judgment for damages in favor of the plaintiff for personal injuries. Appellant contends that the evidence is insufficient to support the judgment and that the trial court committed reversible error in ruling on the admissibility of evidence. The appellant, however, has failed to point out the alleged erroneous rulings, and therefore this court will not search through the long typewritten transcript in an effort to discover them. *Dahlberg v. Dahlberg*, 202 Cal. 295, 260 P. 290; *Scott v. Hollywood Park Co.*, 176 Cal. 680, 169 P. 379.

[2] Disregarding the rule that an appellate court is not concerned with the weight of the evidence, the appellant states the evidence in the light most favorable to its contentions. From the statement of facts contained in the appellant's opening brief, it appears that after it had drilled for oil to a depth of about 4,700 feet it attempted to remove the casing from the well. "On the day before the accident, this work was attempted and the casing parted, leaving 18 inches projecting above the floor of the cellar. The cellar is described as an excavation about 4½x6 feet, and with a depth of 7 feet from the top of the floor to the bottom of the cellar. After the casing parted, it became necessary in the performance of the work of straightening it out, to weld another piece of casing to the point where it had been broken off, and plaintiff was employed for this purpose. * * * He climbed down into the cellar and commenced the welding together of the casing. * * * After working approximately five minutes * * * an explosion occurred, as a result of which he suffered severe burns," the injuries for which damages were awarded.

In appellant's brief it is said: "It affirmatively appears from the evidence that a well filled with water or at least filled with water within fifty feet of the surface, was the only precaution available to prevent a gas explosion." There is evidence that the water level in the well at the time of the accident was several hundred feet below the surface of the ground. The plaintiff testified that the superintendent of the defendant assured him that there was no gas in the well and that the well was full of water. From other evidence it reasonably appears that the gas which exploded came from inside the casing. There is ample evidence to support the judgment and it is unnecessary to pursue the subject further.

The judgment is affirmed.

District Court of Appeal, Fourth District, California.

Nov. 25, 1930.

1. Brokers ⇨86(1).

Evidence warranted finding of contract to split commissions with broker procuring purchaser and performance of services required thereunder.

2. Appeal and error ⇨931(1).

Appellate court in determining sufficiency of evidence must view evidence most favorably to prevailing party.

3. Appeal and error ⇨1011(1).

Conclusion of trial court on conflicting evidence with sufficient evidence to support finding is conclusive.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by I. N. Gilbert against C. F. Krauss. Judgment for plaintiff, and defendant appeals.

Affirmed.

O'Connor & Findlay, of Colton, for appellant.

Duckworth & Harrison, of San Bernardino, for respondent.

CARY, P. J.

Plaintiff, a real estate broker, brought this action to recover from defendant, also a real estate broker, \$607, being one-half of a commission received by defendant from the sale of certain real estate belonging to a third party. The complaint alleged that plaintiff and defendant had entered into an agreement whereby, if plaintiff, either directly or by bringing defendant into communication with a prospective buyer, should procure a purchaser for certain real estate for which defendant was the exclusive sales agent, defendant would pay to plaintiff one-half of any commission defendant might receive through such sale; that plaintiff had procured such a purchaser; that a sale had been made and defendant had received a commission, but had refused to divide it with plaintiff. Defendant's answer denied the existence of such an agreement. The court found that the allegations of the complaint were true and gave judgment for plaintiff.

[1] The defendant urges as grounds for reversal (1) that the finding that there was such a contract is without support in the evi-

dence, and (2) that, even though there were a contract, plaintiff did not perform the services required of him.

[2] Viewing the evidence in the light most favorable to plaintiff, as is our duty where, after a decision in his favor, the sufficiency of the evidence is attacked, the facts follow. Plaintiff's office was in the city of San Bernardino, and defendant's was some three miles north of the business district of that city. Defendant came into plaintiff's office and stated that he had the exclusive sales agency for the property in question and would like to have plaintiff help him sell it, stating the amount of the acreage and the price and telling plaintiff that he was willing to split commissions with plaintiff on a 50-50 basis on any deal made with plaintiff's assistance. At this interview a subagent in the employ of plaintiff copied off from defendant's blueprint the outlines of the property in question. The subagent told defendant that plaintiff had a client who he thought would be interested in the land. Defendant told plaintiff he need not bring the client out to the property, but could send him to defendant, who would show him the property, and, if a sale was made, plaintiff would get one-half of the commission. Plaintiff's subagent testified that he took the prospective buyer to the land, explained to him that it would be to the buyer's advantage to purchase it, and that for a month and a half he discussed the matter daily with the prospective purchaser both while on the land and off of it. He further testified that he gave the prospective purchaser the sketch of the property taken from defendant's blueprint and told the purchaser that it was satisfactory for the purchaser to deal direct with the defendant. The prospective purchaser, who eventually did purchase the property, testified that he became interested in the deal through plaintiff's subagent, that the subagent took him to the property many times and pointed out its advantages and gave him the details regarding price, acreage, etc. He corroborated generally the statement of plaintiff's subagent and testified that, although the deal was closed with defendant direct, yet it was the efforts of plaintiff's subagent which caused him to purchase the property. On the witness stand defendant, while denying the agreement, did admit that he had told plaintiff he would be glad to have plaintiff co-operate with him, and on cross-examination stated by that that he had meant that, if plaintiff actually made a sale for him, there would be something in it for plaintiff, although he had not told plaintiff so.

[3] In defendant's brief a very earnest argument is made as to why the court should have disbelieved the evidence offered on behalf of the plaintiff and why the inferences

from the admitted facts would tend to substantiate defendant's version of the transaction. However, the fact remains that the plaintiff, his employee, and the person who actually bought the property all gave testimony in support of plaintiff's claim and directly contradicted the evidence of the defendant, while the testimony of the defendant in its most material parts was not corroborated from any source. The entire matter is therefore one of conflict of the evidence, and, there being sufficient evidence in the record to support the findings of the trial court, that court's conclusion as to where the truth lay is conclusive.

The judgment is affirmed.

We concur: MARKS, J.; BARNARD, J.

110 Cal. App. 48

WOOTON et al. v. McADOO et al.

SEEGER et al. v. SAME.

Civ. 139.

District Court of Appeal, Fourth District,
California.

Nov. 24, 1930.

Rehearing Denied Dec. 20, 1930. Hearing Denied by Supreme Court Jan. 22, 1931.

1. Mines and minerals $\S$ 78(1).

Lease provision that "operations for drilling" first oil well have been commenced *held* not to mean drilling had commenced.

2. Mines and minerals $\S$ 78(1).

Where second oil well was to be drilled under lease 90 days after first well, such period governed, though first well immediately produced paying quantities.

3. Appeal and error $\S$ 931(1).

In absence of contrary showing, appellate court must assume finding was supported by evidence.

4. Mines and minerals $\S$ 78(1).

Under oil lease, permitting lessee to quitclaim before discovering oil, lessee *held* not obliged to continue drilling where field was exhausted.

The lease contained a provision that the lessee may at any time before discovery of oil on the premises quitclaim the property or any part thereof to the lessor, whereupon all rights should cease as between the parties.

5. Mines and minerals $\S$ 78(1).

Lessors could not recover damages for delay of lessees under oil lease to quitclaim

after abandoning drilling, evidence not showing quitclaims were demanded or that lessors re-entered to minimize damage.

6. Mines and minerals ⇨78(2).

Upon lessees' abandoning work under oil lease, lessors had right of re-entry.

7. Mines and minerals ⇨78(7).

Lessors not being entitled to damages before lessees abandoned drilling, and evidence failing to show which part of damages arose before and which after abandonment, lessors could not recover for breach of contract to drill oil wells.

8. Mines and minerals ⇨78(7).

Evidence, relating only to production in other wells, *held* insufficient to set aside finding no damages were suffered from alleged breach of oil lease.

9. Mines and minerals ⇨78(7).

Complaint *held* not to allege facts, showing lessees of oil lease, executing sublease, prior to principal lease, were trustees for lessors.

Complaint alleged that, prior to execution of lease, lessees executed sublease with liquidated damage clause, that sublease was concealed from lessors, that lessees were trustees for lessors, were bound to reveal terms of sublease, and hence liable to lessors for certain amounts received thereunder.

10. Mines and minerals ⇨78(7).

Evidence *held* not to show lessees under oil lease, allegedly executing sublease before principal lease, were trustees for lessors and concealed terms of sublease.

11. Fraud ⇨58(1).

Evidence *held* not to establish that representations that terms offered for oil lease were as favorable as could be obtained were fraudulent, or that only object was to collect penalty under sublease.

Appeals from Superior Court, Orange County; H. G. Ames, Judge.

Actions by Dora Wooton and another, and by Nettie L. Seeger and another, against William G. McAdoo and another, consolidated for trial. From a judgment in favor of defendants as applying to each case, plaintiffs appeal.

Affirmed.

Ewell D. Moore and D. A. Knapp, both of Los Angeles, for appellants.

McAdoo, Neblett & Claggett, and B. H. Neblett, all of Los Angeles, for respondents.

BARNARD, J.

These two actions were consolidated for trial, and, from a judgment entered as applying to each case, this appeal is taken.

The plaintiffs in each case are the owners of a lot 25 feet wide and 50 feet deep, on the outskirts of the Huntington Beach oil field. The two lots adjoin, and, taken together, formed a unit of land large enough to hold a derrick for drilling, but not of sufficient size to hold such a derrick and also the boiler and other equipment necessary to operate the same. The defendants in these two cases were the owners of a lease upon another lot situated 117 feet from the lots owned by these plaintiffs, upon which they drilled what is referred to in the lease contracts here in question as the first well. The defendants undertook to lease the two lots separately owned by the plaintiffs, and to drill for oil thereon by using power brought from their power plant installed in connection with the first well. The first lease with plaintiffs Wooton was signed on July 24, 1926, and a second or substitute lease with the same plaintiffs was signed on September 28, 1926. The lease with plaintiff Seeger was signed on August 6, 1926. Each of these leases referred to the above-mentioned first well, and then to a second well to be drilled upon the lots owned by these plaintiffs. Neither of the leases contains any provision as to when the first well is to be commenced or completed, but each lease provides that the second well is to be commenced after the discovery of oil in paying quantities in the first well, and thereupon the lessees are "to commence drilling operations within ninety days thereafter and continuously operate one string of tools until said second well has been drilled with due diligence to a depth of 4,000 feet unless oil in paying quantities is discovered at a lesser depth." Each of the leases also contains the following provision: "The lessee may at any time before discovery of oil on the demised premises quitclaim the real property or any part thereof to the Lessor, his successors or assigns, and thereupon all rights and obligations of the parties hereto one to the other, shall thereupon cease and determine as to the premises quitclaimed."

Each of the leases provides for a royalty to the lessors of a certain percentage of the oil that might be produced from the second well, together with a bonus of a percentage royalty interest in the first well. As such bonus, out of the proceeds from the first well the plaintiffs received over \$4,100. The defendants subleased the property to one Cather, and thereafter Cather, together with defendants and their respective wives, made another sublease to one Fred W. Roberts. Roberts entered upon the property, and sunk a well thereon to a depth of 400 feet, when the work

was abandoned. The court found that the work was abandoned for the reason "that prior to the time that the respective leases required the defendants to drill and complete the well on the leased property, the field had been intensively drilled by other operators and the oil supply therein practically exhausted." These actions were filed, seeking to recover damages for alleged breach of agreement in failing to drill on time, and also for alleged misrepresentations. After a trial before the court without a jury, judgment was entered in favor of the defendants, and this appeal followed.

Each complaint sets forth five causes of action. A motion for a nonsuit was granted as to the fourth cause of action. No appeal followed that order, leaving four causes of action to be considered here.

[1] The first cause of action is for damages for failure to use due diligence in carrying on drilling operations to a depth of 4,000 feet. Appellants point out that, when the Wooton lease was signed on July 24, 1926, it referred to the property on which the first well was located, saying: "Operations for drilling an oil well have already been commenced thereon." It is pointed out that there was evidence that it took 64 days to complete the first well, that it was spudded in on September 12 and brought in November 15. It is then argued that, had the first well been started on July 24, 1926, as represented by the clause in the lease last above quoted, this well would have come in by September 26, 1926. This is the first breach of contract relied upon. Not only does it appear that it required both of these lots to make room for the installation of a derrick and that the Seeger lease was not signed until August 6, but we are unable to put any such interpretation upon the contract. To say that operations for drilling an oil well have already been commenced is far from an assertion that drilling has already been commenced. Many things are necessary to be done in getting ready to drill an oil well. The contract is silent as to when the first well was to be begun. If, as argued by appellants, it is a necessary implication that the first well was to be drilled and completed as soon as possible, nothing appears herein to indicate that the beginning of actual drilling on September 12 was an unreasonable delay.

[2] With the assumption that the first well should have been completed on September 26, 1926, it is next argued that the second well should have been begun immediately thereafter, and that the same would have been completed in 64 days, or by December 27, 1926, at the latest. The argument is made that the real intention of the parties was to provide that the second well should be drilled as soon as the first one came in; that the 90-day period for commencing the second well was

intended to apply only in the event the production in the first well should be so small that such time would be required to determine whether or not it was a paying well; and that it is necessarily implied by law that, when the first well came in with a good production, the lessees did not have the 90 days provided for in the contract within which to commence drilling the second well. To state this contention is almost to answer it. Not only does the contract govern, but it is self-evident that it requires some time to assemble sufficient equipment to drill an oil well. Even if we could discard the contract and apply the reasonable time rule, we are unable to say that 90 days was an unreasonable time, in the absence of any evidence upon that point.

[3] That the work on the well was later abandoned because production in surrounding wells decreased to an extent that made drilling seem unprofitable is undisputed. Appellants' cause of action is based upon the theory that the delay of respondents in drilling deprived them of an income that would otherwise have been available before this portion of the field became depleted. By the reasoning referred to, it is insisted that the second well should have been brought in by December 7, 1926. Appellants quote a witness as giving the opinion that a well on their lots would have been profitable until February, 1927, and that in May, 1927, an average production of 100 barrels a day from such a well could have been expected. Reference is also made to a number of surrounding wells, which are said to have been brought in successfully in January, 1927. Based upon production in some other wells, appellants estimate that they would have received from the second well over \$11,000 between December 7, 1926, and October 31, 1928. It was stipulated that the second well was begun within 90 days after the completion of the first well, which is all that was required by the contract. Our attention has been called to no evidence whatever of any lack of diligence upon the part of respondents, or their sublessees, in drilling the second well, until the time drilling operations were abandoned. The court found this was in June, 1927. This finding is not questioned, and, in the absence of any showing, we must assume it to be supported by the evidence. No possible claim of damage could then arise until after that date.

[4-8] The evidence further shows that a quitclaim deed conveying the land back to appellants was executed on November 20, 1927, and recorded February 24, 1928. Under the clause of the contract permitting the lessee to quitclaim the real property, the lessee was under no obligation to continue the drilling. *Dabney v. Key*, 57 Cal. App. 762, 207 P. 921; *Sheehan v. Vedder* (Cal. App.) 292 P. 175. Any possible claim for damages after

the work was abandoned could only be based upon the delay of the respondents in quitclaiming the property. Appellants call our attention to section 1055 of the Civil Code, which provides: "A grant duly executed is presumed to have been delivered at its date." It would therefore appear that the work was abandoned in June and the quitclaim deed was not delivered until November. However, no such theory is set up in the complaints, these being based upon the other theory that the well should have been completed around December 1, 1926. Even if the theory of delay in quitclaiming the property was properly before us, no evidence appears to show that any such quitclaims were ever demanded by the appellants or refused by the respondents. It would appear that appellants should have at least re-entered the property and minimized the damage. Upon the abandoning of the work, the appellants had a right of re-entry to the property. *Acme Oil & Mining Co. v. Williams*, 140 Cal. 681, 74 P. 296; *Brookshire v. Casmalia Co.*, 156 Cal. 211, 103 P. 927; *Taylor v. Hamilton*, 194 Cal. 768, 230 P. 656. In addition, the court found that no damage had been suffered by appellants. If such evidence of damage as is pointed out could be considered, the record is devoid of any evidence from which it could be told what part thereof arose after June, 1927, up to which time defendants were within their rights under the contract so far as shown by the record. The only evidence as to damage set forth relates to the amount of production in other wells, which, in itself, is somewhat remote and speculative. *Escondido Oil Co. v. Glaser*, 144 Cal. 494, 77 P. 1040; *McComber v. Kellerman*, 162 Cal. 749, 124 P. 431; *Allen v. Narver*, 178 Cal. 202, 172 P. 980. The showing made as to the insufficiency of the evidence to sustain this finding is not sufficient to set the same aside.

[9, 10] In the second cause of action it is alleged that the sublease to one Cather, which is above referred to, was executed on July 22, 1926, prior to the time the leases here in question were signed by the plaintiffs. It is further alleged that this sublease provided that the said Cather would pay to the defendants \$2,500 for the location, and also that the said lease contained the following provision: "It being impossible to estimate the damages for failure to drill the two wells, as described herein, it is agreed by and between the parties that if Lessee fails to drill the well on the part or portion of Lots 19 and 21 more fully described herein, then Lessee shall pay \$5000 in oil out of the first well drilled on Lots 2 and 4, Block 218, as provided herein, pay-

able out of 25% of Lessee's share of production."

It is alleged that this sublease was concealed from the plaintiffs, and that at all times in question the defendants were trustees for the plaintiffs, and, as such, were bound to reveal to them the terms of the Cather sublease, and the prayer is for \$7,500 damages for the withholding of information concerning the same. The complaint neither alleges any facts showing the existence of such a trusteeship nor does the record show any proof of such a relation. There is no proof that such information was suppressed or withheld, other than the fact that the appellants testified that they knew nothing of the sublease. No reason appears either from the complaint or the evidence why the respondents were in duty bound to inform appellants of this lease. Nothing is pointed out to show that the court's finding that the defendants did not willfully or otherwise conceal the existence of this sublease from the plaintiffs is not supported by the evidence. The fifth cause of action covers the same matter, but alleges that the defendants, as trustees for the plaintiffs, received \$7,500 from Cather, for which they have failed to account. While the evidence shows that respondents received \$5,000 under the terms of the Cather sublease, there are neither sufficient facts alleged in the complaint to show such a trusteeship nor evidence to support such allegations, had they been made.

[11] The third cause of action is based upon the theory that the respondents induced the appellants to enter into these leases by stating that the terms thereof were as favorable as could be obtained from any responsible parties, which statement is shown to have been false and fraudulent by the fact that they then had a sublease with Cather, upon more favorable terms. It is also charged that the only object of defendants was to collect the penalty from Cather, and that they had no intention of drilling upon plaintiffs' property. Aside from other considerations, no evidence is called to our attention to support such allegations. Even if the respondents had already entered into the Cather sublease at the time (the court found to the contrary), it by no means follows that appellants could have secured a similar lease, especially if they were unable to furnish power, to offset the lack of room for a power plant upon the property.

For reasons given, the judgment is affirmed.

We concur: MARKS, Acting P. J.; WARNER, Justice pro tem.

109 Cal. App. 662

KENNEDY v. JOHNSON et al.

Civ. 6443.

District Court of Appeal, Second District,
Division 2, California.

Nov. 19, 1930.

1. Appeal and error ⇐1011(1).

Findings based on conflicting testimony could not be disturbed on appeal.

2. Brokers ⇐86(7).

Finding that broker was not employed by purchaser in effecting sale *held* supported by evidence, notwithstanding broker received commission from purchaser's agent for assisting in consummation of sale.

3. Brokers ⇐86(7).

Finding that broker merely aided in bringing purchaser and vendor together, and that he did not represent conflicting interests, *held* supported by evidence.

4. Brokers ⇐43(2).

Oral agreement of realty dealer to pay another broker for service in finding purchaser for dealer's principal *held* not in violation of Statute of Frauds (Civ. Code, § 1624, subd. 6).

Civ. Code, § 1624, subd. 6, requires that an agreement authorizing agent or broker to sell real estate for commission should be invalid unless reduced to writing.

5. Appeal and error ⇐1052(5).

Receiving evidence of unpleaded custom between brokers to split commission, if error, *held* harmless; no finding on custom being made.

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by Obe Kennedy, doing business under the fictitious name of Kennedy Real Estate Company, against A. B. Johnson and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

I. Henry Harris, of Los Angeles, for appellants.

Muhleman, Anderson & Palmer, of Los Angeles, for respondent.

SCHMIDT, Justice pro tem.

By the second amended complaint filed in the lower court, respondent sought to recover from appellants the reasonable value of services rendered by him in the capacity of a real estate broker, to appellants as real estate brokers in connection with an exchange of certain properties owned by appellants'

principal, one A. M. Mull on the one hand, and L. H. Wilson, Inc., on the other. The first cause of action is based on a written agreement to pay a reasonable compensation for the services alleged to have been rendered, and the second and third causes of action are based upon an oral agreement to pay such compensation. Appellants denied the performance of any services by respondent, the making of any agreement, the receipt of any commission by them and the reasonable value of the services performed by respondent, and by way of separate defenses appellants alleged that there was no consideration for the agreement alleged; that the contract sued upon fell within the provisions of section, 1624, Civil Code, and was therefore void and that respondent acted as the agent of L. H. Wilson from whom he accepted a commission without disclosing that fact to appellants and for that reason was not entitled to any further compensation.

The court found that there was an agreement between appellants and their principal, Mull, whereby Mull listed his property for sale or exchange with appellants, giving them the exclusive right to sell or trade it, and that same was subsequently traded to one Wilson, and that respondent in its capacity as a duly licensed real estate broker rendered services to the appellants in assisting appellants in disposing of the property belonging to Mull, and that said services were rendered at the special instance and request of said appellants; that in consideration for said services so rendered by respondent, appellants promised to pay plaintiff a reasonable compensation; that such compensation was to be paid out of such commission as appellants received from the said Mull in effecting a sale or exchange of the Mull property; that respondent and appellants by their joint efforts succeeded in making and causing to be consummated an exchange of the property belonging to Mull and that belonging to Wilson; that as their commission for negotiating and assisting in the bringing about of said exchange appellants received from Mull certain real property of the reasonable value of \$13,250; that the reasonable value of the services so rendered by respondent to appellants in assisting in disposing of the property of the appellants' principal, Mull, is the sum of \$1,000; that the agreement to pay respondent a reasonable compensation is not barred by section 1624, Civil Code; and rendered judgment in favor of respondent against appellants for the said sum of \$1,000. From that judgment appellants have appealed.

The evidence in the case further showed that respondent had received through his salesman, Mr. Chestnut, from one Rogers, who was the agent of Wilson, a commission in the sum of \$500 for his services rendered in

effecting the exchange between Mull and Wilson, which fact was not revealed to appellants until some time after the escrow instructions in connection with the exchange had been signed, and prior to its completion.

[1] Appellants attack the findings of the trial court that any services were rendered by respondent to appellants, or that there was any promise to pay respondent a reasonable compensation for his said services. The evidence in the case shows that there was a conflict in the testimony on each of these two points. The trial court having found in favor of respondent on each of these matters, this court will not disturb such findings. *Johnston v. Porter*, 21 Cal. App. 97, 131 P. 69.

[2] Attack is also made on the following finding: "It is not true that plaintiff was employed by the said L. H. Wilson in effecting a sale or exchange of properties with said A. M. Mull." Appellants base their attack on this finding on the ground that respondent, through his salesman, Mr. Chestnut, received \$500 from Rogers, the agent of Wilson. The evidence shows that respondent was not acquainted with Mr. Wilson nor was he employed by Mr. Wilson, but that he did assist in consummating the exchange between Mull and Wilson for which services Rogers paid the \$500 commission. Under these facts the attack on the finding is without merit.

[3] The court further found that respondent merely aided in bringing Mull and Wilson together, as a result of which the exchange was effected through negotiations between Mull and the agent of Wilson and that respondent in no way represented conflicting interests. The evidence fully supports this finding. In *King v. Reed*, 24 Cal. App. 229, 141 P. 41, it was held that a broker who merely brings the buyer and seller together so that they are thereby able to make their own contract is a "middleman"; that he does not occupy a fiduciary relation; that he does not represent conflicting interests and therefore that he is not precluded from receiving compensation from both parties to the sale. And in *Carothers v. Caine*, 38 Cal. App. 71, 175 P. 478, 479, it was held to the same effect and that it is immaterial in such case that either party is unaware of the employment by the other; that the rule "that an agent, act-

ing for both parties and for each without the knowledge of the other, can collect commission from neither, applies only to agents *stricti juris*, and not to middlemen."

Attack is made upon the finding of the court that the value of the commission received by appellants was \$13,250 is unsupported by the evidence, and appellants also attack the finding of the court that the reasonable value of the services rendered by respondent to appellants in the transaction is the sum of \$1,000 as not being supported by the evidence. As to each of these findings there was a conflict of testimony which precludes this court from disturbing either finding.

[4] Further contention is made that the purported agreement not being in writing was unenforceable and in violation of section 1624, Civil Code, commonly called the statute of frauds. This contention is untenable. It has been repeatedly held that an agreement between brokers to split commissions need not be in writing. In *Johnston v. Porter*, supra, at page 102 of 21 Cal. App., 131 P. 69, 71, we find: "Subdivision 6 of section 1624 of the Civil Code, which declares an agreement authorizing or employing an agent or broker to sell real estate for a compensation or commission to be invalid unless reduced to writing, was designed only for the protection of real estate owners against the unfounded claims of brokers; and it was never intended to be applied to contracts between brokers co-operating in the sale of real property and agreeing to share commissions earned as a result of such sale." Citing *Gorham v. Heiman*, 90 Cal. 346, 27 P. 289; *Casey v. Richards*, 10 Cal. App. 57, 101 P. 36, and *Baker v. Thompson*, 14 Cal. App. 175, 111 P. 373.

[5] Complaint is made that over the objection of appellants, testimony was received that it was the custom between brokers to split commissions, when custom had not been pleaded. However, no finding was made on the custom. On the contrary, the finding was on a specific promise to pay. The error, if any, was entirely harmless.

Judgment affirmed.

We concur: CRAIG, Acting P. J., IRA F. THOMPSON, J.

109 Cal. App. 636

EVEN v. PICKWICK STAGES SYSTEM.
Civ. 4086.

District Court of Appeal, Third District,
California.

Nov. 18, 1930.

Rehearing Denied Dec. 18, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

1. Carriers ⇨320(30).

Whether excessive speed or broken steering gear was proximate cause of bus running off road and over grade *held* for jury.

Assuming that there was a latent defect in part of steering gear and that highest degree of care had been exercised by carrier to discover it in accordance with testimony to that effect, nevertheless evidence in respect to excessive speed, as testified to by several witnesses, presented jury question in respect to proximate cause of accident.

2. Appeal and error ⇨1064(4).

Instruction respecting presumption of negligence on part of carrier, even though incorrect as not using "inference," was not prejudicial.

Since, if the word "inference" had been used instead of the word "presumption," the court would then have directed jury that, if they found the facts as first stated in the instruction, there would arise an inference of negligence which would throw on carrier the burden of showing that accident occurred without negligence on its part, and that is all that they were told to require as a result of the presumption stated, the word "presumption" was used to convey the same meaning, and was limited to the same effect, as the word "inference," which might properly have been used.

3. Damages ⇨132(1).

\$2,500 for injuries consisting of cuts in head, broken ribs, and cut on ear leaving scar, *held* not excessive.

4. Appeal and error ⇨1004(1).

Finding of jury on question of damages will not be disturbed unless so grossly disproportionate to compensation reasonably warranted, as to shock sense of justice.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Robert O. Even against Pickwick Stages System. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, *Wulferdinger v. Pickwick Stages*

System, 293 P. 702, 704; *Burns v. Pickwick Stages System*, 293 P. 704.

Theodore Hale and Barry J. Colding, both of San Francisco, B. P. Gibbs, of Los Angeles, and Mannon & Brazier, of Ukiah, for appellant.

Thomas C. Anglim and L. E. Johnston, both of Napa, Charles Reagh and Martin Pence, both of San Francisco, for respondent.

Mr. Justice Pro Tem. SHIELDS delivered the opinion of the court.

The defendant corporation operated an autostage system during the month of August, 1928, between Clear Lake, in Lake county, and Ukiah, in Mendocino county. On August 24, 1928, one of the stages so operated by defendant ran off the road, over a steep grade, about eight miles easterly from Ukiah. The plaintiff was a passenger in the stage, and was injured as a result of this accident. He prosecuted this action to recover damages for his injuries, and was awarded a judgment from which this appeal was taken.

It is first contended for the appellant that there was no evidence offered which justified the judgment, and that the judgment is without support in the evidence. We think, however, that the record shows the contrary. It appears that the road over which the autostage operated was wide and well surfaced, and that it passed through a mountainous country for almost its entire length. At and approaching where the accident occurred, the road wound, in a series of sharp curves, along a cliff about forty-five feet above a creek or stream which is a tributary of the Russian river. The stage proceeded for some time at the rate of about thirty-five miles per hour. When it reached the "highway," it increased its speed to forty miles per hour. About a mile and a half before reaching the point of the accident, the driver took out and looked at his watch, and then increased his speed. He did not slow up in going around curves. He had been driving about forty miles per hour, and he increased this speed up to between forty and forty-five miles per hour. Just beyond what is known as the Cleveland bridge, there was an "S" curve, one turn of which was sharp to the left. The driver entered this curve going at the rate of about forty miles per hour, increasing this speed to the point of the accident. One witness testified that just after passing the bridge the stage began going "towards the edge of the bank." The plaintiff testified: "Just after crossing the bridge I noticed he (the driver) was going pretty fast and got off into the soft dirt, and tried to get back into the highway again—just going so fast he couldn't make it, and went over the grade." The speed of the car was such that it went seventy or eighty feet before it struck the bank.

When the car became unmanageable, the driver left the wheel, and sought to leave the stage. He did not use the brakes. The foregoing evidence was presented by the plaintiff. In its defense, the defendant presented the driver of the stage as a witness, who testified that the stage had been in control until just before the accident, when the steering gear broke, that the car would not respond to the wheel, and that "the wheel spun in his hand," and that "the car turned at a sharp angle, and went over the cliff." In support of this theory, defendant produced the "drag link," a part of the steering apparatus of the stage which was picked up near the scene of the accident by some disinterested party. It is unnecessary here to detail the character or function of this "drag link"; it being sufficient to say that it constituted an essential feature of the steering gear. Defendant then produced a witness who testified that the day before, in Ukiah, he had inspected the autostage involved in this case, and the steering gear as well, and had found the latter to be in apparent good condition. This evidence was produced for the purpose of showing that the accident had occurred through a defect in the steering gear, that that defect was latent, and that due care had been exercised in an effort to discover such defects. But, in contradiction of the first witness that the stage "turned a sharp angle, and went over the cliff," plaintiff produced two apparently disinterested persons, who testified that they examined the tracks of the car on the curve, and that they led in a straight line, ninety or one hundred feet, to the point where the stage "went over the cliff." And, with reference to the examination or inspection which the witness made, who inspected the stage at Ukiah, the day before the happening of the accident, the cross-examination of this witness developed such details of the examination as made it a question for the jury, whether or not the examination he made was of such a character as to constitute the high degree of care required of a carrier of passengers for hire.

[1] But, assuming that there was a latent defect in the part of the steering gear involved and that the highest degree of care had been exercised by defendant to discover it and that it had been unable to do so, plaintiff contends that it was still a question for the jury as to whether or not this defect and the subsequent breaking was the proximate cause of the accident. In this we think plaintiff is correct. He had introduced evidence from which the jury could properly have found, and evidently did find, that at the time of the accident the stage was being driven at an excessive rate of speed, and it was for the jury, as between these two causes, the broken steering gear and the excessive speed, to find which was the proximate one.

The cases of *Johnsen v. Oakland, etc., Electric Ry.*, 127 Cal. 608, 60 P. 170, and *Siemens v. Oakland, etc., Ry.*, 134 Cal. 496, 66 P. 672, very interestingly state the theories upon which, in such a state of the evidence, the jury may find a verdict for the plaintiff. These theories, in so far as they arise in this case, are very admirably set forth in the brief of respondent herein to the effect that the jury might have found from the evidence that the proximate cause of the accident was the excessive speed at which the stage was operated, if they should deem the stage to have been so operated; that the breaking of the steering apparatus would not have occurred if the car had not been so operated; that the car would not have gone over the bank, notwithstanding the broken gear, if it had been traveling at a safe speed; that the car could have been stopped before going over the bank if the driver, traveling at a safe rate of speed, had applied his brakes; or that the car could have been stopped in any event, if the brakes had been applied. The issues were very properly submitted to the jury, and their verdict for the plaintiff is so substantially supported by the evidence that we will not attempt to disturb it.

[2] At the conclusion of the trial, at the request of the plaintiff, an instruction was given, the concluding part of which directed that, "when it is shown that injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed, in its business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part."

Appellant contends that the use of the word "presumption" in this instruction was erroneous; that it is not a presumption, but an inference which arises in such circumstances. But, an identical instruction with the one given herein, and as above quoted, was given and expressly approved in *Jones v. United Railroads*, 54 Cal. App. 744, 202 P. 919. The law was stated to be exactly as stated in this instruction in *McCurrie v. S. P. Co.*, 122 Cal. 558, 55 P. 324, and an instruction quoting this statement was expressly approved in *Cody v. Market Street Ry.*, 148 Cal. 90, 82 P. 666. The law was again so stated in *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, 93 P. 106, 107, 125 Am. St. Rep. 68, where Mr. Justice Lorigan says that "this has been the rule in this state for upwards of 40 years." It is, however, true that in a later case, where an instruction was requested of the court in which the word "presumption" was used as in the case before us, and where the trial judge changed the word to "inference," the Supreme Court said that this was properly done. *Dowd v. Atlas T. & A. Service Co.*, 187 Cal. 523, 202 P. 870. In announcing this opinion, the court cites *Bonneau v. North Shore R. R.*

Co., above, with approval, and, without reference to the decisions above cited, it named, in support of its opinion, *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 P. 481, where an instruction similar to the one in the case under discussion had been given, using the word "presumption" was approved in that particular, and *O'Connor v. Mennie*, 169 Cal. 217, 146 P. 674, where the word "presumption" is repeatedly used in the sense criticised in the present case. It is interesting to note that, in the very instruction in which in the *Dowd Case* it was held that it was not error to change the word "presumption" to "inference" the word "presumption" is later used in exactly the same sense in which it was used where the court changed it to the word "inference." In such a state of the law, it certainly cannot be regarded as reversible error for the court to have used the word "presumption" in the instruction given in this case. There is a distinct difference in the meaning of the words "presumption" and "inference." *Thomas v. Visalia Electric R. Co.*, 169 Cal. 658, 147 P. 972. It may be conceded that the use of the word "presumption" in the instruction under consideration was incorrect, but, if so, the defendant was not injured by it. If the word "inference" had been used, the court would then have directed the jury that, if they found the facts as first stated in the instruction, there would then arise an inference of negligence which would throw on defendant the burden of showing that the accident occurred without negligence on its part. As this is all that they were told to require as a result of the presumption stated, no harm was done defendant by its use. In other words, the word "presumption" was used to convey the same meaning, and was limited to the same effect as the word "inference," which might properly have been used.

[3, 4] The jury returned a verdict for the plaintiff in the sum of \$2,800, of which sum \$2,500 was for general damages. Defendant contends that this sum was excessive. There was evidence from which it appears that the plaintiff received a cut in the head which it took six stitches to close; he received a broken rib, and one of his ears was cut, from which a scar remains. He was confined to his home with a physician in attendance for a month or more, and, when he returned to the place of his employment, he was not able to do his work as formerly. At the time of the trial, near nine months after the accident, the place where his head had been cut was still tender, his chest "bothered him," and he had not recovered the full use of one of his arms. Following the accident, he suffered severe pain, which continued for some time. The amount of damage, which one sustains from pain and suffering and injury such

as have been stated is necessarily difficult of assessment. Verdicts in such cases should not be lightly set aside, and courts of appeal are only justified in interposing their judgment against that of a jury, in extreme cases. The rule in such cases is well stated as follows: "Unless we are able to say that the award of the jury and sustained by the trial court was so grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice, and raise at once a strong presumption that it was the result of passion, prejudice or corruption, rather than honest or sober judgment, this court may not exercise the power of revision." *Kelley v. Hodge Trans. System*, 197 Cal. 598, 242 P. 76; *Sellers v. Wood Hydraulic, etc., Co.*, 205 Cal. 519, 271 P. 1055; *Smith v. Royer*, 181 Cal. 165, 183 P. 660; *Gregoriev v. N. W. Pac. Ry.*, 95 Cal. App. 428, 273 P. 76; *Hasty v. Trevillian*, 102 Cal. App. 405, 283 P. 148; *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100.

Under this rule, and governed by its wise policy, the award here will not be disturbed.

The judgment is affirmed.

109 Cal. App. 642

WULFERDINGER v. PICKWICK STAGES SYSTEM.
Civ. 4050.

District Court of Appeal, Third District, California.

Nov. 18, 1930.

Rehearing Denied Dec. 18, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

Damages $\S$ 132(14).

\$12,500 for injury consisting of cut severing supraorbital branch of trigeminal nerve, healing by formation of scar tissue, *held* not excessive.

The evidence established that many painful symptoms followed the injury, and that injured person for the first time in her life after accident suffered failing eyesight, insomnia, loss of weight, chronic headache, dizziness, nervousness, irritability, lack of energy, bad dreams in place of occasional pleasant dreams before accident, generally poor health, lump on forehead occasionally, not able to wear a hat much of the time, no joy in living, unreasonable fears, afraid to stay at home even in daytime, no energy, hysteria, uncontrollable laughter and tears, and soiling of bed linen.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Frances M. Wulferdinger against the Pickwick Stages System. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 288 P. 93; 293 P. 704; *Burns v. Pickwick Stages System*, 293 P. 704.

Theodore Hale and Barry J. Colding, both of San Francisco, B. P. Gibbs, of Los Angeles, Mannon & Brazier, of Ukiah, and Carroll B. Crawford, of San Francisco, for appellant.

McEnerney, Reagh & Morris, Phillip R. McEnerney, Charles Reagh, and Martin Pence, all of San Francisco, and Thomas Anglim, of Napa, for respondent.

Mr. Justice Pro Tem. SHIELDS delivered the opinion of the court.

The plaintiff herein was a fellow passenger with Robert O. Even, in an autostage, which in August, 1928, left the road and plunged over a cliff some forty feet into a creek bed. Each was injured, and each brought an action to recover the damage they had respectively sustained. Each recovered a judgment, from which in each instance an appeal was taken. In the case of *Even v. Pickwick Stages System* (Cal. App.) 293 P. 700, a decision has this day been filed.

In the case now before us, the trial was by a jury which rendered a verdict for the plaintiff for \$12,500 general damages. The evidence upon the question of negligence was substantially identical with the evidence in the *Even Case*. In this appeal from the judgment in the case now before us, the defendant makes little contention as to any failure of proof of negligence on its behalf. However, that question has been answered adversely to defendant in the case of *Even v. Pickwick Stages System*, above referred to. This leaves defendant's contention that the verdict is excessive, so excessive as to bear evidence that it was rendered under the influence of passion and prejudice as the sole question to be disposed of.

On behalf of plaintiff, evidence was given that at the time of the trial she was of the age of about 33 years, and up to the time of the accident was of sound health. As a re-

sult of the accident, in addition to apparently minor injuries, she received a cut over the left eye, which severed all of the tissues down to the bone. This cut severed "the supra-orbital branch of the trigeminal nerve" and healed by the formation of scar tissue. Many painful symptoms followed, and her physician testified that in his opinion she was suffering from "a trigeminal neuralgia." In treating this, he had injected the nerve with alcohol, which brought relief for only a short time. He stated that the next step in treatment involved a capital operation. Plaintiff herself testified to many consequences of her injuries, which are summarized by appellant in its brief as follows: "That for the first time in her life she suffered after the accident from falling eyesight, insomnia, loss of weight, chronic headache, dizziness, nervousness, irritability, lack of energy, bad dreams, in place of 'occasional pleasant dreams' before the accident, generally poor health, lump on forehead occasionally, not able to wear a hat much of the time, no joy in living, unreasonable fears, afraid to stay at home even in the daytime, no energy, hysteria, uncontrollable laughter and tears, and soiling of bed linen."

Upon being asked a question involving these symptoms, a medical expert testified that in his opinion plaintiff was "suffering from post-traumatic neurosis, plus concussion effects on and of the central nervous system." Asked as to the probable duration of this condition, the physician answered that it was indefinite, and that the prognosis was unfavorable.

The conclusion might reasonably be formed from this evidence, if believed, that this young woman had been grievously injured and her future life greatly burdened. The one alleged consequence of the accident, if true that plaintiff had lost the power of controlling her bodily excretions, so that she soils her clothing with urine and feces, both day and night, and must constantly wear protective linen, would warrant a substantial verdict. The verdict of \$12,500 in this case, based upon this evidence, which was the province of the jury to weigh, and which they had a right to and undoubtedly did believe, does not carry the suggestion of passion, prejudice, or corruption, and the judgment rendered upon it is affirmed.

109 Cal. App. 647

WULFERDINGER v. PICKWICK STAGES SYSTEM.
Civ. 4165.

District Court of Appeal, Third District,
California.
Nov. 18, 1930.

Rehearing Denied Dec. 18, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

Damages ⇨ 132(1).

\$11,000 for injuries consisting of dislocated coccyx and sprained sacroiliac joint *held* not excessive.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Louis F. Wulferdinger against the Pickwick Stages System. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 293 P. 702; *Burns v. Pickwick Stages System*, 293 P. 704.

Theodore Hale, Barry J. Colding, and B. P. Gibbs, all of San Francisco, for appellant.

Charles Reagh and Phillip R. McEnerney, both of San Francisco, for respondent.

Mr. Justice Pro Tem. SHIELDS delivered the opinion of the court.

This action grew out of the same accident involved in the case of *Robert O. Even v. Pickwick Stages System* (Cal. App.) 293 P. 700, an opinion in which has this day been filed. This plaintiff was a fellow passenger with Even, and like him was injured in the accident, and brought this action to recover the damages he thereby sustained. This case was heard by the court without a jury, and by stipulation was tried upon the same evidence upon which the *Even Case* had been tried. The evidence in this case, however, as to the nature of the plaintiff's injuries was different and appropriate to the facts in his case. The court awarded the plaintiff judgment for certain special damages and for \$7,000 general damages. From this judgment this appeal was taken; the same questions being raised which were involved in the case of *Even v. Pickwick Stages System*. The decision in this latter case disposed of all of these points except the contention that the verdict was excessive. This question will be given brief treatment.

The plaintiff before the accident was a piano salesman, who traveled about in his business, frequently going from door to door. In the accident he suffered a dislocated coccyx and a sprained sacroiliac joint. He was taken immediately to the hospital at Ukiah, "suffering terribly." He remained there six days, and was then taken home. He was able to visit his office about the end of September,

but could do no work. He began to do some work about the end of October. He continues to have violent pains in his back, he suffers nervous illness, and has trouble with his rectum.

At the time of the trial, he had not been able to work full time. On many days he has to lie down and cannot work at all. He can walk only a few blocks at a time, and then must sit down on account of pain. At the time of the trial, he was unable to sit evenly on both hips, and had to sit on one or the other. He cannot move pianos as he previously did in the conduct of his business, and is unable to play a piano as his business requires, because he cannot sit on a hard surface. He has lost between twelve and fourteen pounds in weight. His health before the accident was "perfect," and his earnings had been about \$5,000 per annum. Since the accident he has been able to make no more than \$40 per week "at the most." The above statements are from the testimony of plaintiff himself. His physician testified that the dislocation of his coccyx was permanent, and that he did not think he could be restored to complete health without a capital operation.

With regard to the sacroiliac "slip," the witness stated that its condition indicated a bad prognosis. Continuing, he said the "condition is unfavorable." Such evidence, if believed by the court, afforded abundant support for the award made by the court.

For the reasons given in the opinion in *Even v. Pickwick Stages System*, *supra*, the judgment is affirmed.

109 Cal. App. 645

BURNS v. PICKWICK STAGES SYSTEM.
Civ. 4087.

District Court of Appeal, Third District,
California.
Nov. 18, 1930.

Rehearing Denied Dec. 18, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

Damages ⇨ 132(7).

\$5,000 for injury to thigh *held* not excessive.

The injured person testified that, as a result of the injury, she was terribly nervous, vomited nearly every day, had indigestion, and had headaches which came on frequently and stayed with her about three days, and that leg continued to pain her and throbbed like a toothache. She further testified that she had lost fifteen

pounds in weight, and that her leg bothered her in walking or if she stood on it all day.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Amy Burns against the Pickwick Stages System. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, *Wulferdinger v. Pickwick Stages System* 293 P. 702, 704.

Theodore Hale and Barry J. Colding, both of San Francisco, B. P. Gibbs, of Los Angeles, and Mannon & Brazier, of Ukiah, for appellant.

Thomas C. Anglim and L. E. Johnston, both of Napa, Charles Reagh and Martin Pence, both of San Francisco, for respondent.

Mr. Justice Pro Tem. SHIELDS delivered the opinion of the court.

This case was tried jointly with the case of *Robert O. Even v. Pickwick Stages System*, 293 P. 700, an opinion in which case has this day been filed. The parties were fellow passengers in an autostage, which met with an accident in which each of them was injured. The facts in both cases are identical except as to the nature of the injuries sustained by the parties respectively and the amount of the recovery of each. The decision in the case of *Even v. Pickwick Stages System* is decisive of all points raised in this, except as to whether or not the verdict was excessive.

In addition to special damages, the verdict gave the plaintiff \$5,000 as general damages. In support of this verdict, it appears that plaintiff was engaged in the hairdressing business, in Napa, before the accident. In the fall she was hit by a steel trunk, her thigh was injured. When she was raised by a rope from the river, she could not stand on her leg. She was taken to a hospital and thence to her home, where she stayed in bed two or three weeks. She suffered great pain. She was taken in an ambulance to have X-rays taken. She was unable to work at all from August 24 to October 5. At the time of the trial, she had not recovered so as to work as she did before the trial. At that time she stated that she could do a little work but did not seem to get her strength back, and that she did not feel well. She stated that she was "terribly nervous, vomited nearly every day, had indigestion, and had headaches which came on frequently and stayed with her about three days. Her left leg continued to pain her, and throbbed like a toothache." She had gone from 135 pounds in weight to 120; her leg bothered her in

walking, and, if she stood on it all day, it "bothered" her. She needed an electric pad every night to relieve her pain.

Her physician testified that the injury to her left thigh was permanent, and that she had suffered a severe shock from which it would take her a long time to recover. Comment on this evidence would seem unnecessary. For the reasons stated in *Even v. Pickwick Stages System*, we deem the verdict for \$5,000 general damages in this case, so sufficiently supported by the evidence that we should not disturb it.

The judgment is affirmed.

109 Cal. App. 743

GUIRAS et al. v. HARRY H. CULVER & CO.
Civ. 5989.

District Court of Appeal, Second District,
Division 1, California.

Nov. 21, 1930.

1. Landlord and tenant ⇨198.

Landlord's re-entry when tenant surrendered premises terminated lease as to rentals subsequent to entry, but did not affect tenant's liability for rent already accrued.

2. Landlord and tenant ⇨198.

Tenant not vacating premises until rentals for two months accrued held liable therefor subject to credit of deposit equaling half of debt.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by L. Guiras and another against Harry H. Culver & Co. Judgment for plaintiffs, and defendant appeals.

Affirmed.

D. Chase Rich and Wm. L. Kuehn, both of Los Angeles, for appellant.

Canepa & Castruccio, of Los Angeles, for respondents.

HOLLZER, Justice pro tem.

Defendant appeals from a judgment awarded to plaintiffs in the amount of \$550 on account of unpaid rent. The facts, which are not in dispute, disclose that under date of August 30, 1924, the plaintiffs and defendant entered into a written lease under which plaintiffs demised to the defendant certain premises for a term of years, and in consideration of which the latter agreed to pay a total rental of \$28,050 at the rate of \$550 in advance on the first of each month. The lease acknowledged the payment by defendant of the sum of \$1,100, "Five Hundred Fifty (\$550.-

00) Dollars of which is to cover the first month's rent and Five Hundred Fifty (\$550.-00) Dollars as a deposit as a guarantee that said Lessee will perform all the conditions of this lease, and if so performed, will be applied to the last month's rent and if not so performed, is to be retained by the Lessor as a forfeit."

No rent having been paid either for the month of June or the month of July, 1926, the plaintiffs on July 2, 1926, caused a notice to be served on the defendant requiring the latter within three days to pay the sum of \$1,100, being the rental for the months of June and July, 1926, or to deliver up possession of the demised premises. On July 3d, the defendant surrendered possession. Several weeks later, plaintiffs instituted the present action to recover the sum of \$550 on account of rent due for the month of June, 1926.

Defendant contends, in effect, that because the lease was terminated by its surrender of the premises, pursuant to plaintiffs' demand for the payment of the rent or delivery of possession, and because the defendant is entitled to a credit in the amount of \$550, by reason of having deposited this sum with the plaintiffs at the time of the execution of the lease as a guaranty for the performance of the conditions thereof, the plaintiffs should have applied such deposit in payment of the June rent, and hence are not entitled to recover in this action.

[1] We are unable to agree with this contention. It has long been the settled law of this state that, while re-entry by the landlord and his resumption of the benefits, use, and enjoyment of the premises terminates the lease, so far as the landlord's right to rentals subsequent to such entry is concerned, this does not affect the tenant's liability for rent accrued prior to such re-entry. *Anheuser-Busch Brewing Association v. American, etc., Co.*, 59 Cal. App. 718, 723, 211 P. 817, citing *Ruling Case Law*, page 197. To the same effect, see *Wetzler v. Patterson*, 73 Cal. App. 527, 532, 238 P. 1077, and the cases therein cited.

[2] It being conceded that the defendant did not vacate the premises until after the rentals for the months of June and July, 1926, had accrued, it follows that, at the time defendant surrendered possession, the latter was indebted to plaintiffs in the sum of \$1,100, subject, however, to a credit by reason of the above-mentioned deposit amounting to \$550. Accordingly, this would leave a balance of \$550 due from the defendant, and for which plaintiffs would be entitled to judgment against defendant.

For the reasons herein set forth, the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

GOOTAR v. LEVIN.

Civ. 7412.

District Court of Appeal, First District,
Division 2, California.

Nov. 20, 1930.

Rehearing Denied Dec. 20, 1930. Hearing Denied by Supreme Court Jan. 19, 1931.

1. Negligence ⇨136(26).

Contributory negligence is ordinarily question for jury.

2. Automobiles ⇨245(72).

Whether pedestrian struck by motor truck while walking in private driveway was contributorily negligent *held* for jury under evidence.

3. Automobiles ⇨246(4).

Instruction relating to rear view mirror *held* erroneous as adding to duty of defendant, whose motor truck struck plaintiff in private driveway, absolute duty imposed upon one operating vehicle upon public highway (St. 1923, p. 517, § 97).

In the instruction complained of the court read to jury provision of St. 1923, p. 517, § 97, making it unlawful to drive motor vehicle upon public highway under certain conditions without rear view mirror.

4. Automobiles ⇨246(37).

Instruction *held* erroneous, as omitting necessary qualification that doctrine of sudden peril is available only to person confronted therewith without own negligence.

The instruction complained of stated that, if jury should find that plaintiff, suing for injuries received when struck by defendant's motor truck, was suddenly put into position of imminent danger without having sufficient time to consider all circumstances, he is to be excused for omitting to take some precaution or for making unusual choice under disturbing influences, although, if his mind had been clear, he might have done otherwise.

5. Trial ⇨241.

Instruction given in exact language of statute *held* not erroneous (Civ. Code § 1714).

6. Appeal and error ⇨1068(4).

Instruction on damages relating to predisposition to disease or sickness of man, though erroneous, in absence of expert testimony that injuries resulted in such predisposition, *held* not to require reversal, in view of nature of injuries and amount of award.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Sam Gootar against Bob Levin. Judgment for plaintiff, and defendant appeals. Reversed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Clifton Hildebrand, of Oakland, and Allison E. Schofield, of San Francisco, for respondent.

SPENCE, J.

Plaintiff brought this action against defendant to recover for personal injuries received when plaintiff was struck by defendant's automobile truck. Judgment in the sum of \$2,250 was entered in favor of plaintiff upon the verdict of the jury. From this judgment defendant appeals.

The accident occurred in a private driveway on the premises of the defendant. Both plaintiff and defendant were dealers in junk, and plaintiff had called at defendant's premises to obtain a chain. In leaving the premises plaintiff stepped into the driveway from defendant's office in the adjacent building. The width of the driveway was twelve feet three inches. Defendant's employee was endeavoring to back the truck from the front of the premises through the driveway and into the yard. The truck was about eight feet wide and with its load of boilers or tanks was estimated to be about ten or eleven feet in width. In operating the car the employee was standing with his left foot on the running board and his right foot on the gas. The truck was moving very slowly until just before the accident. The employee had an assistant straightening the wheels and directing him as he started to back. The truck was moving back and then forward in order to start into the driveway on a straight course. The plaintiff, preceded by a Mr. Cohen, walked along the right side of the driveway toward the front of the premises. The driver was on the left side of the truck and did not see the plaintiff. Plaintiff saw the truck when he was twenty-five feet from it, and the truck was then a few feet over the sidewalk. The sidewalk was fifteen feet three inches in width. Plaintiff was then about ten feet from the corner of the building. He proceeded forward and the truck proceeded to back. Plaintiff testified that the truck did not back straight, and that it increased its speed just before the accident. He stated that there were two piles of junk near the corner of the building, and that he got mixed up and did not know what to do. He flattened himself against the wall at the corner of the building and the truck struck him, causing the injuries.

[1, 2] Appellant contends that the respondent was guilty of negligence as a matter of law. We do not believe that the record supports this contention. The diagrams and photographs used on the trial are not before us

and the exact locations and descriptions of the various objects, such as buildings, fences, gates, scales, and piles of junk referred to in the testimony, are not altogether clear. It was respondent's claim that there was sufficient clearance to pass the truck if it had backed on a straight course; and, further, that he had sufficient time to clear the building if the speed of the truck had not been suddenly increased. Contributory negligence is ordinarily a question for the jury. Although the evidence might have warranted an implied finding of contributory negligence, it cannot be said that the evidence showed that plaintiff was guilty of contributory negligence as a matter of law.

[3, 4] Appellant further contends that the trial court erred in its instructions to the jury. In instruction 29 the court read to the jury the provisions of section 97 of the California Vehicle Act (St. 1923, p. 517), making it unlawful to drive a motor vehicle upon a public highway under certain conditions without a rear view mirror. On the trial great stress was laid upon the failure of defendant to equip his truck with this type of mirror. The instruction given was inapplicable to the facts in the present case and should not have been given. The section covers the operation of vehicles on public highways. The accident here occurred in a private driveway. In effect the instruction added to defendant's duty to exercise ordinary care the absolute duty imposed upon one operating a vehicle upon a public highway. In instruction 42 relating to the doctrine of sudden peril, the court instructed the jury as follows: "You are instructed that if you find from the evidence plaintiff Gootar was at the time and place set forth in the complaint, suddenly put into a position of imminent danger without having sufficient time to consider all the circumstances, he is to be excused for omitting to take some precaution or for making an unusual choice under such disturbing influences, although if his mind had been clear, he might have done otherwise." The foregoing instruction omitted the necessary qualification that the doctrine of sudden peril is available only to a person who is confronted with such peril without negligence on his own part. Where there is evidence tending to show that such person's sudden peril resulted from his own negligence, it is error to give such an instruction without proper qualification. *Brooks v. City of Monterey* (Cal. App.) 290 P. 540; *Vedder v. Bireley*, 92 Cal. App. 52, 60, 267 P. 724. The main issue in the case was whether plaintiff's injuries resulted from the negligence of the plaintiff or the negligence of the defendant, and the giving of the foregoing instructions constituted prejudicial error requiring a reversal of the judgment.

[5, 6] Appellant complains of other instructions. In instruction 38 appellant takes exception to the use of the word "skill" where

the court used the phrase "ordinary care or skill." This instruction was given in the exact language of section 1714 of the Civil Code. This code section may be inaptly drawn, but there was no error in giving the instruction. Instruction 41 is a general instruction on damages frequently given in cases of this kind. It stated the law correctly, and we find no merit in the contention that the evidence was insufficient to justify the court in giving it. Instruction 35 was also an instruction on damage relating to predisposition to disease or sickness as a result of the injury. This instruction should not have been given in the absence of expert testimony to show that plaintiff's injuries resulted in such predisposition, but in view of the nature of the injuries and the amount of the award, we do not believe that the giving of this instruction would in itself require a reversal.

Appellant further complains of prejudicial misconduct resulting from an answer given by respondent while a witness in which he referred to the doctor attending him as "Mr. Levin's insurance company doctor." We deem it unnecessary to discuss the point, as it is not likely to occur upon a retrial of the cause.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

110 Cal. App. 53

**SOUTHERN PACIFIC LAND CO. v.
KIGGINS et al.**

Civ. 83.

District Court of Appeal, Fourth District,
California.

Nov. 24, 1930.

1. Vendor and purchaser Ⓒ219.

Owner contracting to sell land could sue purchaser and third party for value of gravel removed by third party under contract with purchaser (Code Civ. Proc. § 307).

Owner contracted to sell land to purchaser under contract providing that purchaser would not himself, nor permit others to, remove any part of land nor permit waste thereon. Purchaser entered into contract with third party for sale of gravel from land. Contract for sale of land was not recorded, and after purchaser's default in payment of purchase price, owner brought suit against purchaser and third party to recover damages for gravel removed. Code Civ. Proc. § 307, provided that there shall be but one form of civil action.

2. Landlord and tenant Ⓒ55(2).

"Waste" is unlawful act or omission of duty by tenant permanently injuring inheritance and requires privity of title between parties.

[Ed. Note.—For other definitions of "Waste," see Words and Phrases.]

3. Vendor and purchaser Ⓒ218.

Persons entering on property by authority of vendee in possession, contracting to purchase property, cannot remove large quantities of soil therefrom.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by the Southern Pacific Land Company against E. E. Kiggins and another. Judgment for defendants, and plaintiff appeals.

Reversed.

Frank Thunen, of San Francisco, for appellant.

W. E. Byrne, of San Bernardino, and Charles C. Crouch, of San Diego, for respondents.

MARKS, Acting P. J.

Appellant was and is the owner of approximately four hundred and eighty acres of land in San Bernardino county. On September 29, 1925, it entered into an executory contract for the sale of this land to Harold Kiggins, the son of E. E. Kiggins, one of the respondents. Two hundred and seventy dollars was paid in cash on account of the purchase price of the property, the balance of which was to be paid in deferred payments, the first falling due on September 29, 1926. The vendee was evidently let into possession of the property. The contract contained the following provision:

"Fourth. That until after all payments have been made as hereinbefore provided, Vendee will not, nor will he permit others to remove or destroy, in whole or in part, any improvements placed upon the said land, nor cut any wood or trees thereon, nor do any mining thereon, nor commit any strip or waste on the said premises; and that all trees and minerals upon said land shall, until after all payments have been made, be and remain the property of Vendor."

On October 10, 1925, respondents executed the following instrument:

"Office, Main 3073 Residence Cor. 366.

"Henry G. Fenton Grading and General
Contractor

"Office and Yards, Dewey and Main Streets
"San Diego, California,

"October 10, 1925

"Mr. E. E. Kiggins, Oro Grande, California.

"Dear Sir: Confirming verbal conversation with you this morning concerning the matter

of obtaining material from land owned by you for the manufacture of road surfacing material for use on my contract with the State Highway Commission for the construction of road from Victorville to Hicks, California.

"It is my understanding that you grant to me the right to obtain such material as may be required for the work and for this right I am to pay you or your assigns the sum of one thousand dollars in instalments as follows: One third the amount with this letter, one third on or before December 10, 1925, and the remaining one third on or before January 10, 1926.

"The engineers for the State Highway Commission estimate that this contract will require 41,000 tons of road surfacing material, if, however, more than this amount of road surfacing material is required for this contract or for other work which we may secure, it is my understanding that I may obtain such additional material upon payment to you of two and one-half cents per ton for all tonnage over and above 41,000 tons.

"If the foregoing is in accordance with your understanding of our verbal agreement and is acceptable to you will you so indicate by signing below and return one copy for my record.

"H. G. Fenton

"Accepted E. E. Kiggins."

Harold Kiggins made no further payments on the purchase price of the property and forfeited his right to purchase it. In April, 1927, and after the forfeiture, appellant discovered that Henry G. Fenton had removed about 41,000 tons of gravel from the property. Appellant thereupon filed suit against respondents for \$1,000, the value of the gravel removed.

The complainant alleged: Ownership in appellant, but not the possession of 40 acres of the property from which the gravel had been removed; the value of the gravel and damages in the sum of \$1,000 resulting from its removal; and that demand on respondents for \$1,000 had been made and their refusal to pay the same.

Respondents filed separate answers. Kiggins denied the removal of any gravel and any damage to appellant. Fenton admitted the removal of the gravel, but denied that its value and the damages resulting from its removal were in excess of \$50. He further denied that his entry upon the property and the removal of the gravel was without right and without the permission of appellant.

The trial court found that the contract between appellant and Harold Kiggins had been executed and that it had not been recorded; that Harold Kiggins went into possession of the property and was in possession thereof during the time the gravel was removed; that E. E. Kiggins acted as agent for Harold Kig-

gins and sold to Fenton the gravel in question which was of the value of \$1,000; that it was removed with the knowledge and consent of Harold Kiggins; that in purchasing and removing the gravel Fenton acted in good faith and paid the \$1,000 to Harold Kiggins. Upon these findings judgment was entered for respondents.

It was the theory of respondents before the trial, and which they urge here, that the action is for damages for trespass; that trespass is a wrong against the possessor of property; that an action therefor cannot be maintained by one out of possession; that at all times material to the action, Harold Kiggins was in possession of the property in question; that E. E. Kiggins acted as agent for Harold Kiggins throughout the transaction; that Fenton was the licensee and permittee of Harold Kiggins in entering upon the property and removing the gravel and did so under color of right; that therefore the legal owner of the property out of possession could not recover damages resulting from a trespass committed by one under authority from another in possession.

Section 307 of the Code of Civil Procedure provides that there shall be but one form of civil action in California. In the case of *Rogers v. Duhart*, 97 Cal. 500, 32 P. 570, it was held as follows:

"The briefs are devoted chiefly to a discussion of the question whether an action trespass quare clausum fregit can be maintained by one who was not in the actual possession of the land at the time the acts complained of were performed. The respondent refers to cases showing that actual possession is not in all cases essential, and the appellant insists that the exceptions are confined to cases in which the plaintiffs were the owners,—where the title draws to it the possession for the purpose of redressing injuries to the estate.

"It would be a useless thing to attempt to reconcile the cases on this subject. Decisions adhering to the common-law rules of pleading are seldom of any value in determining the sufficiency of a pleading under the Code, and sometimes lead to serious departures from its letter and spirit. With us mere forms of action are cast aside. Every action is now in effect a special action on the case (*Jones v. Steamer Cortes*, 17 Cal. 487, 79 Am. Dec. 142; *Goulet v. Asseler*, 22 N. Y. 225; *Matthews v. McPherson*, 65 N. C. 189; *Brown v. Bridges*, 31 Iowa, 145); and the rigid formalism and subtle distinctions found in the rules governing the common-law forms of action are as inapplicable and inane under the modern plan of procedure as the highly dramatic speech, senseless repetitions, and symbolic gestures of the formulæ prescribed for the five forms of civil actions by the decemvirs of ancient Rome.

"Does the complaint state in ordinary and concise language facts sufficient to constitute a cause of action? That is the question, and not whether it is sufficient to show trespass quare clausum, trespass vi et armis, or any other technical form of action, ex delicto or ex contractu.

"The common-law rule is that, if plaintiff declare in trespass quare clausum where the action should be case, he will be nonsuited at the trial; but under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of relief, whatever it may be."

[1, 2] If we assume that the theory of respondents is correct, except that a plaintiff out of possession cannot recover for damages to the freehold, yet upon such theory the appellant has a good cause of action and the right to recover. Appellant was the owner of an interest in the freehold. Harold Kiggins possessed an equitable interest in the property through his contract of purchase. Respondents entered upon the land under authority from Harold Kiggins and removed part of the freehold. "Waste" has been defined as follows: "As defined by Lord Coke, it 'is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments to the disinherison of him that hath the remainder in fee simple or fee tail.' It has also been defined as an unlawful act or omission of duty on the part of a tenant which results in permanent injury to the inheritance. The word is not an arbitrary term to be applied inflexibly without regard to the quantity or quality of the estate, the nature and species of property, or the relation to it of the person charged to have committed the wrong. In order to constitute technical waste privity of title must exist between parties, and the wrongdoer must be rightfully in possession." 25 Cal. Jur. 975.

[3] It has been held that a vendee in possession of real property under an executory contract of sale cannot remove fixtures from the land thereby committing waste (Conde v. Sweeney, 14 Cal. App. 20, 110 P. 973), nor can he remove fixtures placed thereon by himself without an agreement giving him the right so to do (Conde v. Sweeney, 16 Cal. App. 157, 116 P. 319). If such a vendee cannot remove fixtures, certainly those entering upon the property under him and by his authority cannot remove large quantities of the soil itself.

Judgment reversed.

We concur: BARNARD, J.; WARMER, Justice pro tem.

GARDNER v. KREIG (two cases).

MICHAUD v. SAME.

WOLLENHAUPT v. SAME.

Civ. 7388.

District Court of Appeal, First District,
Division 2, California.

Nov. 18, 1930.

Rehearing Denied Dec. 18, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

Automobiles $\Rightarrow$ 245 (87).

Whether guests in automobile were contributorily negligent in merely protesting to driver when they realized driver was speeding held for jury.

Appeals from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Separate actions by T. J. Gardner against Minnie Kreig, and by George E. Michaud, James Gardner, and Ida Wollenhaupt, against defendant named. Judgment for plaintiffs, and defendant appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Clifton Hildebrand, James A. Myers, and Granville T. Burke, all of Oakland, for respondents.

DOOLING, Justice pro tem.

These four cases were tried together before a jury and by stipulation of the parties are presented together upon appeal. The four plaintiffs were injured on March 10, 1929, while riding as guests in an automobile operated by appellant. Upon appeal from judgments against her only two points are made by appellant. The first, based upon the subsequent adoption of section 141 $\frac{3}{4}$ of the California Vehicle Act, as added by St. 1929, p. 1580, is no longer open since the decision of Krause v. Rarity (Cal. Sup.) 293 P. 62. The second, that respondents were guilty of contributory negligence in doing no more than protest to appellant when they realized that she was driving at an excessive speed, was properly left to the jury, which decided it against appellant. Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 P. 236; Dowd v. Atlas T. & A. Service, 187 Cal. 523, 202 P. 870; Shields v. King, 207 Cal. 275, 277 P. 1043.

Judgments affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

211 Cal. 87

DANKERT v. OROVILLE-WYANDOTTE IRR. DIST.**S. F. 1398.**

Supreme Court of California.

Nov. 28, 1930.

Mandamus ⇨18.

Determination in original mandamus proceeding of rights of owner of land transferred from water company to irrigation district was refused as involving questions involved in appeal in another action.

Powers of railroad commission in authorizing transfer of water company's system under St. 1915, p. 149, § 51(a), under specified conditions as to rates, uses of water outside district, inclusion of outside lands in district, contractual rights growing out of proceedings culminating in order of transfer, and a number of other important questions, which should receive fullest consideration rendered it inexpedient that Supreme Court should arrest appeal already taken by another user of water in action for declaratory relief under Code Civ. Proc. § 1060 et seq., where determination of such appeal would determine petitioner's rights.

In Bank.

Original mandamus proceeding in the Supreme Court by Charles Dankert against Oroville-Wyandotte Irrigation District, a public corporation.

Writ denied, and alternative writ discharged.

George F. Jones, of Oroville, and Sanborn, Roehl, Smith & Brookman, of San Francisco, for petitioner.

R. A. Leonard, of Oroville, and Chickering & Gregory, of San Francisco, for respondent.

PER CURIAM.

Application for a writ of mandamus. The recitation of facts is taken from the petition:

Respondent Oroville-Wyandotte Irrigation district is now and since July 8, 1919, has been a public corporation and irrigation district organized under the laws of this state for the purpose of providing water for the irrigation of certain lands situate in the county of Butte. Said district is not subject to the regulatory powers of the state railroad commission. *Henderson v. Oroville-Wyandotte Irrigation District*, 207 Cal. 215, 277 P. 487. There also existed in the immediate vicinity of respondent district two other public utilities, to-wit, Palermo Land & Water Company and South Feather Land & Water

Company, organized for the purpose of distributing for sale water to lands within their said districts. Our concern is with the Palermo Company and not with the South Feather Company. Petitioner, Charles Dankert, is the owner of lands within said Palermo Land & Water Company's boundaries. These last-named utilities were under the regulatory power of the state railroad commission, and the owners thereof could not sell said systems or plants without first having secured from the railroad commission an order authorizing them to do so. Section 51(a), Public Utilities Act (St. 1915, p. 149). Both of said public utilities, therefore, applied to the railroad commission in 1922 for authority to sell their respective plants to said Oroville-Wyandotte irrigation district, the latter district joining in said applications as purchaser. The applicants alleged in their petitions that said transfers would benefit the public and would result in an increased and more dependable water supply for the area served and would provide irrigation service to a larger area than was then served at probably a lower cost. The purchase price, to wit, \$200,000, to be paid to each of the selling utilities by the respondent, was mutually agreed upon by the respective parties. Hearings were accordingly held as provided by law. The district's boundaries originally contemplated the inclusion of the lands then served by the two utilities, but, as only a few of the owners of such lands expressed a desire to join the proposed district, a revision of the boundaries was made excluding the lands of those water users who did not elect to join the district. At the first hearing held by the commission eighty-two of the water users of the Palermo Company, who had not joined the district, including petitioner, protested against the transfer, alleging that, if the authority to transfer was granted, they would be without the jurisdiction of the railroad commission and consequently without adequate protection as to future rates and service. They requested as a condition of the transfer that respondent district be required to give guaranties as to future rates to be charged for the use of water and the service to be rendered and also insisted that some provision be made permitting the water users to join said irrigation district. Several conferences were held in which representatives of the railroad commission met with the protestants and representatives of the respondent district and finally a proposal which was agreed to by the parties in interest was adopted, and which the railroad commission caused to be made a record in the proceeding, as a resolution by the board of directors of respondent district, and was intended to have the effect of an agreement.

Said resolution declares that the protest-

ants withdrew their protests against said transfer in consideration of the respondent district agreeing to enter into contracts with each of said protestants and water users accepting the offer as therein made within six months from the date of said resolution. The quantity of water to which each of said water users would be entitled per acre was therein fixed, as was the rate at 25 cents per miner's inch continuous flow per day of twenty-four hours, with a minimum charge of \$5 per acre per year until January 1, 1928. It was further provided that, if at "any time five years" after the first construction work has been started by said respondent any of the water users of said Palermo Company shall make a legal application to have their lands included in the Oroville-Wyandotte irrigation district, and said application shall be rejected by said district, then, and in that event, the said water user shall pay the same charge for water furnished to his land as is paid for water by the water users or landowners within said district. Said resolution provided that the rates above specified should not be raised after said January 1, 1928, and also contained the further provision that, should the charge paid for water by consumers within said district exceed the sum of 22 cents per miner's inch, then and in such event the then outside users of water should pay the same charge as paid by landowners or consumers of water within said district. It was further provided that all the existing rights of said water users should continue and whatever rights and benefits that were conferred by said resolution or agreement were in addition to those they then possessed. Should any of the then water users at any time have their lands included within respondent district, said resolution or agreement, was to become null and void as to them.

The district assumed the obligation of the Palermo Land & Water Company to furnish water to the purchasers of land from said Palermo Company, as provided in its contracts of sale, but which had not for various reasons received water service. The railroad commission thereupon, on December 8, 1922, made its order that the applications for transfer be granted, subject to the condition that the then users of water of said water companies and those persons or firms desiring to become users within ten years from the date of said order should receive service from said Oroville-Wyandotte irrigation district at the rates and under the conditions recited in application 8000 and application 8018—applications of said Palermo Company and South Feather Company, respectively, to sell said plants to respondent irrigation district—and in the resolutions of the directors of said respondent irrigation district, the material part of which are above set forth.

No other orders, records, or documents bearing upon the commission's action are before us in this proceeding.

As grounds of justifying the issuance of the writ of mandamus, petitioner alleges that on January 20, 1928, the board of directors of respondent district fixed the rate to be charged for water used by petitioner and other users of water outside of said district at \$7.50 per acre foot and the equivalent rate for water users within said district at \$5 per acre foot for the year 1928; and that J. C. Henderson, one of said outside users of water, filed with the superior court of the county of Butte a complaint for declaratory relief (section 1060 et seq., Code Civ. Proc.), seeking a determination of the rights and obligations of himself and respondent, including the rate to be paid for the use of water. A demurrer was sustained to the complaint without leave to amend. An appeal was taken from the judgment thus entered and the ruling of the trial court was reversed. *Henderson v. Oroville-Wyandotte Irrigation District*, 207 Cal. 215, 277 P. 487. Said action was thereafter tried in said superior court of the county of Butte and judgment went for plaintiff.

An appeal was taken in that case, and, if affirmed, it will establish the contention of petitioner and all others concerned in the subject of litigation, both as to the power of the railroad commission to regulate respondent district in fixing water charges in the premises and as to the proper interpretation of the word "charge" as used by the commission in dealing with the subject matter. The issues being identical and admittedly arising out of the same state of facts, any judgment rendered in favor of or against plaintiff Henderson, who belongs to the same class as does petitioner, who is acting in a representative capacity, in an action against the same defendant, would certainly become *res judicata* as to petitioner. Judgment was rendered in the Henderson Case on June 7, 1930.

The immediate grounds upon which petitioner bases his claim for this extraordinary writ is that on January 31, 1930, respondent fixed a rate for petitioner and other users of water outside the district at \$10 per acre foot and a rate for users within the district at \$5 per acre foot for the year 1930. The total demand amounted to \$170.40. On June 14, 1930, petitioner tendered \$85.20, one-half of said sum of \$170.40, and demanded a receipt in full, which demand was refused. Whether the whole amount of the demand was thereafter paid or whether petitioner was actually denied the use of water by reason of failure to pay the full amount of the charge does not pointedly appear. This question, however, is not important in view of the demand. Petitioner, for himself and on

behalf of those whom he represents, alleges the ability and willingness of said parties to pay a water charge of \$5 per acre foot, but alleges any sum above that amount to be unlawful "in so far as it exceeds the rate of \$5 per acre foot charged for the use of water to lands within the boundaries of respondent district." The petition contains no allegation that the charge is not a fair, reasonable, or just charge as to said outside users based on the cost of supply and maintenance, but it is resisted on the ground that it is in violation of the rights of petitioner and others, as prescribed by the railroad commission as a condition precedent to its order consenting to the transfer. The contention of petitioner is that he is entitled to water at the same rate per unit of water delivered as respondent charges members of the irrigation district.

It appears from the brief opinion of the learned judge who tried the Henderson Case that respondent imposes charges for water service upon members of the district in the form of a water charge and also in the form of a tax; petitioner claims that in such circumstances the charge to him cannot exceed the water charge exclusive of the tax. It is the claim of respondent, however, that the charge paid for water service by members of the district in the form of a tax added to the \$5 per acre-foot charge would far exceed the charge of \$10 per acre-foot assessed against petitioner and those whom he represents. The powers of the railroad commission in the premises, the question of contractual rights growing out of the proceedings which culminated in the order of transfer and a number of other important questions which should receive the fullest consideration, render it inexpedient that we should arrest the appeal already taken and attempt to decide the relative rights of the parties to this proceeding upon a very incomplete record. The record in the Henderson Case, which went to judgment approximately six months ago, is not yet on file in this court, although it is suggested that it, together with the transcript, has been completed. We have been unable to locate it. Besides, the respondent has not consented that the record in that case should be accepted as the record in the instant case. Moreover, should we sustain the demurrer in the instant case, petitioner would be put to the task of amending his petition, and, if he should finally pass a demurrer, it is highly probable that a reference would be necessary. On the other hand, if the appeal which was taken several months ago is prosecuted with but ordinary diligence, the matter should come to this court within a short time, and, if the case is one where the rights of the parties would greatly suffer by awaiting its turn upon the

calendar, this court has the power to advance said cause upon a sufficient showing.

For the reasons herein set forth, the petition for the writ is denied, and the alternative writ is discharged.

PEOPLE v. STEWART.

Cr. 3154.

Supreme Court of California.

Nov. 26, 1930.

211 Cal. 79

Homicide ☞253(6).

Evidence that prisoner actually participated in prison revolt in which convict was killed *held* to support conviction of murder in first degree.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Albert M. Stewart, alias Zephie Saunders, was convicted of murder in first degree with death sentence, and he appeals.

Affirmed.

J. J. Henderson and Frank L. Murphy, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Neil R. McAllister, of Sacramento, for the People.

PRESTON, J.

This is an appeal by the sixth and last defendant in a prosecution in Sacramento county for murder in the first degree, wherein all of the six were convicted and a judgment imposing the extreme penalty was pronounced.

The appeal of the other five defendants was denied on April 30, 1929, and discussion of that cause is found in *People v. Brown*, 207 Cal. 172, 277 P. 320. The crime of which these defendants were convicted was murder growing out of an armed prison revolt which occurred at Folsom on Thanksgiving Day (November 24), 1927. The defendants conducted a murderous assault upon the innocent prison authorities at which they had access, killing a brave guard by the name of Singleton, and desperately and cowardly wounding at least two others. As part of the same transaction, they also killed a fellow convict, George Baker, and it is for his murder that this conviction was secured. Details of this revolt need not be again recounted, as the reader may find a more extended review of the facts in the volume containing the above citation. It is suffi-

cient to here state that this defendant, while not the leader, was an active participant in the revolt and wielded a knife during these proceedings, stabbing one guard and making an effort at least to strike at the throat of another. He also cut a telephone cord in pursuance of the object of the revolt, and did many other things which make his participation therein a full and complete one.

The defendant offered no brief in his own behalf, but, disregarding this omission, we have examined the record at length. We are convinced therefrom that under the law no relief whatsoever can be accorded him in this court, and that his judgment of conviction must be upheld.

In doing this, however, we feel that, because of the provisions of article 7, § 1, of the Constitution and section 1418 of the Penal Code, which require the consent and recommendation of a majority of this court before executive clemency can be given in a case where a previous conviction of a felony has been had, we should make a few further observations concerning the condition of the record with respect to this defendant.

It appears that he was in prison charged with forgery. It also appears that he has not the malicious tendencies possessed by the other defendants. He claims to have been overreached by them and practically coerced into what he did. He has already been convicted and sentenced to life imprisonment for participation in the murder of the guard, Ray Singleton, which was a part of this same transaction. He was not a life timer, and this sentence was a real punishment for him. During the present trial, and during the two previous trials had in connection with the matter, he stood aloof from the other five defendants. More than this, he testified at each of said hearings and gave damaging testimony not only against the other defendants, but against himself as well. In the present trial he acted as his own attorney and cross-examined witnesses and delivered an address to the jury of more than two hours in length. He likewise took the witness stand in his own behalf, and as such witness testified in detail as to the occurrence on the day in question and the part each man took in the execution of the scheme to escape. He spared not himself in his disclosures.

We do not hesitate to say that his statement of what occurred contributed materially in our judgment to the conviction of the other defendants, and, while the state did not vouch for this defendant and did not introduce him, nevertheless it availed itself of all the valuable testimony adduced by him, even to the extent of introducing as part of his cross-examination certain exhibits consisting of murderous instruments used in the attempt to break prison.

On the whole, we are convinced that there is perhaps left in this defendant a modicum of honor, and that at the proper time, should application be made for a recommendation to the Governor for a commutation of sentence to life imprisonment, we are prepared to entertain and consider the same.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; RICHARDS, J.

211 Cal. 113

ANDERSON v. EATON.
L. A. 12475.

Supreme Court of California.
Dec. 9, 1930.

1. Attorney and client ⇐20.

It is violation of attorney's duty to client to assume position antagonistic to client without latter's consent, given after full knowledge of facts.

2. Attorney and client ⇐20.

Attorney is precluded from assuming relation preventing him from devoting his entire energies to client's interests.

3. Attorney and client ⇐63.

Attorney should not so conduct himself as to be open to temptation of violating his obligation to client of fidelity and confidence.

4. Attorney and client ⇐20.

Contract by attorney of employer's compensation insurance carrier to represent deceased employee's mother in pressing claim against third party causing injuries held void as against public policy.

Contract was void as against public policy, since attorney was required to act in a dual capacity, in that, as attorney for the mother, attorney could secure certain confidential information concerning her degree of dependency on her deceased son, while, as representative of the compensation insurance carrier, he was required to contest the mother's claim before the Industrial Accident Commission, at least on the issue of dependency, and, in addition, as counsel for the insurance carrier, attorney was primarily interested in having the mother's claim for damages against the wrongdoer settled for any amount equal to or in excess of the employer's liability under the Compensation Act.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by F. L. Anderson against Mabel E. Eaton. From the judgment, plaintiff appeals.

Affirmed.

Superseding opinion in 288 P. 824.

Clarence Harden, of San Diego, for appellant.

Crouch & Sanders, of San Diego, for respondent.

WASTE, C. J.

The complaint in this action for attorney's fees contains two counts. The first sets forth a written contract providing for the payment of a one-third contingent fee, and the second, a common count, asks for the reasonable value of services performed. No evidence was introduced in support of the latter count, and we therefore dismiss it from consideration. In conformity with the allegations of defendant's affirmative defense, the trial court found that the contract set out in count 1 had been procured by fraud, and that it was against public policy and void. Judgment was thereupon entered for the defendant. Plaintiff prosecutes this appeal, contending that the judgment is contrary to law, and that the evidence does not support the finding of fraud.

On February 1, 1926, Oris Eaton, an unmarried adult son of the defendant, met his death while acting within the scope and course of his employment by the San Diego Consolidated Gas & Electric Company. The injuries causing his death resulted, however, from the negligence of the employees of the Benson Lumber Company. As an outgrowth of the untimely death of her son, the defendant became invested with two causes of action—one against the employer gas company under the provisions of the Workmen's Compensation Act and the other against the Lumber Company based on negligence. Section 26 of the Workmen's Compensation Act (St. 1919, p. 910, § 8) gave to the employer gas company a cause of action against the lumber company for any loss sustained by it, or a first lien on any judgment recovered by the employee against the lumber company. The plaintiff was the attorney for the insurance carrier of the employer gas company on a regular retainer. He also carried on a general practice. As the attorney for this insurance carrier, he investigated the accident and so met the defendant. In the course of his conversations with the defendant, the plaintiff stated that his company admitted its liability under the provisions of the Workmen's Compensation Act, and that it would not contest her claim before the Industrial Accident Commission. Defendant testified that plaintiff suggested that she retain him as her attorney to

press her claim against the lumber company because of his familiarity with the circumstances surrounding the accident, and that five days after the accident she signed the contract here sued on, employing plaintiff on a one-third contingent fee basis. There is evidence to the effect that plaintiff advised the defendant not to employ an attorney to represent her at the hearings before the Industrial Accident Commission in her claim against the employer gas company, and not to divulge that he was representing her in her claim against the lumber company. At the several hearings before the Industrial Accident Commission, the plaintiff appeared on behalf of the gas company and its compensation insurance carrier, and, while admitting liability, apparently contested or questioned defendant's claim as to the degree of dependency. As a result of these hearings, the defendant received an award of \$309, although plaintiff, prior to his employment by defendant, had approximated the claim against the employer to be worth \$1,500. During all of this period plaintiff had been negotiating with the insurance carrier of the lumber company for a settlement of defendant's claim for damages, although prior to his employment by defendant he had intimated to her that he would bring suit against the lumber company, asking damages in the sum of \$40,000 or \$50,000. Defendant became dissatisfied with the manner in which her claim against the lumber company was being handled, and addressed a letter to the plaintiff discharging him, and offering to pay the reasonable value of his services. Defendant thereafter personally negotiated with the lumber company and its insurance carrier, and settled her claim for damages for \$3,100, whereupon plaintiff brought this action to recover one-third thereof, or \$1,033.33. During the course of the trial, plaintiff introduced evidence tending to show that by reason of his efforts he was in a position, at the time of his discharge, to have settled defendant's claim against the lumber company for \$4,750.

[1, 2] Even if we accept appellant's contention that the finding of fraud in the procurement of the employment is without support in the evidence, the judgment for defendant must stand, for, as found by the court below, the contract sued on is clearly against public policy and void. One of the principal obligations which bind an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client. Section 282, Code Civ. Proc.; *In re Cowdery*, 69 Cal. 32, 10 P. 47, 58 Am. Rep. 545. This obligation is a very high and stringent one. It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the lat-

ter's free and intelligent consent given after full knowledge of all the facts and circumstances. In re Boone (C. C.) 83 F. 944, 954-955. By virtue of this rule, an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed, not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. *Strong v. Int. Bldg., etc., Ass'n*, 183 Ill. 97, 55 N. E. 675, 676, 47 L. R. A. 792.

[3] While the defendant had knowledge that plaintiff was the legal representative of the insurance carrier of the gas company and received an annual retainer therefor, plaintiff failed to explain to her wherein the two employments were adverse. As attorney for the defendant, plaintiff could, and probably did, secure certain confidential information concerning the degree of her dependency upon her deceased son. On the other hand, his representation of the gas company's compensation insurance carrier required him to contest defendant's claim before the Industrial Accident Commission, at least upon the issue of dependency. His dual employment thus placed him in a position to use this confidential information to the defendant's detriment. As already intimated, it is immaterial whether or not plaintiff, as counsel for the insurance carrier, actually availed himself before the commission of information received from the defendant while acting as her attorney. The impropriety of the dual employment is readily apparent. Conscience and good morals dictate that an attorney should not so conduct himself as to be open to the temptation of violating his obligation of fidelity and confidence.

[4] Moreover, as counsel for the insurance carrier of the gas company, plaintiff was primarily interested in having defendant's claim for damages against the lumber company settled for any amount equal to or in excess of the liability (\$309) of the gas company under the provisions of the Workmen's Compensation Act. As attorney for the defendant, however, it was his duty to secure, either by settlement or suit, as large a sum as possible. This conflict of interests may well have worked to the defendant's disadvantage. Plaintiff, though in good faith intending to discharge his obligation as defendant's attorney, would be in such a position as might have unconsciously caused him to accept an

offer of compromise or settlement of her claim against the lumber company rather than run the risk of bringing an action and jeopardizing the gas company's right of subrogation. If plaintiff had been representing the defendant alone, he might have concluded to sue the lumber company for a large sum of money, as he had previously intimated to the defendant he would do. His duty as counsel for the insurance carrier of the employer gas company may have suggested to him, however, the possibility of an adverse judgment, if such action were commenced, which adverse judgment would render the employer's right of subrogation valueless, thus leaving the burden of the Industrial Accident Commission's award on the shoulders of its insurance carrier. Such thought or suggestion may well have deterred counsel so situated from instituting such action, and thus preclude him from enforcing "to their full extent the rights of the interest which he should alone represent." *Strong v. Int. Bldg., etc., Ass'n*, supra. It is also conceivable that plaintiff's opposition of defendant's claim of dependency before the Industrial Accident Commission may have had an adverse effect upon her claim for damages against the Lumber Company. It is our conclusion, therefore, that the contract sued on, even if not tainted with actual fraud, is, as found by the court below, against public policy and void.

The judgment is affirmed.

We concur: PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

110 Cal. App. 61

RANDALL v. STATE BOARD OF MEDICAL EXAMINERS et al.

Civ. 6436.

District Court of Appeal, Second District,
Division 2, California.

Nov. 24, 1930.

Rehearing Denied Dec. 23, 1930. Hearing Denied by Supreme Court Jan. 22, 1931.

1. Physicians and surgeons ☞1.

Right of licensed physician to practice is valuable right, protected by such safeguards as Legislature has thrown around it.

2. Physicians and surgeons ☞1(2).

Statute authorizing suspension, etc., of physician advertising treatment for specified diseases is penal and to be construed with strictness commensurate with penalty imposed (St. 1913, p. 722, § 14, subd. 10, as amended by St. 1929, p. 626).

3. Physicians and surgeons § 11(2).

Use in physician's advertisement of word "prostate" held not violation of statute (St. 1913, p. 722, § 14, subd. 10, as amended by St. 1929, p. 626).

St. 1913, p. 722, § 14, as amended by St. 1929, p. 626, authorizes suspension, etc., of holder of certificate to practice medicine for unprofessional conduct, and subdivision 10 includes, in unprofessional conduct, advertising, etc., that certificate holder will cure or attempt to cure venereal diseases, etc. Evidence showed there were diseases of prostate gland other than venereal diseases.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Certiorari by Thomas J. Randall against the State Board of Medical Examiners and others. From a judgment annulling a judgment of the Board, defendants appeal.

Affirmed.

Otto J. Emme, of Los Angeles, for appellants.

Bertin A. Weyl, and Paul C. Hill, both of Los Angeles, for respondent.

SCHMIDT, Justice pro tem.

This is an appeal from a judgment of the superior court of Los Angeles county in a proceeding in certiorari annulling a judgment of the board of medical examiners, by the terms of which last-mentioned judgment the respondent herein was found guilty of a violation of the Medical Practice Act, and was granted probation for a period of five years.

The Medical Practice Act (section 14), in so far as applicable to this case, provides: "Whenever any holder of a certificate herein provided for is guilty of unprofessional conduct, as the same is defined in this act, and the said unprofessional conduct has been brought to the attention of the board granting said certificate, * * * it shall be the duty of the board and the board shall have power to suspend the right of the holder of said certificate to practice for a period not exceeding one year or to place the holder of said certificate upon probation or suspend judgment in such cases or revoke his certificate, or take such other action in relation to the punishment of the holder of said certificate as in its discretion it may deem proper. * * * The words 'unprofessional conduct' as used in this act, are hereby declared to mean: * * * Tenth—Advertising, announcing or stating directly, indirectly, or in substance, by any sign, card, newspaper, advertisement or other written or printed sign or advertisement, that the holder of such certificate or any other person, company, or

association by which he is employed or in whose service he is, will cure, or attempt to cure, or will treat, any venereal disease, or will cure or attempt to cure or treat any person or persons for any sexual disease, for lost manhood, sexual weakness, or sexual disorder or any disease of the sexual organs; or being employed by, or being in the service of, any person, firm, association, or corporation so advertising, announcing or stating." Stats. 1913, p. 722, as amended, Stats. 1929, p. 626.

The complaint before the medical board charged respondent with unprofessional conduct in violation of subdivision 10 of section 14 of the act, in that he had placed an advertisement in the Los Angeles Evening Herald, a newspaper of wide circulation in the city of Los Angeles, in words and figures as follows: "T. J. Randall, M. D. 602 S. Flower St., cor. 6th. Acute chronic Blood, Skin and infectious disease, Prostate, bladder, also dropsy, rheumatism, stomach and other chronic ailments. An Expert Rectal Specialist, successfully treating Piles, fistula, fissures, ulcers, proctitis, colitis & other allied diseases without loss of time. Men and Women. Free exam. Reas. Charge. Daily 9 to 4 (except Sun.) Eves., Mon., Wed., and Friday 6 to 8.

Respondent contends that the evidence adduced before the medical board was wholly insufficient to sustain the finding that he had violated any part or provision of the Medical Practice Act of the state of California, or that he was guilty of unprofessional conduct. The real question involved is this: Is the effect of the advertisement that respondent would treat any person for sexual disease, lost manhood, sexual weakness, sexual disorder, or for any disease of the sexual organs in violation of said subdivision 10 of section 14 of the Medical Practice Act? Appellants claim the affirmative, basing same upon the testimony of two experts, Dr. Robert V. Day and Dr. Albert J. Scholl, each of whom, after qualifying as an expert, testified upon direct examination: "Q. Doctor, I will ask you whether the prostate gland is a part of the male sexual organs? A. It is." And upon cross-examination: "Q. Now, doctor, there are other diseases of the prostate gland besides venereal diseases, are there not? A. Yes sir. Q. This is, the prostate may be in a condition of disease due to tuberculosis or cancer, or other conditions that have no connection with venereal disease? A. Correct."

[1-3] It has been repeatedly held that the right of a licensed physician to practice is not a mere shadowy privilege, to be revoked regardless of whether the possessor has violated the laws of the state, but is a valuable right, to be protected at least by such safeguards as the Legislature has thrown around it. Subdivision 10 of section 14 of the Medi-

cal Practice Act is in the nature of a penal statute, and therefore is to be construed with a degree of strictness commensurate with the severity of the penalty it imposes; and no one can be held to have violated its provision unless his acts come within both the letter and spirit of the law. The evidence produced before the medical board shows that there are diseases of the prostate which are not in any sense venereal diseases or diseases of the sexual organs. The fact that respondent Randall used the word "prostate" in his advertisement cannot be said to be the equivalent of advertising concerning the matters prohibited by subdivision 10. Many physicians specialize in some particular limited practice, such as for instance, tuberculosis or cancer. Could it be said because a sexual organ may be diseased with cancer that a physician who merely advertises the fact that he specializes in a disease known as cancer has advertised for treatment of the sexual organs? We think not. Likewise the fact that the prostate may have some of the diseases against which the act is directed would not preclude a physician from advertising treatment of that organ.

We are not unmindful that the question involved is one of ethics, upon which professional men naturally have honest differences of opinion. It is not for us to determine the ethical question. It is solely for us to determine whether there has been a violation of the law. We do not feel that the evidence produced in this case warrants adjudging respondent guilty of violating the Medical Practice Act.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

109 Cal. App. 581

ROCKWOOD v. LANSBURGH.

Civ. 7306.

District Court of Appeal, First District,
Division 2, California.

Nov. 17, 1930.

Rehearing Denied Dec. 17, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

1. Damages ⇨26, 186.

Prospective loss of services and earnings of injured minor may be recovered by parent, but evidence must show prospective loss was reasonably certain (Civ. Code, § 3283).

2. Damages ⇨186.

Evidence showed no reasonable certainty that parent would be deprived of prospec-

tive services of minor and did not authorize award therefor to parent.

Evidence did not show that injured minor had ever rendered any service or acquired any earnings prior to trial, and no claim was made by parent suing on own behalf for loss of services up to that time. Evidence showed that, prior to trial, injured minor had been able to do and was doing practically all of things which normal, healthy school boy of age could do, and had made excellent recovery from fracture of right leg.

3. Damages ⇨26.

Future expenses for injury to minor should be recovered in action on minor's behalf rather than in action by parent on own behalf.

4. Damages ⇨26.

Parent could recover only amount expended on injured minor son before trial, where not showing prospective loss of services.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by A. L. Rockwood against Irene Lansburgh. Judgment for plaintiff, and defendant appeals.

Affirmed, on conditions.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Charles W. Haswell, of San Francisco, for respondent.

SPENCE, J.

Plaintiff, the father of a minor son injured in an automobile accident, brought this action to recover such damages as plaintiff claimed to have sustained as the parent of said minor. Upon a trial by jury, plaintiff obtained judgment in the sum of \$6,000. Upon a motion for new trial the trial court ordered that a new trial be granted unless plaintiff remitted one-half of this amount. Plaintiff filed his written consent to the reduction of the judgment, which now stands in the sum of \$3,000. From this judgment in the reduced amount defendant appeals.

Appellant urges a reversal solely upon two grounds, both of which relate to the damages awarded. It is contended, first, that the damages are excessive, and, second, that the trial court committed error in giving certain instructions relating to damages.

The minor sustained a fracture of the tibia and fibula of the right leg in the accident in March, 1928. His age at the time of the trial in September, 1929, was eleven

years. The period of disability, including physiotherapy treatments, was five or six months. The fractured parts made a perfect union and healed in perfect alignment. There was no shortening of the leg or diminution in size. The boy was able to run, swim, play football and generally engaged in athletic activities, but still retained at the time of trial what is known as a habit limp. His physician testified that this was due to "a habit condition rather than being attributable to any structural defect there." He stated that this condition might cause the boy some muscle fatigue because he would favor one extremity to the exclusion of the other. He recommended some definite form of group exercise, such as military training, to overcome this condition. The boy had had a private tutor for about two weeks after leaving the hospital and then went to private school. One of his teachers testified that he was below normal, but was showing improvement. She later testified that in his one year at private school he advanced from the high fourth to the low sixth grade, and that when she said he was below normal she meant "that he was not one hundred per cent."

The maximum amount shown by the evidence to have been actually expended by respondent was \$521.75, which included \$275 expended for tuition. Appellant does not question the propriety of the award to the extent of the \$521.75 expended by respondent prior to the trial, but contends that any award over that amount was excessive under the evidence. Respondent contends that the award of damages over and above the amount expended prior to the trial was justified on the following grounds: First, that the parent may recover for prospective loss of services and earnings, and, second, that the parent may recover for prospective expense.

The points raised involve the general question of the items of damage recoverable by the parent in an action on his own behalf, as distinguished from the items of damage recoverable in an action on behalf of the injured child. This question has been touched upon in this state in *Karr v. Parks*, 44 Cal. 46, and *Durkee v. Central Pacific Railroad Co.*, 56 Cal. 388, 38 Am. Rep. 59, but neither of these cases determines the precise points with which we are here concerned.

[1, 2] There can be no doubt that prospective loss of services and earnings of the minor constitutes one of the items of damage which may be recovered by a parent on his own behalf (*Garrison v. Pearlstein*, 68 Cal. App. 334, 229 P. 348), but we are of the opinion that the evidence must show that the nature of the injury was such as to render prospective loss of services and earnings reasonably certain. Civ. Code, § 3283. There was no evidence to show that the minor had ever rendered any service or acquired any

earnings prior to the trial, and no claim was made for loss of services up to that time. It appeared that for some time prior to the trial the boy had been able to do and was doing practically all of the things which a normal, healthy school boy of his age could do. He had made an excellent recovery, and it cannot be said that there was any reasonable certainty that the respondent would be deprived of any prospective services or earnings of the minor in the future. Under these circumstances we do not believe that an award for prospective loss of services or earnings was justified. There is nothing in *Garrison v. Pearlstein*, supra, in conflict with these views. The opinion in that case does not set forth the nature of the injuries, but does recite that the parent had made expenditures in the sum of \$3,445.40, indicating that the record probably disclosed injuries of an extremely serious nature which, with reasonable certainty, would result in future loss of services and earnings to the parent. It was there held that the evidence of the minor's age, previous health and condition in life "was sufficient to enable the jury to determine his *earning capacity* aided by their own knowledge and experience."

That respondent was entitled to recover all reasonable medical and other expenses necessarily paid or incurred prior to the trial as a result of the injuries to the minor is conceded by the appellant, but the right to recover for future expenses is questioned. Respondent contends that such future expense was a proper item of damage recoverable by the parent, and that the evidence showed that it was advisable to give the minor training in a military school to overcome the habit limp. This evidence was admitted over the objection of appellant. We find no authorities directly in point on this subject. The medical treatment, including physiotherapy, had ended many months before the trial, and no necessity for future medical treatment or expense was shown, but the cases involving the right to recover for future medical expense throw some light upon the general subject of the right to recover for future expense. These cases are not in accord, but we believe that the sounder rule is expressed in the opinion in *Clarke v. Eighth Avenue Railroad Co.*, 238 N. Y. 246, 144 N. E. 516, on page 517, 37 A. L. R. 1. After discussing the right of the parent to damages for prospective loss of services, the court said: "He was also entitled to recover, unless otherwise paid, the expenses actually and necessarily paid out or incurred by him for medical treatment and increased care and maintenance prior to the trial. I do not think, however, that he was entitled to recover, during the infant's minority, the estimated cost of prospective medical treatment, or the estimated cost of the increased care and maintenance subse-

quent to the trial. These were items of damage which personally belonged to the infant, and had to be recovered, if at all, and probably were taken into consideration by the jury, in the action brought for his benefit. The infant, and not the father, was entitled to a recovery for these items. This seems to me much the better rule for the infant in an action of this character. It insures that whatever sum is recovered will be more likely to be used for the infant's benefit than if a recovery be permitted by the parent. Obviously, both cannot recover. If the infant recover, then, usually, security has to be given to insure the proper use and disposition of the sum awarded. On the other hand, if the parent be permitted to recover, then the recovery becomes his property. He can do with it as he sees fit. He can will it away, or, if he dies without a will, it becomes part of his estate. In either case, the infant might receive little or no benefit from it. The natural instinct of a parent to properly support his infant children does not always prevail. It is a matter of common knowledge that some do not, and resort has to be made to the statute to compel them to do so. Some parents actually abandon their infant children and leave them objects of charity, or to be maintained and supported by the kindness of relatives or friends."

[3] We are in accord with the views expressed in the foregoing opinion. When the minor is the injured party he is the one primarily involved. For the protection of the minor for whose benefit such recovery is allowed, future expenses should be recoverable as an item of damage in the action brought on the minor's behalf rather than in an action by the parent on his own behalf.

[4] Under the views above set forth, we are of the opinion that the evidence did not warrant a recovery by respondent for prospective loss of services and earnings, and that the respondent was not entitled to recover on his own behalf for any prospective expenses. It therefore follows that the only items of damage for which respondent was entitled to recover under the evidence were the amounts actually expended prior to the trial, amounting to \$521.75. The judgment was excessive in the sum by which it exceeds the last-named amount.

We deem it unnecessary to discuss in detail the instructions which appellant contends were erroneous. The attack was directed to certain portions of the instructions which related to future expenses. These portions of the instructions were erroneous and should not have been given.

We believe that a reversal is required unless plaintiff is willing to consent to a modification of the judgment. It is therefore ordered that, unless within thirty days from

the filing of the remittitur herein in the lower court the plaintiff shall release all but \$521.75 and costs of the judgment rendered by the trial court, such judgment shall be and it is reversed; but that if within such time plaintiff consents to such reduction in said judgment and releases therefrom all but the sum of \$521.75 thereof and costs, such judgment as so reduced shall be and it is affirmed, said judgment for the reduced amount to bear interest at the legal rate from the date of the entry of the original judgment of the superior court, and neither party to recover from the other costs on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

110 Cal. App. 90

COOK v. SANGER et al.
Civ. 4208.

District Court of Appeal, Third District,
California.

Nov. 26, 1930.

Rehearing Denied Dec. 26, 1930. Hearing Denied by Supreme Court Jan. 22, 1931.

1. Automobiles ⇨244(6).

Evidence warranted finding operator was negligent in cranking automobile without first looking to discover it was in gear with brake released.

As result of cranking automobile in gear and with brake released, the automobile ran down hill backwards and injured pedestrian on sidewalk.

2. Automobiles ⇨244(29).

Evidence warranted finding electrician using own automobile in outside repair jobs was employee, not independent contractor, making employer liable for his negligence.

3. Automobiles ⇨244(26).

Evidence warranted finding electrician using own automobile in doing repair jobs was in course of employment at time of accident injuring pedestrian.

4. Automobiles ⇨160(6).

Operator is chargeable with knowledge that starting automobile in gear by using crank is hazardous operation.

5. Automobiles ⇨146.

Any one not taking reasonable precaution to see no injuries will follow in operating car after it is set in motion or in setting it in motion may be found negligent.

6. Automobiles ⇨160(6).

That operator parked automobile properly does not relieve him from taking reasonable precaution when he returns to see automobile can be safely started.

This is so, because operator's duty to use reasonable care is a continuing one, and fact that he has been careful at one time does not entitle him to be negligent at another time.

7. Automobiles ⇨197(7).

Employer is not relieved of liability for employee's negligence in operating automobile because automobile belongs to employee.

8. Evidence ⇨591.

Plaintiff struck by automobile held not bound by testimony of operator put on stand by plaintiff, as against operator's employer (Code Civ. Proc. § 2049).

Code Civ. Proc. § 2049 provides that party producing witness may not impeach his credit by evidence of bad character, but may contradict witness by other evidence, and may also show he had made at other times statements inconsistent with present testimony.

9. Automobiles ⇨194(2).

If one has control or right to control operator of automobile, and power of employment or discharge, master and servant relation, not independent contractor relation, exists.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by George C. Cook against C. E. Sanger and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellants.

Kidd, Schell & Delamer, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendants in the sum of \$4,500 for and on account of injuries suffered by being struck and knocked down by an automobile owned by the defendant C. E. Sanger, operated by him at a time while said Sanger was acting as an employee of the defendant Lacy Manufacturing Company. From this judgment, the defendants appeal.

The accident leading to the injury of the plaintiff occurred in the following manner:

The defendant Sanger parked his automobile on East Fourth street, between Los Angeles and Main streets, on the north side of Fourth street, about half way up the block. Fourth street runs east and west. There is a decided slope on East Fourth street at the point where the automobile was parked, this slope being down hill from west to east, Los Angeles street being lower than Main street. The automobile was parked at about noontime. After parking the automobile, Sanger spent a few minutes in an establishment conducted by the International Electric Company. After transacting his business with the Electric Company, Sanger returned to the place where his automobile was parked, and in starting the car used a crank for that purpose. It appears that the self-starter was out of order. The crank for starting the car was in the front compartment near the gear shift lever. Upon cranking the car it started backward, ran down hill to where the plaintiff was standing on the sidewalk near the corner of East Fourth street and Los Angeles street, mounted the curb and struck the plaintiff, injuring him quite severely.

Upon this appeal no question is made as to the amount of the damages awarded and, therefore, no further attention will be given thereto.

Upon this appeal it is contended, first: That the defendant Sanger was not negligent, and that the record contains no facts upon which to predicate the finding of negligence on his part; second, that the injury did not occur to the plaintiff while Sanger was within the scope of his employment as an employee of the defendant Lacy Manufacturing Company, and, third, that Sanger was an independent contractor.

The record shows that for a number of years prior to the injury of the plaintiff, as herein stated, Sanger had been in the employ of the Lacy Manufacturing Company, and for a considerable period of time had been in the service of the defendant Lacy Manufacturing Company as an outside man; that is, Sanger would be sent by the Manufacturing Company to look after outside jobs or work on electric motors outside the immediate establishment maintained by the Lacy Manufacturing Company.

The record also shows that it was the practice of the company to allow its employees the sum of 7 cents per mile for traveling expenses, whether they used their own automobiles or traveled by other conveyances. The mileage allowance was always calculated by the shortest distance that could be traveled, irrespective of whether such route was or was not followed by the employee. The defendant Sanger owned his own automobile, and on the day of the accident was operating his own automobile, and was paid the

sum of 7 cents per mile for the shortest route between the respective points which he traveled on that day. The record likewise shows that some time previous to the accident resulting in injury to the plaintiff, the Lacy Manufacturing Company had had business dealings with the International Electric Company; that a certain motor belonging to the Lacy Manufacturing Company had been repaired by the International Electric Company, but did not operate satisfactorily by reason of some defect, presumably in the winding of the motor, and the defendant Sanger had been instructed by someone connected with the Lacy Manufacturing Company, entitled to give him orders, to call at the business place of the International Electric Company and ascertain what was wrong with the motor. Sanger, however, was not instructed to call at the International Electric Company on any particular day, but simply to stop there when convenient on some of his outside trips, or, as stated by him, the first time he was uptown.

The accident occurred on the 3d day of April, 1926. On that day Sanger was directed to go to a place called "Vernon" and there perform certain work in behalf of the Lacy Manufacturing Company. In pursuance of this order, Sanger went to Vernon, starting early in the morning, and remained several hours. On his way back he deviated from the most direct route, two or three blocks, and stopped at the business place of the International Electric Company to make inquiries concerning the motor which we have mentioned. The defendant Sanger testified that he left his car, when parked on Fourth street, with the hand-brake set and the control lever set in neutral; that when he came back to the car he took the implement for cranking the motor from the front compartment of the car immediately beside the hand-brake lever and the gear-shifting lever; that he did not notice that the hand brake had been released, or that the shift gear lever had been moved from neutral into reverse; that after the car had started to back down hill, the defendant Sanger testified that he noticed for the first time that the car had been moved from the position in which he claimed to have left it.

While a number of cases have been cited where the questions involved relate to the interference with cars by third persons, whereby they have been started, and after so being started, caused injury; also cases concerning independent contractors, and also cases where an employee has departed from his employer's business, a statement of testimony taken principally from that given by the defendant Sanger, we think will completely answer all the questions presented upon this appeal, without any extended analysis of the cases cited by the appellant.

[1-3] For some ten years or more prior to the accident the defendant Sanger had been an employee of the defendant Lacy Manufacturing Company, working as an electrician, and occasionally did work outside the plant for the company, this work consisting of repairing electrical machines. He gave all his time to the Lacy Manufacturing Company, and worked for no one else. His time began at 7 o'clock in the morning and closed at 4 p. m. He was paid so much an hour for this period, regardless of where he was. A half hour was deducted for the lunch period. It is admitted that Sanger was an employee of the Lacy Manufacturing Company on the day of the accident, and on that particular day was working for the Lacy Manufacturing Company. The defendant Sanger received full pay for his work on the day of the accident, including the 7 cents a mile allowed for traveling expenses. For some time prior to the accident it was a custom of the Lacy Manufacturing Company that employees should use their own automobiles on company business, for which they were paid 7 cents per mile. There was no difference in the rate of mileage allowed employees whether they used their own machines or other means of transportation.

A certain motor belonging to the appellant, Lacy Manufacturing Company, had not been operating satisfactorily for some time. Work for the Lacy Manufacturing Company had been done by the International Electric Company. Sanger had also worked on this motor. Sanger testified that he had been directed to call at the place of business of the International Electric Company and inquire as to this motor and ascertain the cause of the trouble. Two officers of the Lacy Manufacturing Company testified that they did not have any recollection of giving Sanger such orders. Sanger testified that he was not instructed to go to the office of the International Electric Company and find out about the defect in the motor on the particular day of the accident, but was simply told to go there some time and find out about the motor. The defendant Sanger testified that he stated he would attend to it and would stop at the International Electric Company's place of business the first time he was uptown, and that the person who gave him the directions—either Mr. Ludke or Mr. Stiles—said that would be all right. It appears that the deposition of defendant Sanger was taken before the trial. In that deposition he testified that the day before the accident he had a conversation with Mr. Ludke (an officer of the Lacy Manufacturing Company entitled to give him orders) with reference to his visit to the International Electric Company, and upon the trial testified that this testimony was true. Mr. Ludke testified that he had had no such conversation with the defendant Sanger. Stiles only testi-

fied that he remembered no such conversation. Neither Mr. Ludke nor Mr. Stiles denied Sanger's testimony about the defect in the motor which had been repaired by the International Electric Company. Mr. Stiles had directed Sanger to go direct from his home (that is, the home of Mr. Sanger) to the job at Vernon on the morning of the 23d day of April, 1926. On that morning Sanger drove his automobile to the place in question; he went there to repair a motor for the Lacy Manufacturing Company; remained there three or four hours. Sanger left the Vernon job in his automobile with the intention of going from there to the International Electric Company so as to talk to the foreman about the motor heretofore referred to, and with the intention of going directly on to the plant of the Lacy Manufacturing Company. In doing this he was taken a few blocks off from the shortest route between the Vernon job and the plant of the Lacy Manufacturing Company. Sanger testified: "I went to the International Electric Company place of business to have a conversation with the foreman of the International Electric Company. There was something wrong with the motor they had repaired and I went there to find out from the foreman what was wrong. The motor in question belonged to the Lacy Manufacturing Company; there was something wrong with the winding of it, and I went to find out the trouble; I had no other purpose in going there." On the trial of the action Sanger testified as follows: "I could not decide whether I went to the International Electric Company on my own business or on that of the Lacy Manufacturing Company." Sanger, however, testified that in giving his deposition he stated that he was attending to business of the Lacy Manufacturing Company when at the International Electric Company's plant, and that this statement was true at the time he made it. Sanger testified that he parked his automobile on East Fourth street between Los Angeles and Main streets, on the north side of Fourth street; that he arrived there at about noon; he started to park in the red zone, then noticed this and moved up to the yellow zone; that he parked his car with the right wheel against the curb, and left the car in neutral gear with the hand brake set. Sanger then went to the International Electric Company's office, talked with the foreman about the motor, and did nothing else while away from his car; that he remained away ten or fifteen minutes. Upon returning, Sanger approached his car from the left-hand side. The self-starter was not working, so it was necessary to use the crank. He did not look to see if the car had been moved. The crank was lying on the floor of the car a few inches from the gear-shift lever and hand-brake lever. These were in plain view as he took up the crank. He then proceeded to crank the car, which, being in reverse gear, started down

hill. Sanger attempted to get on the car and stop it, but did not succeed. The car went down the hill, mounted the curb at the corner of Fourth and Los Angeles streets and struck the plaintiff, injuring him severely. When the car started to back down the hill the defendant Sanger testified that he noticed for the first time that the car had been moved from the position in which he had left it. Sanger testified that while the car was moving he tried to catch it; got one of his feet on the running-board, but did not get into the car or to the steering wheel. Sanger further testified that he did not notice whether the hand brake had been released or whether the gear shift had been moved from neutral into reverse.

No instructions had ever been given by the Lacy Manufacturing Company as to how its employee Sanger should operate his car.

[4, 5] Upon this appeal it is claimed that the evidence is insufficient to support the verdict against the appellants. We think it unnecessary to insert here any other portions of the testimony, as the foregoing is sufficient to sustain the respondent's contention that it supports the following propositions from which the jury was entitled to draw the conclusion that the defendant Sanger was negligent; that he was an employee of the defendant Lacy Manufacturing Company, and in the pursuit of its business at the time the injury resulted to the plaintiff. These propositions are listed as "A," "B," "C," and "D," and are as follows: "A. Starting the motor from a position from which he had no control over the movements of the car, without first having assured himself that the car would not be put in motion by such cranking; B. Failure to observe that the car had been moved; C. Failure to observe that the gear-shift was in reverse—it being in plain sight and a few inches from the crank which he picked up; D. Failure to observe that the brake had been released—the brake-lever being in plain sight and within a few inches from where the crank was picked up." The answer of the defendant Sanger to these propositions may be stated as follows: "I did not notice that the car was in gear; I did not notice that the brake had been released; I did not notice that the car had been moved." This, we think, is properly assigned by the respondent not only as a poor excuse, but as no excuse. Sanger, when starting his car by using the crank, was, of course, in a position where he could not have immediate control over the movement of the automobile. The very absence of this power of control would cause any reasonable person to ascertain if his car was in proper condition to be started. Every operator of an automobile knows, and we think must be reasonably held to know, that the starting of a car when in gear, by means of using a crank, is a hazardous operation. If in forward gear, it is

likely to run over the person doing the cranking. If in reverse, it would immediately go in the opposite direction and away from the control of the person doing the cranking. The record shows that Sanger did nothing to determine whether the car was in neutral gear or had been changed. Appellant claims that he did not have to do anything to determine whether the car was in neutral gear, whether it had been changed, or whether the brakes were released. This would be tantamount to saying that a person starting a car need not take any precautions whatever to ascertain whether, in so doing, he would either be endangering himself or endangering some other person. Such is not the law. An automobile is a dangerous instrument when not operated with wisdom and due caution, and anyone who fails, whether in the operation of the car after set in motion, or in the setting of a car in motion, without taking reasonable precautions to see that in so doing injury will not follow, is guilty of acts upon which a jury may find the fact of negligence, even if a court might not declare such acts negligence as a matter of law.

[6] In this particular the appellant asks the following question: "Is the driver of an automobile, who has set the emergency brake, left his car in neutral gear, parking it in such a manner that it could be safely started, negligent in going in front of the car to crank it in order to start it, without examining the car to see whether the gear has been shifted from neutral to reverse, and the emergency or parking brake released?" To answer this question in favor of the appellant would be to presuppose that one starting a car is under no obligations to ascertain whether it can be safely started. It also presupposes that one who has left his car in proper condition is thereafter relieved from any reasonable exercise of judgment or precaution to see that it is in the same condition in which he left it. To answer the question in the negative also presupposes that the jury is under obligations to conclude that because a witness testifies that he left the car in neutral, the car was actually left in neutral gear. It also excludes the idea that the operator of the car was only absent therefrom ten or fifteen minutes. It likewise excludes the idea that the occurrence all took place in broad daylight, when no third person would be likely to be tampering with a parked car. It also includes the idea that when an operator of a car picks up the crank which is lying alongside of the brake-lever and the gear-shift lever, he is under no obligation to see that they are in proper position. The answer to the appellant's question is this: The fact that an operator of a car has parked the same properly does not thereafter relieve him from taking reasonable precautions when he returns to the car to see that it can be safely started. This duty is a continuing one. In other words, the fact

that one has been careful at one time does not entitle him to be negligent at another time. There is no period of time when an operator of a vehicle like the modern automobile can be excused from negligence; there must be a reasonable exercise of care and caution all the while.

[7] The appellant cites, as we have stated, a long list of authorities having to do with the starting of parked cars by third persons. We do not need to review these authorities, as not one of them is applicable. The car in question was started by Sanger himself, and not by any other person. Nor do we need to consider the authorities cited where an employee had departed from his employer's business and was engaged in the pursuit of his own pleasure or business. The facts here, which we have cited, taken from Sanger's own testimony, show an entirely different state of circumstances. Nor is there anything in the contention that Sanger was using his own automobile. *Press v. Industrial Accident Commission*, 190 Cal. 114, 210 P. 820, 823; *Dillon v. Prudential Insurance Co.*, 75 Cal. App. 266, 242 P. 736; *Eng-Skell v. Industrial Accident Commission*, 44 Cal. App. 210, 186 P. 163; *Ryan v. Farrell*, 208 Cal. 200, 280 P. 945; *George v. Chaplin*, 99 Cal. App. 709, 279 P. 485; *May v. Farrell*, 94 Cal. App. 703, 271 P. 759. These cases likewise negative the contention of the appellant that Sanger was an independent contractor.

[8] Upon the request of the defendant, the court instructed the jury as follows: "For the purposes of this case the testimony of the witness Sanger is to be accepted by you as true in so far as the Lacy Manufacturing Company is concerned. In determining the question of its liability, as distinguished from that of Mr. Sanger, you are to take Sanger's testimony, concerning the way the accident happened, as true. The plaintiff put Sanger on the witness stand as his witness, and so far as the Lacy Manufacturing Company is concerned, plaintiff is bound by the testimony given by Sanger while such witness." Pursuant to this instruction it is contended that the testimony of Sanger relieves the defendant, Lacy Manufacturing Company, from responsibility. It is for this reason that we have set forth the testimony of Sanger quite extensively, which we think, if accepted as true, shows conclusively sufficient facts to support the verdict of the jury against the Lacy Manufacturing Company. However, the contention of the appellant that the plaintiff is bound by the testimony of Sanger is not tenable. Section 2049, Code of Civil Procedure, reads: "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 2052."

Taking Sanger's testimony as absolutely true, it shows sufficient facts from which the jury was warranted in concluding that he was an employee of the Lacy Manufacturing Company on the day of the accident; that at the time of the accident he was engaged in the business of the Lacy Manufacturing Company; that Sanger was guilty of negligence in starting his car without having first ascertained that it could be safely started. It was likewise within the province of the jury to conclude whether Sanger had in fact left his car in neutral and the brake set, or whether he had parked the car, climbed out of it, leaving the gear shift in reverse when he stopped his car from going forward as he brought the right wheel thereof against the curb. It was only an assumption on the part of the witness that somebody had interfered with the gear-shift lever and the brake lever. But even if the assumption be true, the jury had ample reason for concluding that Sanger was negligent in not observing the changed position of the levers referred to.

Relying upon the following cases, to wit: *Hedge v. Williams*, 131 Cal. 455, 63 P. 721, 64 P. 106, 82 Am. St. Rep. 366; *Pyyny v. Loose-Wiles Biscuit Co.*, 253 Mass. 574, 149 N. E. 541, and *Khoury v. Edison Electric Illuminating Co.*, 265 Mass. 286, 164 N. E. 77, 60 A. L. R. 1159, the appellant Lacy Manufacturing Company insists that the appellant C. E. Sanger was an independent contractor at the time of the injury to the plaintiff, and therefore that the appellant Lacy Manufacturing Company is not liable. We find nothing in the case of *Hedge v. Williams*, supra, supporting the appellant's contention. The two other cases cited by appellant, if the law of this state, would lead to a reversal. In the case of *Pyyny v. Loose-Wiles Biscuit Co.*, supra, it appears that one Bancroft was a traveling salesman in the general employment of the defendant; that he had no regular hours of work; his time was his own; he was employed to sell biscuits; that was his sole business; he could see the patrons any time during the twenty-four hours. Bancroft was paid a salary and commission and the expense of operating the car. He carried a sample case and advertisements in the back of his Ford coupé, and they were in his car at the time of the accident. It further appeared that about 1 o'clock on the day of the accident Bancroft drove to an Elks' Field Day picnic at Ft. Pond, in Lancaster, and remained there until around 4 o'clock, when he went to a weekly sales meeting in Fitchburg; that after the sales meeting, at a quarter to 5, he started, in a car, with a friend whom he had found at the picnic, to return to Ft. Pond, and that the accident happened on the road between Lineburg and the Pond at Lancaster. It further appears that Bancroft did some selling until he reached the "Field Day." "That he was going back

to see some of his trade; he did not have an appointment with anyone in particular; did not expect to see any particular individual, but as a whole, expected to see some of his trade there. He intended to do business with them if he should see them." Upon the above facts it was held that the defendant was not liable for the injury caused by Bancroft. The court further said that it was the duty of Bancroft, and not of the defendant, to register the automobile and obtain a license to operate it; that the defendant had no right, upon the reported facts, to direct the manner in which Bancroft should control the car; it assumed no obligations to keep the car in repair, other than was involved in its agreement to pay the expense of operating it, or so much per mile for the number of miles that Bancroft operated the car for them in connection with his employment.

In the Edison Case, supra, it appears that the injury was caused by an automobile, owned and operated by Eric Parnell, who was in the general employment of the defendant. The accident occurred at the intersection of two streets, after Eric Parnell had left the defendant's place of business, and at the time was proceeding to Watertown, the purpose of his trip being in connection with the defendant's installation of a certain flood light in that place. That he had in the car a flood light belonging to the defendant, which he was carrying to that place; that prior to the accident, Parnell had entered into an agreement with the defendant, that when traveling for the defendant he could, at his election, use his own car for transportation, or the railroads and street railways, and in either case the defendant would pay to him an amount equivalent to the railroad or trolley fare; that the defendant had no other obligation to the said Parnell in respect to said Parnell's automobile or its use, than to pay to the said Parnell an amount equivalent to that which would have been Parnell's expenses had he traveled by common carrier rather than by the use of his own automobile; that the use by Parnell of his automobile on November 17, 1925, the day of the accident, and upon the particular trip which he was taking at the time of the accident, was known to the defendant, and the use of his automobile on this trip was in accordance with the above agreement between him and the defendants. Upon this state of facts the court directed a verdict for the defendant, which was upheld upon appeal.

[9] While these opinions are by a court of unquestioned ability, nevertheless, a few important elements have apparently been overlooked or are not mentioned in the opinions, or else there is a confusion of ideas. But giving the two cases all the weight to which they are entitled, they are directly at variance with what appears to be the settled law of this state. Nor do we think that the distinc-

tion between the control of the person operating the automobile and the mechanical control of the automobile is tenable. If one has control or the right to control the person operating the automobile, has the power of employment or discharge, and may direct the person operating the automobile where to go and what services to perform upon his mission, and has a right to discharge the employee for any disobedience or any wrongful act while on such mission, we think the legal power of control and the relation of master and servant is established.

In the case of *Press Publishing Company v. Industrial Accident Commission*, supra, we find the following applicable to the instant case: "As previously indicated, it is not the actual exercise of control, but the right of control—that is to say, the potential power of control—which is important in a determination of whether or not the status of an employee or independent contractor exists." Citing *Claremont Country Club v. Industrial Accident Commission*, 174 Cal. 395, 163 P. 209, L. R. A. 1918F, 177. "One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed. In the instant case, it is undisputed that the Press Publishing Company had the power to hire and the power to discharge.

* * * This power of discharge made obligatory any instructions given, for it gave to the Press Publishing Company the power to require obedience to those instructions and insured their being carried out. As was held in *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 417, Ann. Cas. 1917E, 390, 156 P. 491, 495: "The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged by him for disobedience * * * or misconduct." The fact that Benefiel furnished his own transportation does not, of course, affect his status as an employee." (Citing *Eng-Skell Co. v. Industrial Accident Commission*, 44 Cal. App. 210, 186 P. 163.) * * * "It is insisted by both petitioners that because of the fact that Benefiel owned his own motorcycle, paying personally for its upkeep, gasoline, oil, etc., and also because of the fact that he carried packages and filled small orders for persons along his route in order to defray the expenses of his machine, it must be held that he was engaged in an independent calling." This contention of the appellants was held without merit.

In the case of *Ryan v. Farrell and Edwards-Merritt Co.*, a corporation, 208 Cal. 200, 280 P. 945, 946, an automobile salesman was in the general employment of the defendant; was using his own automobile at the time of the injury. The employer, nevertheless, was held liable. We take from that case the following:

"In calling upon prospective purchasers Farrell used an automobile purchased from appellant on conditional sales contract and not fully paid for, and at the time he struck the automobile in which plaintiff was riding he was returning to San Diego, his place of residence, from Pacific Beach, where he had gone with the purpose of interviewing a prospective purchaser. He testified that salesmen connected with appellant generally used between 100 and 120 gallons of gasoline a month, 40 gallons of which were furnished by said appellant. If Farrell was the employee of appellant, rather than an independent contractor, and was acting in the course of his employment when he inflicted injuries upon plaintiff, appellant is not relieved of liability by reason of the circumstance that the automobile was not one supplied by it for the use of its employee, but was the private car of said employee used by him in performing service for his employer with the express or implied consent of said employer." See, also, the case of *May v. Farrell*, 94 Cal. App. 703, 271 P. 789, where a long list of authorities are cited showing that the mere fact of an employee using his own automobile while in the course of his employment in behalf of the employer, is immaterial. Hearing in that case was denied by the Supreme Court.

In the case of *Dillon v. Prudential Insurance Co.*, 75 Cal. App. 266, 242 P. 736, the employee of the company used his own automobile; his duties were to travel from place to place and collect premiums on policies, etc. The fact that the employee used his own automobile was held not to relieve the defendant from liability. The servant in that case, just as in the case at bar, was in the course of the business of the master. The opinion in this case, by Justice Langdon, cites a number of authorities supporting the conclusion reached in that case.

In *George v. Chaplin*, 99 Cal. App. 709, 279 P. 485, a similar question was before the court, and it was there held: "In determining whether the relationship is that of independent contractor or master and servant, the real test is whether the employee is subject to the employer's order and control, and is liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment, where the employer has general supervision and control thereof." The opinion in this case points out the distinction between one who is employed to do certain work, and where one is only accountable for the results of the work. In the instant case Sanger was in the general employment of the defendant, Lacy Manufacturing Company, and was in nowise responsible for the result of any work; he was on a mission to gain information for the benefit of his employers. The cases which we have heretofore cited are also referred to

and reaffirmed in the opinion in the case of *George v. Chaplin*.

In the case of *Eng-Skell Co. v. Industrial Accident Commission*, 44 Cal. App. 210, 186 P. 163, in an opinion written by Justice Richards, it was held that an agreement of employment under which the servant was to furnish a delivery track during the term covered by the agreement, which truck he was to drive, did not affect his status as an employee. This case recites that the circumstances are no different where an employee furnishes his own automobile, and where employees furnish their own tools in other occupations carried on for the benefit of the employer.

A good case is that of *Dishman v. Whitney*, 121 Wash. 157, 209 P. 12, 29 A. L. R. 460, where it was held: "A salesman canvassing in a city on a salary and commission, and using his own automobile to reach his prospects, is not an independent contractor, for whose negligent use of the car the employer is not responsible."

A recent case, dealing with the questions which we are now considering, is that of *Brown v. Montgomery Ward & Co.* (Cal. App.) 286 P. 474. The following excerpt from the opinion shows the facts involved and their applicability here: "The defendants claim that the evidence did not show that at the time of the accident the defendant Vinje, who was driving the automobile, was acting within the scope and course of his employment. Mr. Vinje is an accountant, he owns his automobile, and resides in Berkeley. At the time of the accident he was a traveling auditor for the defendant Montgomery Ward & Co. That company maintains a store in Oakland and a chain of stores located in different parts of the state. The head auditor is attached to the Oakland store. He has an assistant. Besides that assistant, the company has two or more traveling auditors. From time to time the head auditor and the traveling auditor, as the witnesses testified, 'lay out a program of audits for a trip.' That program includes certain designated stores and a certain designated period for the trip. Mr. Vinje was paid a certain sum per week, and he was allowed to travel in his own automobile and the company paid him nine cents per mile." (Here follows a description of the places to be visited and the order in which they were to be visited.) " * * * On Monday, about ten days prior to the accident, Mr. Vinje left his home to audit the stores located at Merced, Tulare, Hanford, and Salinas. He traveled in his automobile and carried with him a typewriter and some books of instruction which were the property of Montgomery

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Ward & Co. At about 3 o'clock on Friday, July 29, 1928, he had finished auditing the store at Salinas, which was the last store on his program, and had written out his reports. * * * As he traveled north he passed by the Oakland store, but did not stop. It was then 7:45 p. m. and the store had closed at 5 p. m. He continued on his way to his home in Berkeley and returned to the store Monday morning. While traveling between the Oakland store and his home the accident happened." Upon these facts it was held that the defendant was liable. It appears that the appellants did not really urge the question that Vinje was an independent contractor. In view of the authorities which we have cited, such a defense, we think, would have been untenable.

The authorities which we have cited and the cases cited in the opinions to which we have referred demonstrate that the great weight of the cases having to do with the question of employer and employee, under conditions similar to those presented, is that the employer is liable, and that where the employer has control over the employee, the fact that the employee uses his own automobile is wholly immaterial if that automobile is being used when the employee is in the general course of his employment. In other words, the control of the man behind the wheel is control of the wheel, and that to draw a distinction between the control over the animate and control over the inanimate in fixing liability, is not either logical or a correct statement of the law. It could not very well be argued that an employer is not liable where a mechanic negligently drops a hammer and injures a third person, because the hammer happened to belong to the mechanic. With no more consistency can it be argued that an employer is not liable for the negligent operation of an automobile, in the course of his employment, simply because the automobile belongs to the employee. The Lacy Manufacturing Company knew that Sanger, in going to Vernon, where he had been directed to go in the service of the company, would use his own automobile, and the same company also knew that whenever he stopped at the International Electric Company it would be some time when he was "up-town" with his automobile, and would be in the course of his general employment.

The facts which we have set forth, and the authorities which we have cited, we think, establish beyond question the liability not only of the appellant Sanger, but also of the appellant Lacy Manufacturing Company, a corporation.

The judgment of the trial court is affirmed.

109 Cal. App. 711

TITLE INS. & TRUST CO. v. BEAN et al.

Civ. 7555.

District Court of Appeal, Second District,
Division 1, California.

Nov. 20, 1930.

1. Highways ⇨107(1).

Notice of final hearing in matter of road improvement, in which "Inc." was left off contractor's name, *held* substantial compliance with statute (St. 1907, p. 806, § 18, as amended by St. 1921, p. 311).

The notice was correctly entitled as "Notice of Final Hearing in the Matter of Road District Improvement No. 181," and in the body of the notice a reference was correctly made to number of the resolution of intention to perform proposed work, as well as number of road district improvement, but name of contractor was stated as "F. and E" instead of "F. and E., Inc."

2. Highways ⇨107(1).

Property owner, after statutory time for objecting elapsed, could not take advantage of error occurring in course of road improvement proceedings (St. 1907, p. 806, §§ 11, 18-20, as amended by St. 1921, p. 311).

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by the Title Insurance & Trust Company against J. H. Bean and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Frank Bryant, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, J.

In pursuance of a petition presented to the board of supervisors of Los Angeles county, which petition was signed by the plaintiff and each of fifteen other individual owners of respective pieces of real property, said board of supervisors, acting in accordance with the provisions of the so-called "Road District Improvement Act of 1907," and statutes amendatory thereof (Stats. 1907, p. 806; Stats. 1921, p. 311), awarded a contract for the improvement of a road specified and described in the said petition. As its final act in connection with such improvement, said board of supervisors ordered the issuance of certain bonds in payment to the contractor for the work done by him or it in the completion of the contract, and which said bonds were

thereupon issued and delivered to the contractor.

Although, as provided by the terms of the statute, as the proposed improvement progresses, as well as after its completion, an owner of real property affected by said proposed improvement is afforded an opportunity to object thereto and to have a hearing with reference to his objection before the board of supervisors, the record herein shows that at no time preceding the completion of the work of improvement, nor on any occasion until long after the bonds in payment of the work done had been delivered to the contractor, did the plaintiff offer or make any objection of any sort in connection with said improvement to said board of supervisors; nor was it until after a tax or assessment had been levied against the property owned by the plaintiff for the purpose of collecting an installment or fixed portion of the cost of such improvement that the action herein was commenced by the plaintiff to quiet title to its said property as against the lien arising from such tax or assessment. It is from a judgment rendered in such action in favor of the defendants that this appeal is presented to this court.

The objections of appellant are directed to an error which occurred in the "Notice of Final Hearing" before the board of supervisors in the matter of the improvement, which error, in substance, is that the name of the contractor who performed the work was incorrectly stated in said notice of final hearing; also to the effect of the tax or assessment levied for the payment of the work of improvement, in that the total amount of the several levies of taxes or assessments which already had been levied, or which necessarily would be levied, exceeded the benefits accruing to the property of the plaintiff, as well as the value of the property itself, as disclosed by the assessment value placed thereon by the county assessor for the purpose of levying the general tax on said property.

[1] With reference to the objection interposed by appellant to the effect that, because of an error as to the name of the contractor, which occurred in the notice of final hearing, the invalidity of the bonds issued in payment of the work should be decreed and title quieted to the property in question, at the outset the provisions of the statute relating to the proceedings should be noted. The pertinent part of the statute is as follows:

"The presiding officer of the board of supervisors is hereby authorized to fix a time and give a notice for a hearing for the purpose of determining whether the work shall be accepted as being completed according to the

contract, and for determining the aggregate amounts for which bonds shall be issued.

"Such hearing shall be known as the final hearing. The notice of such hearing may, in form, and shall, in substance, be (filling the blanks) as follows:

"Notice of final hearing in the matter of road district improvement number _____

"Notice is hereby given that a final hearing of the above named matter will be had at the hour of — m., on the _____ day of _____ 19—, at the chamber of the board of supervisors of the county of _____ State of California, for the purpose of determining whether the work done under the contract made with _____ under resolution of intention number _____ in road improvement district number _____ of the county of _____ shall be accepted as being performed according to the contract. * * * Stats. 1921, pp. 311, 323, § 18.

As hereinbefore indicated, the only complaint regarding the notice which was given is that, instead of correctly stating the name of the contractor as "Francisco and Ellington, Inc.," the notice incorrectly named the contractors as "Francisco and Ellington." It will be observed that the language of the statute is that "the notice of such hearing may, in form, and shall, in substance, be" (so and so). Then follows a form which "may" be followed. All that the statute specifically demands is that the substance of the form "shall" be followed.

With the one exception, the notice given was "verbatim" with the form suggested by the provisions of the statute. It was correctly entitled as "Notice of Final Hearing in the Matter of Road District Improvement No. 181." In the body of the notice a reference was correctly made to the number of the "Resolution of Intention" to perform the proposed work, as well as the number of the "Road District Improvement"; and the name of the contractor was stated as "Francisco and Ellington." It thus appears that the identity of the proceeding regarding which the notice was given was established, first, by a certain numbered "Resolution of Intention"; and, secondly, by the specific number by which the "Road District Improvement" was designated. As is stated in the statute, the notice was given "for the purpose of determining whether the work shall be accepted as being completed according to the contract", etc.; and it is most apparent that, after such a particularization of the road district improvement, the requirement of the statute that the "substance" of a specified form of notice should be given was complied with, and that the omission of the letters "Inc." after the words "Francisco and Ellington" could have misled no person who was interested in the matter.

[2] Furthermore, as affects either of the objections herein specified by the appellant, it is noted that no claim is made that in any particular the board of supervisors acted either fraudulently or in violation of its discretionary powers in the premises. Assuming (without conceding) that, had the plaintiff availed itself of either or any of the several opportunities which were afforded it by the terms of the statute to make timely objection to the board of supervisors relating either to the improvement as it progressed, to the cost thereof, or to the assessment or assessments of which it here complains, and thereupon that either or all its several objections had been overruled or denied, it might have become entitled to some remedy, it is plain, both by the terms of the statute as well as by numerous decisions of the courts of this state, that as to each of such several opportunities, the plaintiff having permitted the statutory time to elapse within which it properly might have sought and possibly might have obtained relief, it is now too late for the plaintiff to claim or to take advantage of any error which may have occurred in the course of proceedings before the board of supervisors. Sections 11, 18, 19, 20, Stats. 1907, p. 806, as amended by Stats. 1921, p. 311; Dillingham v. Welch, 179 Cal. 656, 178 P. 512; Pierce v. County of Solano, 62 Cal. App. 465, 217 P. 545; Swall v. County of Los Angeles, 42 Cal. App. 758, 184 P. 406; Hutchinson Co. v. Coughlin, 42 Cal. App. 664, 184 P. 435; Duncan v. Ramish, 142 Cal. 686, 76 P. 661; Lent v. Tillson, 72 Cal. 404, 14 P. 71; Chase v. Trout, 146 Cal. 350, 80 P. 81.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

110 Cal. App. 107
FRANCIS v. JONES et al.
Civ. 172.

District Court of Appeal, Fourth District,
California.
Nov. 26, 1930.

Rehearing Denied Dec. 20, 1930. Hearing Denied by Supreme Court Jan. 22, 1931.

1. Schools and school districts ⇨133.

Position of public school teacher becomes permanent after teaching length of time required by Teachers' Act (Pol. Code, § 1609).

2. Schools and school districts ⇨141(5).

Permanent teacher can only be deprived of her right to teach by and after filing written charges against her and hearing had thereon (Pol. Code, § 1609).

3. Schools and school districts ☞141(6).

In proceeding to compel reinstatement of permanent school teacher dismissed without charges having been filed and hearing had thereon, court erroneously granted school district's motion for dismissal (Pol. Code, § 1609).

4. Mandamus ☞4(5).

That permanent school teacher could appeal to superintendent of public instruction on her salary being withheld did not preclude her from maintaining mandate proceeding, where statutory procedure was not followed in making discharge (Pol. Code, § 1609).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Petition by Lou H. Francis for a writ of mandate against Walker Jones and others, as trustees of the Victor Valley Union High School District, to compel reinstatement of petitioner as public school teacher and payment of salary. Judgment for defendants, and petitioner appeals.

Reversed.

Fall & Fall, of Los Angeles, for appellant.

Geo. H. Johnson, Dist. Atty., and James L. King, Deputy Dist. Atty., both of San Bernardino, for respondents.

MARKS, Acting P. J.

Appellant is, and was at all times herein mentioned, the holder of a certificate entitling her to teach in the high schools of the state of California. The Victor Valley Union High School district was a district that employed more than eight teachers under a principal who devoted more than two hours per day to supervision in the school under his control. Walker Jones, L. V. Robinson, R. J. Mills, James M. Holloway, and T. A. Lee were trustees of this district.

Appellant was employed as a teacher in the district from 1922 to the end of the school term in 1927, and became a permanent teacher of such district under the provisions of section 1609 of the Political Code. On May 7, 1927, the board of trustees passed a resolution terminating the employment of each teacher in the high school effective June 30, 1927, the end of the school year.

On August 20, 1927, appellant informed the trustees of the district that she was ready and willing to discharge her duties as a teacher, and asked them to inform her of the date upon which the school would open. Under date of August 23, 1927, appellant, acting through Messrs. Fall & Fall, her attorneys, informed the trustees by letter that she was ready, willing, and able to teach in the high school during the ensuing school year, and requested that she be informed when

she could enter upon the performance of her duties. It does not appear from the record that respondents replied to either of these communications. Under date of February 17, 1928, Messrs. Fall & Fall, as attorneys for appellant, wrote a letter to the board of trustees of the district, in which they requested the payment of the salary of appellant from the commencement of the school year in 1927. They received no reply to this letter, and suit was instituted in the court below whereby appellant sought a writ of mandate requiring respondents to reinstate her in her position as a permanent teacher, and directing the drawing of warrants in her favor for the salary which had accrued during the school year 1927-1928. It was stipulated at the trial of this case that no charges were filed against appellant, as required by section 1609 of the Political Code, nor was she given any hearing by the board of trustees of the district prior to her purported dismissal. After proof of the foregoing facts the trial court granted respondents' motion to dismiss appellant's petition. This had the same effect as a judgment of nonsuit.

[1-3] Since this case was heard in the court below, the cases of *La Shells v. Hench*, 98 Cal. App. 6, 276 P. 377; *Dutart v. Woodward*, 99 Cal. App. 736, 279 P. 493; and *Saxton v. Board of Education*, 206 Cal. 758, 276 P. 998, have been decided. These cases, together with the case of *Grigsby v. King*, 202 Cal. 299, 260 P. 789, furnish us authority under which we must reverse the judgment and order of the trial court.

It is now well-settled law in California that the position of teacher in the public schools of California becomes permanent after teaching for the length of time required by the Teachers' Tenure Act (Pol. Code, § 1609), and that a permanent teacher can only be deprived of her right to teach by and after the filing of written charges against her and a hearing had thereon. There were no charges filed or hearings held in this case. Therefore the motion of respondents to dismiss the petition should not have been granted.

[4] Respondents contend that, under section 1699 of the Political Code, appellant had the right to appeal to the superintendent of public instruction upon her salary being withheld, and that, as she failed to do so, her action could not be maintained. In the case of *Saxton v. Board of Education*, supra, it was held that the provisions of this section do not apply in the case of the discharge of a permanent teacher where the procedure prescribed by section 1609 of the Political Code is not followed.

In the instant case, appellant sought to accomplish two results by her petition for a writ of mandamus: First, her reinstatement as a permanent teacher; and, second, the

drawing of warrants for the payment of her salary. If the provisions of this section could be construed so as to defeat her action for her salary it could not be held to bar her action for reinstatement.

The order and judgment appealed from are reversed.

We concur: BARNARD, J.; WARMER, Justice pro tem.

Mark M. Cohen, Aaron N. Cohen, of San Francisco (Vincent Surr, of San Francisco, of counsel), for appellant.

Roy V. Rhodes, of Los Angeles, for respondent.

HOUSER, J.

The defendant was the owner or in the possession of certain storerooms at what were known as Nos. 745 to 749 South Hill street, in the city of Los Angeles. The storeroom at No. 745 was separate and apart from the remainder of the premises, the latter of which were occupied by defendant in the operation of its business as a restaurant. The plaintiff is a corporation acting as a broker in the business of selling and leasing real property. Through an employee of the plaintiff, it solicited from the defendant the business of procuring a tenant for such storeroom at No. 745 South Hill street, and at the same time informed the defendant of the name of a person or a corporation which plaintiff hoped might be induced to become such tenant. Concurrently therewith, the defendant gave to the plaintiff full particulars respecting the terms and conditions under which the storeroom would be leased. Shortly thereafter, acting under the direction of the plaintiff, the proposed tenant visited the premises owned or possessed by the defendant. At that time, the plaintiff was informed by the defendant that theretofore it had given to another person an option to lease the storeroom at No. 745 South Hill street, but that, if such option were not exercised, the defendant would then be in a position to enter into a lease with the proposed tenant which the plaintiff had sent to the defendant. Within a few days following such statement by the defendant, the storeroom at No. 745 South Hill street was leased by the defendant to a third person or corporation, with the proviso that possession of such storeroom was not to be taken by the lessee until after the lapse of approximately three months following the date of such lease. About two weeks after the proposed tenant who had been introduced to the defendant by the plaintiff had inspected the premises owned or possessed by the defendant and had then been informed as hereinbefore stated, and some days following the date of the lease of the storeroom at No. 745 South Hill street to the third person or corporation, the defendant approached the proposed tenant who had been introduced to the defendant by the plaintiff and in person sought to induce such proposed tenant to lease from the defendant a portion of the remainder of the premises which were then being occupied and operated by the defendant as a restaurant. The part of such premises at that time proposed by the defendant to be leased to such prospective tenant was known as No. 749 South Hill street. The negotiations between

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W. ROSS CAMPBELL CO. v. HERBERT'S OF LOS ANGELES.

Civ. 6309.

District Court of Appeal, Second District,
Division 1, California.

Dec. 5, 1930.

1. Brokers ⇨40.

Some sort of contractual relation is prerequisite to recovery of broker's commission for procuring tenant.

2. Contracts ⇨4.

Written proposal made and accepted, or oral substitute, in substance the counterpart of the writing, is not necessary to establish contractual relationship.

3. Brokers ⇨40.

Defendants permitting brokers to continue efforts to interest prospective lessee, without informing brokers premises were leased, held liable on implied contract on consummation of lease for different premises (Civ. Code § 1589).

Civ. Code, § 1589, provides that a voluntary acceptance of benefit of transaction is equivalent to consent to all obligations arising from it so far as facts are known or ought to be known to person accepting. Defendants employed broker to procure tenant for particular premises, but, after broker had interested proposed tenant, leased premises to third person, and leased different premises to tenant procured by broker. Defendants contended there was no contractual relationship as to premises actually leased.

Appeal from Superior Court, Los Angeles County; R. Morgan Galbreth, Judge.

Action by W. Ross Campbell Company against Herbert's of Los Angeles, a corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

the parties with reference to the location at storeroom No. 749 South Hill street continued over a period of several weeks. In the meantime, the storeroom at No. 745 South Hill street, although leased to a third person or corporation, remained unoccupied. But at no time after such premises at No. 745 South Hill street were so leased did the defendant ever notify or inform the plaintiff of such fact; nor until after the premises at No. 749 South Hill street had been leased as hereinafter stated, did the plaintiff have any knowledge of the fact that the premises at said No. 745 had been leased. To the contrary, with knowledge of the fact that the plaintiff was in complete ignorance of the leasing of the storeroom at said No. 745, the defendant permitted and encouraged the plaintiff to use and exert its endeavors in behalf of the defendant toward inducing the prospective tenant to enter into a lease with the defendant—the plaintiff all the time assuming that the storeroom at No. 745 South Hill street was the premises to be leased. A lease of No. 749 South Hill street was finally entered into between the defendant and the tenant introduced to the defendant and presented to it by the plaintiff. After demand had been made by the plaintiff upon the defendant that it pay the usual commission charged by real estate brokers in the city of Los Angeles for such services as had been rendered by the plaintiff to the defendant in the matter, and following the refusal by the defendant to compensate the plaintiff for such services, the action herein was commenced.

On the trial of the action the principal evidence introduced in substance having been as hereinbefore indicated, judgment was rendered in favor of the plaintiff; and the defendant appeals therefrom.

Appellant urges the points that "without a contract of some kind, no broker can recover"; and that "the law will not imply a contract to pay for services, where those services have been rendered pursuant to an express contract."

[1-3] It is plain enough that in circumstances of the nature of those here under consideration some sort of contractual relation between the parties is a necessary prerequisite to a recovery by the person who performs the services as against the person for whom or in whose behalf the services are rendered. However, it is well-settled law that neither a written proposal on the part of one person which in terms is accepted by another, nor even as between the parties, an oral substitute, in substance the counterpart of what might have been a writing, is necessary to establish a contractual relationship. In this case the relationship of the respective parties, followed by unambiguous conduct one toward the other, constituted a clear manifestation that the defendant desired the plaintiff to per-

form certain services in behalf of the defendant; and on the performance of which the law assumes that compensation was to be made therefor. At least, as far as concerns the premises at No. 749 South Hill street, there was no express contract between the parties. However, the fact that the plaintiff was not correctly informed by the defendant as to the particular floor space which it desired to lease to some other person, or of the exact street number by which such place was known or designated, should present no legal barrier to the just compensation of the plaintiff for services honestly performed by it in procuring a tenant for the defendant at its request or at least with its consent and acquiescence.

Section 1589 of the Civil Code provides as follows: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

With full knowledge of all the facts which related to the situation, and particularly that the plaintiff knew nothing with reference to the fact that the storeroom at No. 745 South Hill street had already been leased to another corporation, the defendant voluntarily accepted the benefits which arose from the efforts of the plaintiff in endeavoring to procure a tenant for the defendant, with the result that the storeroom at No. 749 South Hill street was leased to the identical corporation with which during all the time involved in the matter the plaintiff had been negotiating—from which it follows that defendant consented "to all the obligations" which would have arisen from the transaction had both of the parties thereto been fully cognizant of all the facts and had entered into an agreement with reference thereto.

The other points presented by appellant and upon which reliance is also placed as constituting sufficient grounds for reversal of the judgment are to the effect that, where no contract exists between a landlord and a broker, the landlord will incur no liability to the broker by leasing the premises in question to a person introduced by the broker to the landlord in connection with "another matter"; also, that the broker "must perform within the time specified."

Considering the facts in the instant case, it is difficult to perceive the application to them of the principles of law enunciated by appellant. As this court has attempted to elucidate herein, by reason of the conduct of the parties to the transaction, and in view of the situation and the knowledge of each of them with reference to the facts involved, an implied contract resulted. With the acquiescence and consent of the defendant, the plaintiff performed certain services in behalf of the defendant which, to say the least, largely contributed to the leasing of the premises in

question. Compensation for such services should follow as a matter of course.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

110 Cal. App. 237

PEOPLE v. MILLETT et al.

Civ. 6604.

District Court of Appeal, First District, Division 2, California.

Dec. 5, 1930.

Rehearing Denied Jan. 3, 1931. Hearing Denied by Supreme Court Feb. 2, 1931.

1. Appeal and error ⇐1010(1).

Trial court's determination of fact question is conclusive, if sustained by evidence.

2. Eminent domain ⇐205.

Evidence sustained finding lessee operating auto camp and garage business was not damaged by taking of land for highway purposes.

Evidence showed wide boulevard had been constructed in front of lessee's garage and auto camp, and that access to and egress from it had both been facilitated by construction of proposed highway.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the People against Joseph Millett and another to condemn land for highway purposes. From the judgment, defendant Frank Marschall appeals.

Affirmed.

William B. Hornblower and Fabian D. Brown, both of San Francisco, for appellant.

Sullivan & Barry and Theo J. Roche, of San Francisco, for respondent Millett.

Paul F. Fratessa and Fabius T. Finch, both of San Francisco, for the People.

PRESTON, Justice pro tem.

This is an appeal by defendant Frank Marschall from a judgment entered against him in an eminent domain proceeding.

The facts are briefly these: The state of California, acting through the California highway commission, brought this action to condemn, for highway purposes, a small strip of land in San Mateo county fronting on the county road. The defendant Joseph Millett is the owner of the land sought to be taken, and also the owner of a large area contiguous thereto. On February 3, 1925, Millett and wife leased to defendant and appellant, Frank

Marschall, all of the lands owned by Millett, except the dwelling house, for a term of ten years. The rental for the first three months was \$75 per month, and \$200 per month for the remainder of the lease. Only a very small portion of the land leased to Marschall is sought to be condemned in these proceedings. Marschall was in possession of the land leased and was using the same for an auto camp and garage business. One of the auto camp cottages projected a short distance onto the land sought to be taken, but this cottage was moved by plaintiff to another location on the leased premises.

The new road runs near a garage built by Marschall on premises leased. Plaintiff, however, before the commencement of this action, paid appellant \$2,500 damages to the garage and, therefore, the question of damages to the garage is not an issue in this case.

The case was tried before the court without a jury, and the court found that Millett had sustained damages in the sum of \$2,473.50 for the land taken, and also sustained further damages in the sum of \$2,400 by reason of its severance from the balance of the land not taken, making a total sum of \$4,873.50, and rendered judgment accordingly.

The court also found that the appellant Marschall had sustained no damages whatever, either by reason of the taking of the small strip under lease, the removal of the cottage, or by reason of its severance from the other portion of the land held by him under lease.

Appellant Marschall contends that the court erred in awarding all of the damages to Millett and none to him—that he should have been awarded \$2,207 thereof, and prays that the judgment be modified accordingly; or, in other words, he claims that the uncontradicted evidence shows that his leasehold interest was damaged, by reason of the taking of the strip for highway purposes and its severance from the portion not taken, in the sum of \$2,207, and that out of the total damages awarded by the court to Millett he should have been paid that amount.

[1, 2] The court having found that appellant's leasehold interest was not damaged, and that Millett, the owner of the land, was entitled to all of the damages awarded, we are helpless to interfere, provided the findings of the court are sustained by the evidence. This rule is so well established that citation of authority is entirely unnecessary.

We have examined the entire record with care, and we think the findings of the trial court find substantial support in the evidence. The evidence shows that a wide boulevard has been constructed in front of appellant's garage and auto camp, and that access to and egress from it have both been facilitated by the construction of the proposed highway.

The testimony of Mr. E. G. Poss, assistant division engineer of the California highway commission, is sufficient upon which to sustain the findings of the trial court.

It is unnecessary to state the evidence here in detail. The case, in its last analysis, is a simple question of fact, and the trial court having determined that question upon sufficient evidence, against the contention of appellant, we are powerless to interfere. In view of this fact, we deem a further discussion of the case entirely unnecessary.

The judgment should be affirmed, and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

110 Cal. App. 154

FARUM v. GARRISON et al.
Civ. 7287.

District Court of Appeal, First District,
Division 2, California.
Dec. 2, 1930.

1. Automobiles ☞171(1).

Automobile driver approaching intersection could not assume road was unoccupied, or that there was no one else, except automobile collided with, traveling on road.

2. Automobiles ☞208.

Automobile driver entering intersection held not contributorily negligent if failing to keep continuous watch on movements of defendants' car after seeing car approaching intersection.

3. Automobiles ☞146.

In determining automobile driver's negligence, physical facts should be considered.

4. Appeal and error ☞979(2).

Sufficiency of evidence is fact question reviewable by trial court, and discretion in granting new trial is not error of law which may be disturbed on appeal, unless discretion is abused.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Julius L. Farum against V. G. Garrison and others. Verdict for defendants, plaintiff's motion for new trial was granted, and defendants appeal.

Order affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellants.

Maurice J. Rankin and S. F. Holstein, both of San Jose, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendants to recover a judgment for damages arising out of an automobile accident. The defendants answered and a trial was had before the trial court sitting with a jury. The verdict was for the defendants. The plaintiff made a motion for a new trial. The motion was granted, and the defendants have appealed under section 953a of the Code of Civil Procedure.

[1, 2] In their first point the defendants claim that the evidence was clearly insufficient to support a verdict for the plaintiff because it showed that the plaintiff's negligence was a contributory cause of the injuries sustained by him. The accident happened at the intersection of two crossroads in a district where the speed limit was 20 miles per hour. As the plaintiff was approaching the crossing from the east he saw the defendants' car 100 or 150 feet south of the intersection. Plaintiff slowed down to 15 miles per hour and entered the intersection at that speed. He had his lights on, but it was just breaking day. As the plaintiff passed the curb line the other car was 20 or 30 feet south of the car tracks. He testified that he figured he had the right of way and took his eyes off of their car at that time. Having set forth the above portions of the record the defendants assert that the plaintiff's said negligence consisted of not keeping continuous watch on the movements of the defendants' car. He cites and relies on *Towne v. Godeau*, 70 Cal. App. 148, 153, 232 P. 1010; *Truitner v. Knight*, 83 Cal. App. 655, 661, 662, 257 P. 447; *Cal. Jur. Supp.* 135-136, and cases. If it is his contention that after the plaintiff saw the position of the defendants' car he was bound to keep looking at it and not to look at, nor to look out for, other dangers, if any, the authorities cited do not support him. The plaintiff was not entitled to assume the road was unoccupied. *Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066. For the same reason he was not entitled to assume that there was no one else except the defendants traveling the road. We cannot say as a matter of law that the plaintiff was guilty of contributory negligence if he failed to keep a continuous watch on the movements of defendants' car after seeing their car at the point indicated.

[3] In their next point the defendants argue that the evidence showed that they were not negligent. True, it is that they so testified. But it is also true that the plaintiff's evidence given on that subject was quite to the contrary. In this connection the physical facts should also be taken into consideration, and no doubt the trial court gave them the consideration to which they were entitled.

[4] The sufficiency of the evidence being a question of fact which the trial court was authorized to review, the exercise of its discretion was not error of law which may be disturbed by this court, except this court is able to say that the trial court abused its discretion. 20 Cal. Jur. 114. That it did abuse its discretion we are unable to say.

The order is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

110 Cal. App. 150

In re BORBA'S ESTATE.

Civ. 7606.

District Court of Appeal, First District,
Division 1, California.

Dec. 2, 1930.

As Modified Dec. 23, 1930.

1. Wills ⇐440.

Real intent expressed in will must be discovered, if practicable, and should prevail, though requiring departure from literal construction (Civ. Code, §§ 1317, 1322).

Civ. Code, § 1322, provides that clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, other words not equally clear and distinct, or argument from other parts of will, but section 1317 requires that will be construed according to testator's intent.

2. Wills ⇐472.

Clause declaring intention to give children who received no advances sum which would make all share alike must prevail over preceding conflicting portions of will (Civ. Code, § 1321).

3. Wills ⇐529.

Children of testator *held* entitled under will to equal shares of residue, including advances, less sums advanced to some of them (Civ. Code, § 1395).

The will gave one-eleventh share of residue, less amounts advanced, to six of testator's children, and one-eleventh portion, plus one-fifth share of portion of residue, increased by such advances, to his remaining five children, "it being my intention to give our children who have received no advances a sum which will make all share and share alike when taking into consideration the advances heretofore made." Civ. Code, § 1395, provides that "any estate * * * given by the decedent in his lifetime as an advancement to any child, or other heir, is a part of the estate * * *

for the purposes of division and distribution, * * * and must be taken by such child, or other heir, toward his share of the estate."

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Joseph R. Borba, deceased. From an order and decree of distribution on petition of the American Trust Company, executor, etc., Annie Borba Ryan and others appeal.

Reversed, with directions.

Louis Oneal and Maurice J. Rankin, both of San Jose, for appellant Annie Borba Ryan.

Vincent W. Hallinan and Felix M. Cunningham, both of San Francisco, for appellants Joseph Borba and others.

Fry & Jenkins and Fred A. Wool, all of San Jose, for respondent.

PER CURIAM.

Joseph R. Borba died on December 10, 1928, in Santa Clara county. He left a will, which was duly admitted to probate and letters testamentary issued thereon.

Among other provisions the will contained the following:

"Third: Prior to the making of this will I have advanced to Joe Borba the sum of one thousand dollars, to Dominicus Borba one thousand dollars, to Frank Borba three thousand dollars, to John Borba one thousand dollars, to Annie Borba seven hundred fifty dollars and to Rodgers Borba six hundred fifty dollars, all being sons and daughters of Anna S. Borba and myself, the other five children, to wit, Mary Garcia Pierce, Rosa Amaral, Minnie Dutra, Antone Borba and Willie Borba, also the children of Anna S. Borba and myself, having received no advancements whatsoever.

"Fourth: I give, devise and bequeath to Frank Borba, my son, one-eleventh less three thousand dollars heretofore advanced to him, of all of the residue of my estate; to Joe Borba, John Borba and Dominicus Borba, our sons, one-eleventh share, less one thousand dollars, to be deducted from each share, said deduction having been advanced to said sons during my life-time, of the residue of my estate; to Annia Borba one-eleventh share, less seven hundred fifty dollars, the sum having been advanced to her, of the residue of my estate; to Rodgers Borba, one-eleventh share, less six hundred fifty dollars, the same having been advanced to him during my lifetime, of the residue of my estate, and to Mary Garcia Pierce, Rosa Amaral, Minnie Dutra, Antone Borba and Willie Borba an one-eleventh portion of all of the residue of my estate, plus a one-fifth

share of all that portion of the residue which was increased by the advances deducted from the shares of the above named sons and daughter, it being my intention to give our children who have received no advances a sum which will make all share and share alike when taking into consideration the advances heretofore made; it is my wish and I do so will that in the event of the death of any of the above named children without issue that his or her share shall be divided equally among the survivors."

On November 10, 1929, his executor filed a final account, and petitioned for distribution from which it appears that the property remaining to be distributed consisted of cash in the sum of \$28,031.14. This sum by the decree of distribution was ordered to be distributed to the children of the decedent as follows: Frank Borba, nothing; Joe Borba, \$1,548.28; Dominicus Borba, \$1,548.28; Annie Ryan, formerly Annia Borba, \$1,798.28; Rodgers Borba, \$1,898.28; George W. Lyle, as sheriff of the county of Santa Clara, attaching officer in an action filed in the superior court of said county against John Borba, named therein as Jack Barbe, \$1,548.28; to each of decedent's other children, namely, Mary Garcia Pierce, Rosa Amaral, Minnie Dutra, Antone Borba and Willie Borba, there was distributed \$3,937.93.

Frank, Joseph, Dominicus, John and Rodgers Borba and Annie Borba Ryan have appealed from the order and decree of distribution. They claim that the court erred in its construction of the provisions of the will, and that they are entitled to more, and the heirs to whom no advances were made to less, of the amount remaining to be distributed than the decree provides.

In making distribution the court divided the amount which remained to be distributed into eleven parts each in the sum of \$2,548.28; it then deducted from the shares of appellants the advances received by each of them, adding these amounts to the shares of the heirs to whom no advances had been made. The result was to give to each of the latter \$1,389.63 more than the amounts received by the others through advance and distribution. Respondents urge that this result is supported by the terms of the will, which provides that the advances shall be deducted from the respective shares of those who received them, namely, six of the children; and that each of the other five children shall receive a "one-eleventh portion of all the residue plus a one-fifth share of all that portion of the residue which was increased by the advances deducted from the shares of the above named sons and daughters. * * *

[1, 2] While the provisions quoted, standing alone, might sustain this claim, and it is the rule that a clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or any other words not equally clear and distinct, or argument from

other parts of the will (Civ. Code, § 1322), nevertheless a will is to be construed according to the intention of the testator (Civ. Code, § 1317; *Estate of Phelps*, 179 Cal. 703, 178 P. 846), it being the duty of the court to discover, if practicable, the real intent expressed in the will (*Upham v. Plankinton*, 152 Wis. 275, 140 N. W. 5, 48 L. R. A. (N. S.) 1004, Ann. Cas. 1914C, 376); and this should prevail, though it would require some departure from the literal construction of its provisions (*Morton v. Barrett*, 22 Me. 257, 39 Am. Dec. 575).

The intention of the testator in the present case was clearly shown by the declaration which follows the portion of the will last quoted, namely: "It being my intention to give our children who have received no advances a sum which will make all share and share alike when taking into consideration the advances heretofore made; it is my wish, and I so will, that in the event of the death of any of the above named children without issue that his or her share shall be divided equally among the survivors." If the preceding portions of the will can be said to be in conflict with this, the latter clause must prevail (Civ. Code, § 1321), as it was manifestly the testator's intention to place his children upon an equality with respect to the residue of his estate, taking into consideration the advances already made.

[3] To accomplish this result it will be necessary to follow section 1395 of the Civil Code, which has been held to apply as well to cases of testacy as to partial intestacy (*Estate of Hayne*, 165 Cal. 568, 133 P. 277, Ann. Cas. 1915A, 926), and which reads as follows: "Any estate, real or personal, given by the decedent in his lifetime as an advancement to any child, or other heir, is a part of the estate of the decedent for the purposes of division and distribution thereof among his heirs, and must be taken by such child, or other heir, toward his share of the estate of the decedent." So applied, the residue for the purpose of distribution would equal the amount of the estate remaining in the hands of the executor, namely, \$28,031.14, plus the advances, a total of \$35,431.11, the share of each child therein being the sum of \$3,221.01. Deducting from their shares the sums advanced to them, the amounts the respective appellants are entitled to receive upon distribution are as follows: Frank Borba, \$221.01; Joseph Borba, \$2,221.01; Dominicus Borba, \$2,221.01; John Borba \$2,221.01; subject to the lien of an attachment levied by George W. Lyle, as sheriff of the county of Santa Clara, State of California, attaching officer in the action filed in the superior court of said county, entitled *Art Ryan, Plaintiff, v. Jack D. Barbe, Defendant*, number 38414; Rodgers Borba \$2,571.01, and Annie Borba Ryan \$2,471.01."

The order and decree is reversed, with directions to enter a decree in accordance with the views herein expressed.

HASTAIN & PURMAN, Inc., v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. *

Civ. 7626.

District Court of Appeal, Second District,
Division 2, California.

Dec. 2, 1930.

Rehearing Denied Dec. 30, 1930. Hearing
Granted by Supreme Court Jan. 29, 1931.

Justices of the peace. ☞ 140.

Statute enlarging jurisdiction and limiting right of appeal held inapplicable to case tried before ascertainment of applicability or assumption of enlarged jurisdiction (Code Civ. Proc. § 112, as amended by St. 1929, p. 834, and § 982a as added by St. 1929, p. 833).

Code Civ. Proc. § 112, as amended by St. 1929, p. 834, enlarges jurisdiction of justices' courts in townships with population of 30,000 or more, and section 982a, as added by St. 1929, p. 833, requires appeals to be taken, heard, and determined as provided for municipal courts. Township in question had required population, but at date of trial there had been no finding to that effect, and court had not assumed to exercise the enlarged jurisdiction. Defendant sought to appeal for trial de novo as previously authorized.

Original mandamus proceeding by Hastain & Purman, Inc., against the Superior Court of the State of California in and for the County of Los Angeles.

Writ granted.

Frank L. Simons, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, J. H. O'Connor, Asst. Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, all of Los Angeles, for respondent.

CRAIG, J.

The superior court of Los Angeles county having declined to try and decide de novo an action appealed from the justice's court of Montebello township, and having dismissed the appeal, mandamus is sought to compel a vacation of the order of dismissal and a retrial of the issues.

By acts of the last Legislature section 112 of the Code of Civil Procedure was amended to confer upon justices' courts in townships having a population of 30,000 or more original jurisdiction in cases at law in which the demands, exclusive of interest, or the value of the property in controversy, should amount to \$1,000 or less (Stats. 1929, c. 473, p. 834); and a new section numbered 982a was added, requiring that appeals from such courts be

taken, heard, and determined, as provided by chapter 4, title 13, part 2 (section 983 et seq.) relating to appeals from municipal courts (Stats. 1929, ch. 471, p. 833). The amending acts became effective August 14, 1929. The petitioner herein was made a party defendant in an action for \$288 filed in the justice's court of Montebello township on May 16, 1929, wherein judgment was rendered in favor of the plaintiffs on August 30, 1929. On December 30, 1929, petitioner appealed to the superior court of Los Angeles county by the method formerly applicable to all justices' courts permitting of trials de novo. When called for trial upon appeal the plaintiffs moved to dismiss the appeal upon the ground that said township had been classed as one possessed of the enlarged jurisdiction, and that the superior court had lost jurisdiction of appeals therefrom, except upon a judgment roll and bill of exceptions or certified transcript.

By a proceeding entitled Los Angeles County v. Justice's Court of Beverly Hills, 208 Cal. 429, 281 P. 611, 612, the Supreme Court on October 24, 1929, directed the issuance of a writ of mandate commanding the justices' courts of several townships, including Montebello, to accept and exercise the jurisdiction prescribed for such courts in townships having a population of 30,000 or more. There had previously been no announcement by county or federal census as to its population, nor had its justice's court exercised jurisdiction of demands in excess of \$300. In said decision it was said, in part: "The jurisdiction of the respondent courts depends upon the fact of there being the specified number of inhabitants within their respective territorial boundaries, and not upon any report or proclamation of the fact. * * * That being true, it would seem to follow that, when it is found by any proper mode of ascertainment that the various political subdivisions in which the respondent courts are located have the required population, the respondent courts must entertain, consider, and act in all those matters and causes falling within the jurisdiction prescribed by the recent law. * * * No objection was made to the report of the referee, and all the parties to this proceeding joined in a written stipulation that the report be affirmed as presented. That was done, and the court now finds, as a fact and in accord with the report of the referee, that each of the following townships of the county of Los Angeles, state of California, has a population of 30,000 inhabitants or more, viz.: Beverly Hills township, Glendale township, Inglewood township, Montebello township. * * * Therefore let a peremptory writ of mandate issue, directed to and commanding the respondents' justice's court of * * * Montebello township * * * to forthwith

accept and exercise the jurisdiction prescribed by section 112 of the Code of Civil Procedure * * * for justices' courts * * * having a population of 30,000 or more."

It is stipulated in the instant proceeding that on and after August 15, 1929, said township had a population of more than 30,000, but it is manifest that, notwithstanding the amendments to the Code, there had been no finding by a proper mode of ascertainment that Montebello township had the required population to invest its justice's court with the enlarged jurisdiction; and said court had not at any time during the pendency, trial, or appeal of petitioner's case assumed or been authorized to exercise a jurisdiction other than that conferred by preexisting laws. It cannot in the absence of express legislative intent be said that the amendments of 1929 may be given by construction a retroactive effect which deprives parties of their rights of appeal. This rule was recognized in *Harris v. Moore* (Cal. App.) 283 P. 76, 77, as applied to appeals from the superior court after judgment in and appeal from the municipal court. Quoting from various authorities upon the subject, it was there held: "Retrospective legislation, except when designed to cure formal defects, or otherwise operate remedially, is commonly objectionable in principle, and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to enact it." *Cooley, Const. Lim.*, p. 62. "It is in view of consequences such as these that all writers upon the construction of law concur in the opinion that, whether constitutional or statutory, it should be construed to operate prospectively only, unless such construction is absolutely precluded by the language used." *Cassard v. Tracy*, 52 La. Ann. 835, 27 So. 368, 370, 49 L. R. A. 272.

The writ is granted.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

109 Cal. App. 691

PACIFIC STATES ELECTRIC CO. v. UNITED STATES FIDELITY & GUARANTY CO., and five other cases.

Civ. 4213.

District Court of Appeal, Third District,
California.

Nov. 19, 1930.

1. Mechanics' liens §315.

Bond for faithful performance of contract to which it refers binds surety for labor performed and materials furnished thereunder as completely as though surety were party to contract.

2. Mechanics' liens §315.

Bond guaranteeing faithful performance of subcontract to furnish labor and materials implies promise to pay for such labor and materials.

3. Mechanics' liens §315.

Common-law undertaking furnished general contractor for faithful performance of agreement with subcontractor inures to benefit of persons performing labor or furnishing materials.

4. Mechanics' liens §315.

Obligation of subcontractor's surety to guarantee payment for labor and materials under subcontract held fixed and certain.

5. Mechanics' liens §315.

That furnishers of labor and materials to subcontractor might have recovered from general surety did not relieve subcontractor's surety (Civ. Code, §§ 2848, 2849, 2854).

In the event of securing judgment against the original general surety by the claimants, it would then be entitled to be subrogated to rights of claimants for purpose of reimbursement.

Appeals from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Actions by the Pacific States Electric Company, by L. B. Marsh, by the Graybar Electric Company, Incorporated, by the Southwestern Creditors' Association, by Sterling & Harkness, and by Illinois Electric Company, against United States Fidelity & Guaranty Company. Judgments for defendant, and plaintiffs appeal.

Reversed.

John M. Martin, of Los Angeles, for appellants.

Edward C. Mills, of Los Angeles, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment rendered against each of the plaintiffs in the foregoing six cases which were consolidated for trial. Each of the actions was based upon the claims of materialmen against a surety bond which was given to pledge the faithful performance of a subcontractor for the construction of specific parts of a building. The court held that the bond was not liable for the labor performed or the materials furnished. The judgment depends upon a construction of the bond.

The Breakers Hotel Company, a corporation, awarded a contract to construct a hotel of the same name at Long Beach to William G. Reed at a cost of about \$850,000. The

court found that Reed agreed to furnish and pay for all necessary labor and materials to complete the building according to the contract. Mr. Reed, as principal, and the Metropolitan Casualty Insurance Company, as surety, executed and delivered to the hotel company a bond pursuant to section 1183 of the Code of Civil Procedure for the faithful performance of the contract. This bond was duly recorded. It guaranteed "the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the work" of constructing the hotel building. By the terms of this bond its provisions were to "inure to the benefit of any and all persons who should perform labor upon or furnish materials for the work" performed under the contract.

William G. Reed, the general contractor, made a subcontract with Jensen Electrical Company for the furnishing of materials and the performance of certain portions of the structure. Each plaintiff in this group of consolidated cases furnished the subcontractor, Jensen Electrical Company, with materials of substantial value which were used in the construction of the building. For the faithful performance of this subcontract an independent common-law bond was executed and delivered to Reed, the general contractor, with Jensen Electrical Company as principal and United States Fidelity & Guaranty Company as surety. This was the only bond executed by the last-mentioned surety on account of the structure. It provides, in part: "Whereby the said party of the second part (the subcontractor) undertakes to furnish all necessary labor and material and to perform and complete for the said party of the first part * * * (the work contracted for) we, Jensen Electrical Co., as Principals, and the United States Fidelity and Guaranty Company, * * * as Surety, are held and firmly bound unto said William G. Reed. * * *. The condition of this obligation is such that if said contract is made, and if the said contractor shall well and faithfully keep and perform all of the covenants and agreements of said contract, by them to be kept and performed, and shall turn over and deliver to said General Contractor, said improvement according to said contract, and shall save and hold harmless the said general contractor from any and all loss or damage arising out of the failure of said contractor to fulfill said contract, then the above obligation to be void; otherwise to remain in full force and effect."

The trial court rendered judgment in favor of the defendant in these consolidated cases. From this judgment the several plaintiffs have appealed.

[1] A bond which is given for the faithful performance of a contract, to which it refers, binds the surety for labor performed and ma-

terials furnished thereunder as completely as though the surety were a party to the contract. *Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 129 P. 978, 981; *Fuller & Co. v. Alturas School Dist.*, 28 Cal. App. 609, 153 P. 743; *Fickling v. Jackman*, 203 Cal. 657, 662, 265 P. 810; *Ryan v. Shannahan* (Cal. Sup.) 285 P. 1045, 1047. In the case last cited it is said: "It is also elementary that a bond given to guarantee the execution of a contract according to its terms becomes a part of such contract, and to that contract the sureties become parties the same as though they had actually made and executed the contract itself. Therefore, in interpreting the language of the undertaking for the purpose of gathering its scope or the measure of the liability of the sureties, we must do so by treating or viewing the contract and the undertaking as a whole or as constituting an indivisible contract."

[2] A bond which undertakes to guarantee the faithful performance of a subcontract to furnish all necessary labor and materials for a specified portion of a structure implies a promise to pay for such labor and materials so furnished. It is unreasonable to hold the obligation is fulfilled by the mere supplying of the labor and materials. *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 Wash. 630, 45 P. 316; *Mayes v. Lane*, 116 Ky. 566, 76 S. W. 399; *Crowley v. U. S. Fidelity & Guar. Co.*, 29 Wash. 268, 69 P. 784, 786. In the case last cited it is said: "The true meaning and intent of the provision requiring the contractor to furnish materials was certainly that he should pay for them, and not that he should simply supply them, and leave respondent to pay for them. This is the only reasonable deduction from such an agreement."

[3] A common-law undertaking which is furnished to a general contractor for the faithful performance of an agreement with a subcontractor for the supplying of labor and materials for a structure is not a pledge for the sole benefit of the general contractor, but inures to the benefit of any person who performs labor or furnishes materials which are used in the structure pursuant to the provisions of the subcontract. *Sunset Lumber Co. v. Smith*, 91 Cal. App. 746, 267 P. 738; *Fuller & Co. v. Alturas School Dist.*, 28 Cal. App. 609, 153 P. 743.

[4, 5] The obligation of the respondent in the present cases to guarantee payment for labor performed and materials furnished under the subcontract seems fixed and certain. The fact that these claimants may have been entitled to recover compensation from the original general surety, Metropolitan Casualty Insurance Company, does not release the respondent from the clear obligations of its contract. In the event of securing judgments against the original general surety by the claimants in this action, it would then be enti-

tled to be subrogated to all the rights of these plaintiffs for the purpose of reimbursement, which would include the right to resort to respondent's bond to satisfy their claims. Sections 2848, 2849, 2854, Civ. Code; Adamson v. Paonessa, 180 Cal. 157, 179 P. 880.

The judgment is reversed.

All concur.

109 Cal. App. 633

SCHUBERT v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 7586.

District Court of Appeal, Second District,
Division 2, California.

Nov. 18, 1930.

Divorce ⚭262.

Petitioner in contempt for failure to comply with decree could not compel hearing of motion for modification of interlocutory decree of divorce.

Petition for writ of mandamus by Frank W. Schubert against the Superior Court of the State of California, in and for the County of Los Angeles.

Writ denied.

Robert J. Sullivan, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, Acting P. J.

A motion having been presented by the petitioner herein to the superior court for modification of an interlocutory decree of divorce in which he was named as defendant, he was denied permission to examine the plaintiff or to introduce any evidence, upon the ground that he had previously been adjudged in contempt of court for a failure to comply with the terms of said decree. The petitioner applies to this court for a writ of mandamus requiring the hearing and determination of such motion.

The decree provided for certain regular monthly payments of money by petitioner for the maintenance and support of a minor child of the parties, which provision it was found by the court he had violated for a period of about four months. The order in this respect, dated February 25, 1930, recited that "the court finds the defendant guilty of contempt for failure to pay order, having the ability so to do." Upon interposing his motion for modification of the decree, the plaintiff's

counsel objected to the introduction of evidence upon the ground that the defendant was in contempt of court, and that the court was without jurisdiction of the matter, which objection was sustained. The instant proceeding is predicated upon Archer v. Superior Court, 81 Cal. App. 742, 254 P. 939, 940, principally, it is said, because the cases are not dissimilar. But an important distinction is at once apparent from the fact that Archer's motion for modification of an interlocutory decree was filed before an order to show cause why he should not be punished for contempt had been heard. Both proceedings were placed upon the calendar, but were held in abeyance, and, for no other reason than that expressed, the trial court ruled: "Until he (defendant) does show some evidence of good faith, I will not listen to his motions." Thereafter a substantial payment was made, the petitioner was discharged in the contempt proceedings, and the court still refused to entertain his motion. The petitioner herein ignored the provisions of the decree, was ordered to show cause why he should not comply therewith, upon a hearing was adjudged to have willfully violated the same, and was held in contempt of court. Following further derelictions, he has again been cited to show cause, yet he prays the equitable indulgence of the court which he has persistently defied. Reviewing the history of such summary powers of trial courts, a thorough consideration was afforded the rule upon refusal to strike a complaint from the files, in O'Neill v. Thomas Day Co., 152 Cal. 357, 92 P. 856, 859, 14 Ann. Cas. 970. It was there observed that section 1991 of the Code of Civil Procedure provided for drastic action in proper cases, but that it was predicated upon the party being adjudged guilty of contempt. Further, it was said: "To such a judgment for a contempt, committed out of the immediate presence of the court, a citation and showing is necessary. The court, having found the contempt, must punish the plaintiff for it, and in a proper case that punishment may take the form of a rule striking out his complaint. A certain discretion is vested in the court in this regard, but it is not a discretion which would permit the court in one case and under a given state of facts to strike out the complaint, and in another case and under an identical state of facts to refuse to strike it out. If the plaintiff upon being adjudged guilty of contempt should express his willingness to obey further orders of the court, and to answer the questions propounded to him, clearly whatever other punishment might be awarded against him for his contempt that of striking out his complaint would be altogether too severe. But, upon the other hand, if the plaintiff remain obdurate and contumacious, it would not only be the right, but as well the duty, of the court, to refuse to proceed with his litigation further, and to evidence its re-

fusal by ordering the pleading stricken from the files."

Likewise, in *Weeks v. Superior Court*, 187 Cal. 620, 203 P. 93, 94, upon numerous authorities of this and other jurisdictions, including *O'Neill v. Superior Court*, supra, it was said: "No party to an action can, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to its legal orders and processes. * * * 'No rule of law seems more widely prevalent or better established than that a court whose authority has been put to naught will extend no favors or privileges to the party in contempt until he has acknowledged its authority by purging the offense.'"

Petitioner, having failed to bring himself within the foregoing rules, is not entitled to the writ of mandamus herein prayed.

The writ is denied.

We concur: IRA F. THOMPSON, J.; ARCHBALD, Justice pro tem.

110 Cal. App. 144

PEOPLE v. BISHOP.

Cr. 1136.

District Court of Appeal, Third District,
California.

Dec. 1, 1930.

Criminal law ☞ 1130(4).

When no brief was filed for appellant or appearance made when case was called for hearing, judgment and order will be affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Charles Bishop was convicted of an attempt to commit the infamous crime against nature, and from the judgment and an order denying a new trial, he appeals.

Affirmed.

Hugo McKinley, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Stanislaus county of a felony, to wit: Attempt to commit the infamous crime against nature.

The transcript on appeal was filed in this court July 5, 1930. No brief has been filed in behalf of appellant. The cause was regular-

ly placed on the calendar for oral argument on December 1, 1930. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

110 Cal. App. 175

PEOPLE v. YAROSLAWSKY.

SAME v. CRANE et al.

Cr. 2014.

District Court of Appeal, Second District,
Division 2, California.

Dec. 3, 1930.

Criminal law ☞ 1130(5).

Defendants' liberty being at stake, court examined all contentions, notwithstanding violation of rule requiring brief to present points separately (Rule 8 of Rules of Supreme Court and District Courts of Appeal).

Appeals from the Superior Court, Los Angeles County; L. W. Fulkerth, Judge.

Nathan Yaroslowsky, Theodore Rosner, and Morris Itzkowitz were convicted of possessing stills, and they appeal.

Affirmed.

C. B. Conlin, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

The defendants Theodore Rosner and Morris Itzkowitz, together with William F. Crane and Carl Williams, were charged by information with the possession of two stills. The defendant Yaroslowsky, by a separate information, was charged with the possession of a still. The information was dismissed as to the defendant Carl Williams. The remaining defendants were found guilty of the offenses charged. William F. Crane was granted a new trial. The other three prosecute this appeal from the judgment pronounced upon the verdict and also from an order denying their motion for a new trial.

Being a criminal case and the liberty of the appellants being at stake, we have been at pains to examine all of their contentions, but have found them to be without merit. What we have done in this regard has been in spite of a violation of rule VIII of the rules of the Supreme Court and District Courts of Appeal, which requires the brief to "present each point separately, under an appropriate heading,

showing the nature of the question to be presented," and further says that "for the failure of the appellant" in this regard the court may of its own motion "dismiss the appeal." If counsel would only take into consideration the difficulties with which we are confronted in an endeavor to determine from the record and the briefs exactly the occurrences in the trial court, and the precise points upon which they rely, we are sure it would not be necessary to call to their attention a rule adopted for the purpose of preventing a conglomeration of recitals which we are expected to dissect for the purpose of attempting to arrive at their contentions. A dismissal of the appeal would be a proper proceeding in this and all other like violations of the rule. However, as we have indicated, so far as we can discover, there is no merit in the appeal.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

BEATTY v. McGUIRK et al. *
Civ. 7390.

District Court of Appeal, First District,
Division 2, California.
Nov. 19, 1930.

Rehearing Granted Dec. 19, 1930.

1. Negligence $\S$ 56(1).

"Proximate cause" is efficient cause and moving influence.

[Ed. Note.—For other definitions of "Proximate Cause," see Words and Phrases.]

2. Appeal and error $\S$ 209(1).

Trial court's finding, not attacked as not supported by evidence, is binding on appellate court.

3. Automobiles $\S$ 201(2).

Excessive and unlawful speed of both automobiles approaching street intersection held proximate cause of injuries to pedestrian on sidewalk who was struck by one automobile when both swerved to avoid collision.

Accident in question resulting in injuries to plaintiff while on sidewalk before crossing street occurred at intersection of street running north and south with one running east and west. When drivers of respective automobiles discovered that a collision was imminent, the one approaching from the left or from the west swerved

to his left and ran upon sidewalk and there struck pedestrian, resulting in injuries complained of, while the one approaching from the right or from the south swerved to the right, thereby avoiding collision. Testimony showed that there was sufficient space between northerly curb on east and west street and northerly street car rail on that street to allow automobile approaching from the left to pass without going upon sidewalk.

4. Appeal and error $\S$ 656(3).

Where conclusions of trial court from findings in action for personal injuries arising out of automobile accident were erroneous, appellate court could amend conclusions and enter proper judgment (Code Civ. Proc. $\S$ 956a).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by James J. Beatty against Albert McGuirk and others. Judgment against defendant named and in favor of defendants Edward M. Wiegmann and the Lewald Coal Company, and plaintiff appeals.

Judgment modified, and, as modified, affirmed.

Hubbard & Hubbard, of San Francisco, for appellant.

Cooley, Crowley & Gallagher and Cooley & Crowley, all of San Francisco, for respondents.

BURROUGHS, Justice pro tem.

A judgment in the sum of \$2,336, together with costs, was entered in favor of the plaintiff and against the defendant Albert McGuirk. A judgment was entered in favor of the defendants Edward M. Wiegmann and Lewald Coal Company, a corporation, and against the plaintiff, for the costs incurred in this action by the two last-named defendants. From the judgment in favor of the latter defendants, the plaintiff appeals. The cause of action arose out of an automobile accident which occurred at the northeast corner of the intersection of O'Farrell and Larkin streets in the city and county of San Francisco. It is the contention of the appellant that, under the facts found, amplified by an examination of all the evidence, the court erred in the conclusion that the proximate cause of the injuries received by plaintiff was the sole negligence of the defendant McGuirk and in absolving the defendants Wiegman and Lewald Coal Company, a corporation, from all blame as proximately contributing to said injuries.

The court found that O'Farrell and Larkin streets in San Francisco are public thoroughfares and intersect at right angles; that

$\S$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 298 P. 510.

O'Farrell street runs easterly and westerly and Larkin street runs northerly and southerly; that each of said streets from curb to curb at said intersection are 44 feet and 9 inches wide; that a single track street car line runs along O'Farrell street through said intersection; that running through said intersection on Larkin street is a double track street car line; that the distance from the northerly rail of said O'Farrell street track to the northerly curb of O'Farrell street is 19 feet and 8 inches; that at the time of the accident plaintiff was walking southerly on the sidewalk on the easterly side of Larkin street towards the intersection of Larkin and O'Farrell streets; that about the time plaintiff arrived at the northeasterly corner of Larkin and O'Farrell streets, and before he had stepped from the sidewalk, defendant McGuirk drove a Dodge automobile in an easterly direction along O'Farrell street, through the intersection above referred to; that at said time and place McGuirk drove said automobile at an excessive, dangerous, and unlawful rate of speed, to wit, at a speed of approximately 30 miles an hour; that a very short time after Wiegmann drove a certain Ford automobile in a northerly direction along Larkin street and into said intersection at a careless, dangerous, and unlawful rate of speed, to wit, at a speed of approximately 25 miles an hour; that defendant Wiegmann did not see the automobile driven by defendant McGuirk until after both of said automobiles had entered into said intersection and until a passenger in said Wiegmann's car shouted to him; that, for the purpose of avoiding a collision between said automobiles, defendant McGuirk swerved to his left from about the center of said intersection over to the northeasterly corner of said intersection and partly on to the sidewalk; that the left front wheel of said automobile struck plaintiff's right foot, inflicting injuries upon the person of plaintiff; that, when defendant Wiegmann saw the automobile of defendant McGuirk as aforesaid, Wiegmann swerved his automobile in said intersection to the right; this was done for the purpose of avoiding a collision with defendant McGuirk's automobile; that both of said automobiles for a space ran in parallel courses in a northeasterly direction, with their running boards not more than 12 inches apart; in swerving to the right, defendant Wiegmann drove his Ford in such a manner that the left front wheel of his said car crossed and ran to the north of the northernmost rail of the street car track on O'Farrell street; defendant Wiegmann succeeded in turning to his right and going easterly on O'Farrell street without bringing his automobile into collision with that of the defendant McGuirk, or with the plaintiff's body; that there was sufficient space between the left side of said Wiegmann's automobile and the northerly curb line of O'Farrell street for defendant McGuirk to have driven down

O'Farrell street in an easterly direction, but on the wrong side of O'Farrell street, without running upon the sidewalk and injuring plaintiff as aforesaid; that said accident happened very suddenly; that the space between the left side of said Ford and the northerly curb of O'Farrell street was not more than a few feet, that is, 5 or 6 feet, wider than the width of McGuirk's automobile; that each automobile is approximately 5 feet wide. The court further found that Wiegmann was employed by the Lewald Coal Company, a corporation, and at the time of the accident was acting within the scope of his employment; that plaintiff's damage by reason of said accident is the sum of \$2,336; that at the time of the accident Wiegmann intended to proceed directly across O'Farrell street in a northerly direction and defendant McGuirk intended to proceed directly across Larkin street in an easterly direction; that each of the defendants changed the course of his automobile solely for the purpose of avoiding a collision with each other; that the plaintiff exercised reasonable care for his own safety and was not guilty of contributory negligence. From the said findings, the court concluded that the defendant McGuirk was guilty of negligence in driving his automobile at an excessive, unlawful, and dangerous rate of speed and upon the sidewalk and into collision with plaintiff; that defendant Wiegmann was also guilty of negligence in driving his automobile at an excessive, dangerous, and unlawful rate of speed; that defendant McGuirk had the right of way through the intersection of O'Farrell street because of the fact that he entered the intersection before defendant Wiegmann; that, because of the employment of Wiegmann by the Lewald Coal Company and because Wiegmann was in the performance of his duty, his negligence was imputable to the said coal company; that the proximate cause of the injuries to plaintiff was the negligence of defendant Albert McGuirk as set forth in the findings; that the negligence of the other defendants did not contribute as a proximate cause of the plaintiff's injuries, because defendant McGuirk could have driven between the Ford automobile operated by Wiegmann and the northerly curb of O'Farrell street without running upon the sidewalk and without injuring plaintiff. The court then ordered judgment for plaintiff and against McGuirk, and denied relief against the other defendants, and gave the latter judgment for their costs.

[1-3] Appellant claims that under the findings the court should have concluded that all three of the defendants should be held responsible as the proximate cause of plaintiff's injuries; that the mere fact that there was a space between the curb line on O'Farrell street and the car driven by Wiegmann through which McGuirk might have driven his

car without running on the sidewalk does not constitute an intervening cause that would relieve Wiegmann and the Lewald Coal Company from their negligence. In *Hill v. Jacquemart*, 55 Cal. App. 498, 203 P. 1021, 1022, it is held that "the proximate cause of an injury is the efficient cause; * * * the moving influence." In *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134, the proximate cause of an injury is epitomized in the syllabus as follows: "An independent wrongful act, to constitute the proximate cause of an injury, by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission." What was the efficient cause, the moving influence in the series of events which led to plaintiff's injuries? Under the court's findings there can be but one answer to this question—the excessive, dangerous, and unlawful rate of speed at which both McGuirk and Wiegmann were driving their cars and which caused them, for the purpose of avoiding a collision with each other, to swerve their cars, Wiegmann's to the right so that he turned into O'Farrell street, crossed the center line thereof and then brought his car to the right side and stopped; the defendant McGuirk drove his car in a northeasterly direction to the northeast corner of Larkin and O'Farrell streets, where his car went on the sidewalk and injured the plaintiff. We think the foregoing shows without further elaboration that the primary cause of the accident was the negligence of both McGuirk and Wiegmann. Having fixed the conduct of both Wiegmann and McGuirk as the original primary cause of the injury, was there any independent wrongful act that displaced the original primary act as the proximate cause of the injury? It is claimed by the respondent that the finding of the court that "there was sufficient space between the left side of said Ford automobile and the northerly line of O'Farrell street for McGuirk to drive on down O'Farrell street in an easterly direction and on the wrong side of O'Farrell street without running upon the sidewalk and injuring plaintiff as aforesaid" establishes that Wiegmann was not responsible for the injury to plaintiff and must be so accepted by this court. The trial court having made the finding, and it not being attacked as not supported by the evidence, it is binding as a fact, but as to whether it is a new and independent act that relieves Wiegmann and the Lewald Coal Company from its original responsibility to plaintiff must be determined by this court.

After examining the authorities, we are satisfied that, notwithstanding the finding of the court that the defendant McGuirk could have driven between the Ford car and the northerly

curb of O'Farrell street without running on the sidewalk and without injuring plaintiff, Wiegmann, and hence his employer, the Lewald Coal Company, are responsible with McGuirk to the plaintiff for the latter's injury, and that there was no intervening cause that relieved either of responsibility. We believe the following decisions are in point and sustain the above view.

In *Keiper v. Pacific Gas & Electric Co.*, 36 Cal. App. 362, 172 P. 180, 182, defendant Elkus left his car unattended, parked across the street railway track. While in that position it was struck by a street car and catapulted in a diagonal direction from 50 to 75 feet, striking and injuring plaintiff, who was on the sidewalk. The street car was traveling at a good rate of speed, but under such circumstances that the servant of the street car company should have seen the automobile. Judgment was for plaintiff against defendant Elkus, who is the appellant; the claim being made that neither the complaint nor the proofs disclosed that the appellant's negligence was the proximate cause of the accident and injury complained of. Defendant Elkus admitted negligence, but claimed that the negligent act of the operator of the street car was an active intervening cause of the accident and that negligence on his part ceased the instant that the street car negligently struck his automobile.

The court said: "If it was negligence to leave and allow the automobile to remain standing on the street car tracks in the first instance, upon what logical hypothesis may it be said that that negligence did not continue until the accident and injury which the collision of the car with the automobile produced? * * * It is, of course, obviously true, as counsel declare, that but for the negligence of the defendant electric company the accident and its disastrous result would not have happened. But it is equally obvious that the damage suffered by the plaintiff would not have been produced but for the negligence of the appellant. Thus it is clear that the case as presented is essentially and peculiarly one where the injury complained of was produced by the concurrence of two separate, distinct and independent acts of negligence on the part of two separate and different persons. In other words, it is a case where the injury could not and would not have been produced by the act only of one of the two tort-feasors. * * * Hence it cannot logically be said that the negligence of the appellant was not 'an active, continuous, contributing cause, and therefore at least a necessary element of the proximate cause of the injury.' *Spear v. United Railroads*, 16 Cal. App. 659, 117 P. 956. In such a case both parties through whose direct joint agency the injury has been sustained are joint tort-feasors and may be sued either jointly or separately."

In *Springer v. Pacific Fruit Exchange*, 92 Cal. App. 732, 268 P. 951, 954, defendant John Franzioa who had previously parked his Peerless automobile off the paved portion of the highway and headed west, was attempting to enter the paved road from the north side and continue westerly. A Buick car driven west by Ritchie, employee of Pacific Fruit Exchange, was approaching from the east on the north half of the 18-foot pavement. At the time the Peerless and Buick came together, both machines were moving, the Peerless slowly, the Buick very fast. The Peerless' left front wheel and fender came in contact with the right front wheel and fender of the Buick. The Buick, after colliding with the Peerless, went in a southwesterly direction across the highway 30 or 40 feet, and collided with a stage parked entirely off the pavement, then veered back to the middle of the pavement and at a distance of 30 or 40 feet further on veered south and hit a Franklin car traveling easterly on the south half of the pavement. The Franklin was overturned, and plaintiff riding in the Franklin was injured. Plaintiff dismissed the action against the Pacific Fruit Exchange, owners of the Buick car, and proceeded against Franzioa, owner of the Peerless, and a jury returned a unanimous verdict in favor of Franzioa. Plaintiff was granted a new trial. The appeal was from that order. The appellate court affirmed the order granting a new trial on the ground that "there is substantial evidence in the record to support a finding that plaintiff was injured by the concurrent negligence of both appellant and Ritchie." The court says: "In order that the independent negligence of Ritchie might constitute the sole proximate cause of the injury to plaintiff, and displace the original negligence of appellant, it must appear from the evidence that Ritchie's negligence was so disconnected in time and nature as to make it plain that the damage occasioned was in no way the natural or probable consequence of the original negligence of appellant. Therefore, how far the Buick car might go after it collided with the Peerless before the driver would be chargeable as an independent actor would also be a question of fact."

In commenting on the facts the court says: "If Ritchie had been traveling at a lawful rate of speed and had his car under control, he could have avoided the collision with the appellant. On the other hand, if appellant, when he approached the paved portion of the highway, had looked in the direction from which the traffic was coming, he would have seen the approaching Buick and could have waited until it passed him, and thus have avoided the collision."

"The court or jury would therefore be warranted in saying that appellant and Ritchie were both negligent and that their concurrent negligence caused the collision between

their two cars. This being true, the appellant would be a participant in whatever injury might reasonably follow from his negligent acts. The Peerless deflected the Buick from its course, and as the Buick veered from one side of the road to the other it finally came in contact with the Franklin and caused the injury to plaintiff. * * * If plaintiff was injured by the concurrent negligence of both appellant and Ritchie then each is and both are the proximate cause of her injuries, and she may recover from either or both at her election."

In *Hansen v. Bedell Co.*, 126 Or. 155, 268 P. 1020, where an automobile approaching an intersection was so negligently driven as to cause another automobile approaching from his right to swerve and thereby injure a pedestrian who was on the sidewalk, it was held that the first driver was not relieved of liability because the second driver may not have used due care and caution to avoid striking the pedestrian. Other authorities to the same effect are 19 Cal. Jur. 573; *Hansen v. Market St. R. R. Co.*, 64 Cal. App. 426, 221 P. 955; *Spear v. United R. R.*, supra; *Merrill v. Los Angeles Gas & Elec. Co.*, supra; *King v. San Diego Electric Ry. Co.*, 176 Cal. 266, 168 P. 131; *Lotesto v. Baker & Henikoff*, 246 Ill. App. 425; *Schilling v. Hayes*, 55 Cal. App. 1, 202 P. 680; *Hill v. Jacquemart*, supra.

Under the head of proximate cause, the defendants have cited a large number of authorities as supporting their position that the question of proximate cause in the instant case rested solely with the trial court. They cite *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157; *Stohlman v. Martin*, 28 Cal. App. 654, 152 P. 319; *Metzler v. Los Angeles R. R. Corp.*, 99 Cal. App. 656, 279 P. 190; *Off v. Crump*, 40 Cal. App. 173, 180 P. 360; *Newman v. E. E. Overholtzer Sons' Co.*, 182 Cal. 778, 190 P. 175; *Milwaukee & St. Paul R. R. Co. v. Kellogg*, 94 U. S. 469, 25 L. Ed. 256, also many other cases to the same effect.

We are of the opinion that the cited cases do not apply to the instant case. Here the trial court has found facts as above stated that place the original primary cause of the accident on all three defendants; this being true, was there any independent intervening cause that relieved the defendants or either of them from responsibility? In the reply brief of respondents it is admitted that there was no "intervening cause." They also admit that the doctrine of "last clear chance" has no application. We are satisfied that the proximate cause of the injury received by the plaintiff was the concurrent negligence of all three defendants, and the court was in error in releasing the defendants Wiegmann and the Lewald Coal Company from liability.

[4] It is well settled in cases of this class that this court may amend the conclusions of

law and enter a proper judgment. 2 Cal. Jur., § 587, p. 990; section 956a, Code Civ. Proc. It is therefore ordered that the court's conclusion of law No. 6 be amended to read as follows: "The proximate cause of the injuries complained of by the plaintiff was the concurrent negligence of the defendants, Albert McGuirk, Edward M. Wiegmann, and Lewald Coal Company, a corporation, as in these findings and conclusions set forth. Plaintiff is entitled to judgment against said Albert McGuirk, Edward M. Wiegmann, and Lewald Coal Company, a corporation, in the sum of \$2,336 and for plaintiff's costs."

The conclusion of law No. 7 is hereby amended to read as follows: "Let judgment be entered in accordance with these findings and conclusions."

The judgment herein is amended to read as follows:

"Judgment.

"The court having made and filed herein its findings of fact and conclusions of law, judgment is hereby rendered in favor of plaintiff, James J. Beatty, and against the defendants, Albert McGuirk, Edward M. Wiegmann, and Lewald Coal Company, a corporation, for the sum of \$2,336 and for plaintiff's costs herein in the sum of \$———."

As thus modified, the judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

109 Cal. App. 724

**LOS ANGELES COUNTY v. INDUSTRIAL
ACCIDENT COMMISSION et al.**

Civ. 7492.

District Court of Appeal, Second District,
Division 2, California.

Nov. 20, 1930.

Rehearing Denied Dec. 19, 1930. Hearing Denied by Supreme Court Jan. 19, 1931.

1. Master and servant ☞417(4).

Contention award cannot stand in absence of finding whether employer had refused or neglected to furnish proper medical treatment could not be raised for first time before reviewing court, point not having been made in petition for rehearing before commission (St. 1917, p. 873).

2. Master and servant ☞417(7).

Award of Industrial Accident Commission, sustained by evidence, was conclusive on certiorari.

Proceeding under the Workmen's Compensation Act by Bessie Halpern, employee, against the County of Los Angeles, employer.

To review an award of the Industrial Accident Commission for compensation and medical expenses, employer petitions for writ of review.

Award affirmed.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

IRA F. THOMPSON, Judge.

This is a petition for a writ of review by which it is sought to annul an award made by the Industrial Accident Commission to applicant Bessie Halpern. The facts of her injury and subsequent treatment are as follows:

On May 29, 1929, while applicant was employed as a nurse at the Los Angeles County Hospital, she fell on a cement floor while reaching upward to a shelf, resulting in injury to her low back and hip. She left her work on June 3 and became a patient at the Los Angeles County Hospital, where she remained until July 15. While in the hospital one of the medical staff was in attendance upon her, but during the last ten days while she was there she called in, with the permission of the regular attending physician, Dr. Arnov, the latter being a member of the visiting medical staff at the hospital. Dr. Arnov then took complete charge of her case, the other physician permitting him to order such medicines and treatment as he prescribed. Two days after applicant left the hospital she developed lockjaw and called Dr. Arnov to her home to attend her. He advised her to go to a sanitarium and suggested in this connection Loma Linda Sanitarium. She left in a few days for this sanitarium and remained there until the 16th of August. She paid her hospital bill at the Loma Linda Sanitarium and also paid Dr. Arnov a part of his fee, and it is reimbursement for these amounts and for compensation awarded her which forms the basis of petitioner's complaint.

Pursuant to her application to the Industrial Accident Commission, a hearing was had on February 6, 1930, in which she was adjudged to be entitled to her reasonable medical expenses which were to be fixed subsequently upon request and the filing of itemized bills; she was further awarded the sum of \$20.83 a week commencing June 10 and to and including November 28, 1929. Thereafter defendants petitioned for a rehearing before the Industrial Accident Commission, which was granted, and which resulted in an affirmation of the award.

The petitioner here now contends, in effect, that the respondent commission failed to find upon the question of whether the applicant

left the county hospital of her own accord or was discharged therefrom, and further that any finding to the effect that she did not leave voluntarily would be unsupported by the testimony. Hence it is said the commission was without jurisdiction to render its award.

[1] As to petitioner's first contention that the award cannot stand in the absence of a finding on the question of whether "the employer had refused or neglected to furnish proper medical treatment," the record discloses the fact that no point was made in its petition for rehearing before the commission of the failure to find upon this question, as is required by section 64 of the act (St. 1917, p. 873). Therefore the question may not be raised for the first time before this court. The following authorities comment upon this section as follows:

Great Western Power Co. of California v. Industrial Acc. Commission, 196 Cal. 593, 238 P. 662, 665: "Complaint is made by petitioner that no allowance was made by the commission in fixing the amount of the contribution to the dependents, for hospital dues, and certain small personal expenditures by the employee at the petitioner's commissary, which were deducted from the employee's wages in issuing his pay checks. The findings are silent on the subject, but the claim of the petitioner cannot be considered in this proceeding on the writ of review, for the reason that *it was not made to the commission in the petition for rehearing* filed by petitioner in the proceeding below. Workmen's Compensation Act, § 64(c)." (*Italics ours.*)

In Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 54, 151 P. 658, one of the grounds for petition for writ of review was that "in making the award the commission failed to credit the employer with the sum of \$25 paid by him to the employee." The court there said: "It is sufficient to say that no such point was made in the application for rehearing filed by the petitioner with the Accident Commission; the result being that this objection must be held to have been finally waived. * * * The Workmen's Compensation Act requires that an application for rehearing before the commission 'shall set forth specifically and in full detail the grounds upon which the applicant considers said final order, decision, award,' etc., unjust or unlawful."

Petitioner's remaining point may be disposed of by a determination of whether there was any evidence in the record to support the findings. The evidence in some respects is in conflict and notably on the question of whether applicant left the county hospital of her own accord, or whether that hospital discharged her, but we find ample evidence

to support the view that she did not leave "independently of any request or order from the officials of the hospital." The evidence is susceptible of the construction that she was discharged therefrom as cured

[2] Inasmuch as the evidence in the record supports both the findings and award, we are concluded from disturbing the award. Walker v. Industrial Accident Commission, 177 Cal. 738, 171 P. 954, L. R. A. 1918F, 212; Southern Pacific Co. v. Industrial Accident Commission, 177 Cal. 380, 170 P. 822, 823; Southern Calif. Edison Co. v. Industrial Acc. Comm., 78 Cal. App. 586, 248 P. 938.

Award affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

109 Cal. App. 715

BEETSON v. HOLLYWOOD ATHLETIC CLUB.

Civ. 5949.

District Court of Appeal, Second District,
Division 1, California.

Nov. 20, 1930.

1. Bailment ⇨14(1).

Plaintiff's delivery of automobile to club attendant for parking, there being charge for such service, constituted bailment for hire, imposing on club duty to exercise reasonable care to preserve car against loss or damage (Civ. Code, §§ 1851, 1852).

2. Bailment ⇨31(3).

Evidence held sufficient to establish liability against club for damages to automobile left for parking.

3. Bailment ⇨32.

One recovering bailed property unlawfully taken from bailee receives it in mitigation of damages, measure of damage being expense of procuring return with interest (Civ. Code, § 3336).

4. Bailment ⇨31(1).

Plaintiff suing for damage to automobile taken from parking place had burden to prove certain expenditures necessarily made and reasonableness thereof.

The expenditures in question were \$8 for telegrams; \$50 to sheriff of place where car was finally located; \$326 to railroad for freight in transporting car back; and \$45 for services of investigator.

5. Pleading $\hookrightarrow$ 126.

Answer in form of negative pregnant held not to raise damage issue, admitting damage alleged.

The complaint alleged damages in the sum of \$254.19, and the defendant by denying that plaintiff's automobile was damaged in the sum of \$254.19 admitted damage in any less sum, or \$254.18. As the law disregards trifles, this was not sufficient to raise an issue.

6. Bailment $\hookrightarrow$ 32.

Plaintiff was entitled to recover rental value of car during time he was deprived of its use after it was taken from defendant's parking place.

7. Bailment $\hookrightarrow$ 32.

Expenditure for taxicabs held not to constitute item of damages for deprivation of use of automobile taken from defendant's parking place.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Fred W. Beetson against the Hollywood Athletic Club. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

G. R. Dexter, J. B. Irsfeld, and Howard B. Henshey, all of Los Angeles, for appellant.

Mitchell, Silberberg & Davis and H. C. Mabry, all of Los Angeles, for respondent.

HOLLZER, Justice pro tem.

Defendant prosecutes this appeal from a judgment awarding plaintiff damages, claimed to have been sustained in connection with the disappearance of and damage to plaintiff's automobile while left with the defendant.

The evidence showed that on the night of March 1, 1925, the plaintiff, a member of the defendant club, drove his automobile into a parking place provided for that purpose and operated by the defendant, and delivered the car to an employee of the defendant, who was the attendant in charge. The keys for the car were left therein. At the time of delivering his car the plaintiff signed a slip required for that purpose by the defendant, and the same was retained by the attendant. For this parking service, defendant charged the plaintiff fifteen cents.

On returning about an hour later for his car, plaintiff learned that the same had disappeared and that the parking place had been left without any attendant.

The evidence further disclosed that it was the custom of the attendant, on leaving the parking place, to remove the keys from all

of the automobiles and deposit the same in the defendant's office, where they would be obtained by the respective owners as they called for their cars. On the occasion in question, however, the keys which plaintiff had left in his car were not delivered by the attendant to the defendant's office.

Several years previously the defendant's board of directors had adopted a resolution reading: "That in accepting the parking of automobiles of members and guests, the club is not to be held responsible in case of loss through fire, theft or injury to the car or its contents, *the club using due caution in the protection of automobiles left in its care.*" (Italics ours.)

The attendant who had been in charge of defendant's parking place at the time plaintiff's car was delivered there was not called as a witness. Likewise, the defendant offered no evidence tending to explain how the plaintiff's car was removed from its custody.

Some weeks after its disappearance, plaintiff, through the service of an investigator, learned that his car had been removed to Texas, and he thereupon had the same shipped back to him.

The lower court found that plaintiff's car had been stolen through defendant's negligence while the same was in its care; that the car had been damaged after it had been stolen and before it was returned to plaintiff in the sum of \$254.19; that the latter had expended \$440.36 in conducting his search for the automobile and on account of freight charges for the return of the same; and also that the plaintiff had sustained further damage in the sum of \$350 through the loss of the use of said automobile. Accordingly, plaintiff was awarded judgment in the total sum of \$1,044.55.

The grounds upon which the defendant seeks a reversal may be summarized under two points: The first is the contention that the evidence is insufficient to establish liability against defendant. Secondly, it is claimed that the court erred in computing the damages allowable to plaintiff.

[1] Upon the question of liability, while it may be said that no case arising out of facts substantially similar to those presented in the action at bar has been decided in California, we have no doubt that, under the law of this state, the delivery by plaintiff of his automobile to the defendant's attendant under the circumstances heretofore stated constituted a bailment of the same for hire, and thereby imposed upon the defendant the duty to exercise reasonable care to preserve the same against loss or damage. Civ. Code, §§ 1851 and 1852; 4 Cal. Jur., Bailments, § 2, p. 3, and § 13, p. 21, and cases there cited.

In a case arising out of facts strikingly

similar to those presented here, the appellate division of the New York Supreme Court reached a similar conclusion.

The case referred to was that of *Galowitz v. Magner*, 208 App. Div. 6, 203 N. Y. S. 421, 422. There it appeared that the plaintiff drove his automobile into a parking station operated by the defendant, delivered the same to one of the defendant's attendants, paid 50 cents therefor and received a ticket from the attendant. Upon the reverse side of the ticket there was printed in fine print the following: "The person accepting this ticket assumes all risk of accident, and expressly agrees that the managements shall not be liable, under any circumstances for any injury to person, loss, or damage." When plaintiff returned several hours later for his car he discovered that the same was gone. The proof further showed that the parking space was enclosed with an eight-foot wooden fence, had one entrance and one exit, and that on the day in question there were three attendants looking after the cars.

In the course of his opinion, Mr. Justice Young, speaking for the court, said: "I think, however, it was a bailment for hire. It was, in my opinion, of the same nature as checking parcels, and the disclaimer of liability could only become effective, if brought to plaintiff's knowledge (citing cases).

"Neither the face of the ticket nor the disclaimer of liability printed on the back throws any light on the subject. Its presence on the ticket or stub is quite as consistent with a contract of bailment as with one for mere rental of parking space. It seems to me obvious that plaintiff had the right to believe, from the fact that defendant maintained an inclosed space for parking cars, with an entrance and exit and attendants, that he was paying the parking fee in consideration of care and watchfulness to prevent injury or loss. Otherwise he might almost as well have parked upon the public street and saved the fee. * * *

"The proof in this case is very meager, but is in my opinion sufficient to present a question of fact for the jury. Where a space is inclosed by an 8-foot board fence, for parking cars, with an entrance and an exit, a checking system, and three attendants to look after and take care of the cars as they came in and went out, the jury might infer that the theft of plaintiff's car could not have occurred had defendant and his employees properly performed their duty. Indeed, it seems to me that such inference is well-nigh irresistible, because some one must have taken out plaintiff's car without presenting a check or ticket therefor, and to permit this was clearly negligent."

While the judgment rendered in the case cited was set aside, it should be noted that the reversal was ordered upon the ground

that the complaint failed to allege that plaintiff's car was lost through the defendant's negligence, and because the trial court instructed the jury that the burden rested upon the defendant to show that the theft did not occur through want of due care on his part.

Again in the case of *Dalton v. Hamilton Hotel Operating Co.*, 242 N. Y. 481, 152 N. E. 268, 270, the court of appeals held that an agreement for gratuitous storage of a prospective tenant's baggage until she could be given possession of an apartment leased constituted a bailment, and that the failure of the hotel to return the trunks upon demand established a prima facie case of gross negligence on the part of the hotel operator. The court further held that proof that the trunks had been deposited in a room under constant watch of competent employees was not sufficient alone to rebut the presumption of gross negligence arising from the failure to deliver the trunks. In upholding plaintiff's right to recover, the court of appeals said in part:

"But if we assume that the trunks were placed in the proper depository under the watchfulness provided by the defendant, we do not think that this fact answers the presumption arising in favor of plaintiff on failure to deliver her trunks or satisfactorily explains their disappearance. Presumptively under this system the trunks should have been in defendant's possession and ready for delivery when called for, and it is the failure of what was to be expected that defendant is called on to explain. * * * So far as concerns the exemption clause on the checks, independent of any other answer, we do not think it is to be assumed that it was the intention of the parties that it should relieve the defendant from its own gross negligence."

The cases cited by appellant support the rule that a bailee is required to exercise reasonable care to protect the property deposited with him against loss or damage.

In *Perera v. Panama-Pacific Int. Exp. Co.*, 179 Cal. 63, 175 P. 454, 456, and *Webber v. Bank of Tracy*, 66 Cal. App. 29, 225 P. 41, cited by appellant, the bailee was absolved from liability because the evidence in those cases furnished no sufficient basis for any inference of negligence on the part of the bailee.

In the *Perera* Case, however, the Supreme Court declared: "It is true, of course, that evidence of facts and circumstances from which want of ordinary care may reasonably be inferred is sufficient to support a conclusion of negligence, in which event the question of negligence is one for the jury."

[2] On the other hand, applying the decision rendered in *Galowitz v. Magner*, supra, it might well be inferred from the facts in the action at bar that the disappearance of

plaintiff's car could not have occurred had the defendant's employees properly performed their duty. Indeed, the inference of negligence is well-nigh irresistible from the fact that, upon the occasion in question, the defendant's attendant left its parking place without taking the slightest precaution to protect plaintiff's car against theft. Likewise, it might well be added that had this attendant even taken the precaution of removing the keys from plaintiff's car and depositing the same in defendant's office in accordance with the practice which defendant admits its employees customarily followed when leaving the parking place unattended, it is highly improbable that plaintiff's car would have been taken.

[3] When we come to consider the amount of damages awarded, a more serious question is presented. In their opening brief appellant's counsel say: "Had the theft been due to the negligence of defendant, the loss would have amounted in such case to conversion, and the damages in such case would have been fixed by section 3336 of our Civil Code, reading as follows:

"The detriment caused by the wrongful conversion of personal property is presumed to be:

"1. The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest at the option of the injured party; and

"2. A fair compensation for the time and money properly expended in pursuit of the property."

Where, however, one recovers his property which had been unlawfully taken from him, he is considered as having received it in mitigation of damages, and the measure of damage, in the absence of special damage, is the expense of procuring its return with interest. *Blewett v. Miller*, 131 Cal. 149, 151, 63 P. 157. Citing 1 *Sutherland on Damages*, 239; 3 *Sutherland on Damages*, 527; 1 *Sedgwick on Damages*, § 58.

"So where goods are lost by the negligence of the bailee, and the bailor, by the aid of detectives, legal proceedings, and the expenditure of money, recovers some of the property, and repairs such of it as is damaged, he may be allowed to prove, against the objection of the bailee, what expenses were thus incurred. In such a case the bailor was not bound to seek for his property. When the bailee failed, on demand, to deliver it, he became liable for the whole. What was done, therefore, to recover the property, so far as it was successful, was for the bailee's benefit, and he was entitled to credit for the property thus recovered, less the expense of recovering it." 3 *Ruling Case Law, Bailments*,

§ 80, citing *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131.

In the present case, the plaintiff was not only put to the expense of procuring the return of his car, but also was obliged to have the same repaired, and in addition was deprived of its use for sixty-five days.

[4] The only evidence as to the amount expended to procure the return of the car was that furnished by the testimony of one Gilmore, who was employed by plaintiff to investigate what had become of the car and to secure its return. This witness testified that he advanced on behalf of plaintiff the sum of \$8 for telegrams; \$50 to the sheriff at San Angelo, Texas, the place where the car was finally located, and also the sum of \$326 to the Santa Fe Railway as freight for transporting the car back to Los Angeles, and in addition paid himself \$45 for the services he had rendered conducting the investigation to locate the car.

On the other hand, there is nothing in the record to disclose why the sum of \$50 was paid to the sheriff at San Angelo, or the necessity for expending \$8 for telegrams, nor was it shown that the sum of \$45 was a reasonable charge for the services performed by the witness.

Assuming that the last three mentioned items were recoverable as damages, nevertheless the burden rested upon the plaintiff to prove that such expenditures were necessarily made, and that the same were reasonable. In the absence of such proof, we must conclude that there was no basis for allowing the same in the present case.

[5] Upon the issue respecting the damage to plaintiff's automobile, the complaint alleged "that said automobile was damaged while out of the possession of the plaintiff, after such bailment and before found by the plaintiff, in the sum of Two Hundred Fifty-four and 19/100 Dollars (\$254.19)." In its answer the defendant denied "that said automobile was damaged while out of the possession of the plaintiff, after such bailment or before found by plaintiff, in the sum of Two Hundred Fifty-four and 19/100 Dollars (\$254.19). * * *

By thus answering in the form of a negative pregnant, defendant admitted that the damage to said automobile was any sum less than \$254.19, to wit: \$254.18. As the law disregards trifles, this was not sufficient to raise an issue. *Janeway et al. v. Long Beach Co.*, 190 Cal. 150, 153, 211 P. 6.

[6, 7] With respect to the damage sustained by plaintiff because of being deprived of the use of said automobile, the trial court found that "plaintiff lost the use of said automobile for the period of two (2) months, to his damage in the sum of three hundred fifty dollars (\$350.00)."

Plaintiff was entitled to recover the rental value of his car during the period he was deprived of its use. *Taylor v. Bernheim*, 58 Cal. App. 404, 410, 209 P. 55, 58; *Nahhas v. Brown*, 181 Cal. 55, 183 P. 442, 6 A. L. R. 476; *Blodgett v. Rheinschild*, 56 Cal. App. 728, 739, 206 P. 674.

The only evidence bearing upon this subject is to be found in the testimony of the plaintiff. According to his testimony, the car which he had delivered to the defendant was "a regular stock Buick sedan automobile, model 1924, which cost approximately \$2,300." For a period of about a week immediately following the disappearance of his car, plaintiff hired taxicabs at a total expense of \$50, and for a period of two months he hired a Peerless sedan, for which he paid \$150 per month.

As observed in the case of *Taylor v. Bernheim*, supra, "From the description given in the testimony of the car in question, the court may well have inferred that the rental value of such a car would not be less than the one rented."

However, as already noted, the rental value of the car which plaintiff rented in the present suit for the period during which he was deprived of the use of his own car amounted to \$300, whereas the trial court here allowed the plaintiff \$350. While the latter sum may have included an item of \$50 expended for taxicabs, we know of no authority warranting such an allowance as part of the damages which may be recovered in an action of this character.

For the foregoing reasons, the judgment is modified by deducting from the same the sum of \$153, and, as thus modified, the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

109 Cal. App. 736

HUNTER v. RYAN.

Civ. 7415.

District Court of Appeal, First District,
Division 2, California.

Nov. 21, 1930.

Rehearing Denied Dec. 20, 1930. Hearing Denied by Supreme Court Jan. 19, 1931.

1. Contracts ⇨9(1), 39.

Contract which is not complete and certain is unenforceable.

2. Master and servant ⇨72.

Employer's promise to pay bonus in part to induce acceptance of employment was promise to pay additional compensation.

The promise made in letter from employer to prospective employee was to the effect that employer had a job and would pay \$50 a week and a bonus to try it out.

3. Work and labor ⇨11.

Recovery, where promise to pay additional compensation does not fix amount of wage, is to be based on quantum meruit (Civ. Code, § 1611).

4. Work and labor ⇨11.

Assignee of employee promised bonus without specifying amount was entitled to sue for reasonable value of services rendered under promise.

5. Master and servant ⇨80(7).

Letters by employer to employee or members of family were admissible to establish that bonus promised was as inducement to enter employment.

6. Work and labor ⇨27(3).

Evidence tending to prove reasonable value of services rendered was admissible in action to recover bonus.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by M. L. Hunter against Mary Ryan. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

William M. Stafford, of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

NOURSE, P. J.

The plaintiff sued for the reasonable value of a "bonus" promised to be paid to his assignor in a letter which read, in part: "I have a job for you. I will give you \$50 a week and a bonus to try it out." The cause was tried before a jury, which returned a verdict for the plaintiff in the sum of \$5,000. On a motion for a new trial the trial court reduced the verdict to \$2,000, and, from the judgment for that amount, the defendant has appealed upon a bill of exceptions.

Defendant was engaged in a very successful business in the city of New York. Plaintiff's assignor was employed in a clerical capacity in an insurance company in San Francisco. They became very warm friends and defendant made the written offer to employ plaintiff's assignor in her New York office with the end in view that she might become a valuable member of her organization. The offer was accepted, and the employment continued for approximately one year, when a dispute arose

and plaintiff's assignor terminated the employment. During all this time she was paid regularly \$50 a week for her services, but nothing was said by either regarding the bonus until some time after the employment ceased. On this appeal the only question involved is whether plaintiff's assignor is entitled to recover a bonus under the contract.

[1] The first contention of the appellant is that there was no enforceable contract to pay a "bonus," because the writing is uncertain and incomplete. Upon this issue the principle of law may be taken to be settled that a contract is unenforceable which is not complete and certain. 6 Cal. Jur., p. 215; 13 Cor. Jur., pp. 266, 267. If, therefore, the words "and a bonus to try it out" are so uncertain and incomplete that the court or jury could not determine what the parties meant, it follows that the contract was unenforceable under this rule. To escape this situation the respondent argues that he is not suing to enforce payment of a bonus as such, but is suing on a contract to pay a nominal salary of \$50 a week, "together with a further reasonable compensation for her said services to be fixed at convenient intervals."

[2, 3] If respondent can sustain his theory of the case, it will dispose of all the assaults upon the judgment covering the merits of the controversy, because, if he was entitled to sue in quantum meruit under the circumstances, he was entitled to judgment on proof of the services and of their reasonable value. Respondent's theory finds support in the authorities. The promise to pay the bonus was not a promise to make a gift, but was made in part to induce the promisee to accept the employment and so was a promise to pay additional compensation. *Fuller v. Brown* (C. C. A.) 15 F.(2d) 672, 676, and cases cited; *Payne v. U. S.*, 50 App. D. C. 219, 269 F. 871, 873; *Warren v. Mosher*, 31 Ariz. 33, 250 P. 354, 49 A. L. R. 1311; *Johnson v. Fuller & Johnson Mfg. Co.*, 183 Wis. 68, 197 N. W. 241, 245, and cases there cited. Hence, where the promise to pay additional compensation does not fix the amount of the wage, recovery is to be based on quantum meruit. *Nave v. Taugher*, 49 Cal. App. 308, 193 P. 508; *Toomy v. Dunphy*, 86 Cal. 639, 25 P. 130. And we find this principle recognized in our statutes (section 1611, Civ. Code), which declares that when the amount of the consideration is not fixed in the contract it is to be determined on the basis of quantum meruit.

[4] From the foregoing we conclude that the respondent was entitled to sue for the reasonable value of the services rendered under the promise to pay a bonus in addition to the stipulated weekly wage.

The verdict of the jury was based upon evidence which was widely conflicting upon the two elements—the amount of work performed and the reasonable value of the services. If the jury believed the story of respondent's as-

signor, it must have found that she performed many duties outside of those for which she was paid \$50 weekly. The value of such services was a matter of opinion, and, though the estimate placed thereon by respondent's assignor and approved by the jury seems wholly unreasonable, we cannot say that the sum of \$2,000 to which the verdict was reduced by the able trial judge is not a fair or just amount.

[5] The appellant assigns error in the admission of evidence. She objected to the reading in evidence of a great number of letters written by her to respondent's assignor, or to members of her family. These letters, of course, contained much extraneous matter which could well have been omitted if objection had been made to those portions. But the letters were admissible to show that the promise to pay a bonus was an inducement to enter appellant's employment for which a reasonable compensation was intended to be paid above the weekly wage and to show that the bonus was not intended as a gift or gratuity.

[6] The other assignments relate to the admission of evidence tending to prove the reasonable value of the services rendered. Under respondent's theory of the case, that he was entitled to recover reasonable value, this evidence was admissible, and, having approved that theory, we find no error in the admission of this evidence.

Appellant bases her criticism on the modification of instruction No. 5 on the claim that the testimony of respondent's assignor showed that she had been fully paid for all services performed by her. The testimony of this witness is not subject to the interpretation placed on it by appellant. It was conceded that the witness had been paid \$50 weekly by appellant, but her testimony that this sum was in payment of the services which she rendered to appellant could not be taken to mean that it was in full compensation for all services rendered. For the same reasons the trial court did not err in refusing to give appellant's proposed instructions numbered 7, 8 and 9.

Proposed instructions numbered 10, 11, 12, 13, and 14 were all tied into appellant's theory that, unless the offer to pay a bonus was definite and clear as to the amount and manner of payment, there could be no recovery. The unsoundness of this theory under the circumstances here presented we have already pointed out, and hence we conclude that the proposed instructions were properly refused.

Instructions numbered 2, 3, and 4, given at the request of the respondent, were designed to present to the jury respondent's theory that, under the special circumstances of this case, the bonus was not intended as a gift or gratuity, but was intended as a promise to pay additional compensation for the services over and above the payment of \$50 weekly, and that re-

spondent was entitled to recover the reasonable value of such services if the jury found such value to be in excess of the weekly sum. As we have heretofore said, respondent's theory is amply supported by the authorities; hence we find no error in these instructions.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

109 Cal. App. 740

PELLOW v. BOLLINGER.
Civ. 7386.

District Court of Appeal, First District,
Division 2, California.
Nov. 21, 1930.

Rehearing Denied Dec. 20, 1930. Hearing Denied by Supreme Court Jan. 19, 1931.

1. Corporations ⇨120.

Agreement to repurchase stock transferred as part consideration *held* not mere option but extension of credit, exercisable within reasonable time after expiration of credit.

As part of consideration for exchange of land, plaintiff gave defendant 25 shares of certain stock, and delivered an instrument reciting: "Two years after date, I, the undersigned, do hereby agree to purchase from" plaintiff "25 shares of common stock * * * at the price of \$50.00 per share."

2. Appeal and error ⇨694(1).

Trial court's finding respecting effect of evidence cannot be held erroneous on appeal, where evidence is not before appellate court.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by J. W. Pellow against George W. Bollinger. Judgment for plaintiff, and defendant appeals.

Affirmed.

Calkins, Hagar, Hall & Linforth, of Oakland, for appellant.

Glickman & Glickman, of Oakland, for respondent.

STURTEVANT, J.

The trial court gave the plaintiff judgment for moneys alleged to be due on a written instrument. From that judgment the defendant has appealed and has brought up the judgment roll. On the 15th day of October, 1924, the plaintiff deeded to the defendant lands

near Stockton in exchange for lands at Columbus, Ohio, and as a part of the consideration for the exchange defendant gave to plaintiff twenty-five shares of stock in Lampron Bakery Company, a corporation, and at the same time the defendant executed and delivered a writing in words and figures as follows, to-wit:

"Oakland, Cal., Oct. 15, 1924.

"Two years after date, I, the undersigned, do hereby agree to purchase from J. W. Pellow 25 shares of common stock of the Lampron Bakery Co. of Springfield, Mass., at the price of \$50.00 per share.

"George W. Bollinger,
"1245 Niagara St., Buffalo, N. Y.
"c/o R. H. Connor Co."

[1, 2] On April 17, 1928, the plaintiff commenced this action. During the trial in the lower court the defendant contended, and in his briefs in this court the defendant contends, that the instrument sued on was an option, and that the plaintiff waived his rights by not demanding performance on the date of the expiration, that is, two years after October 15, 1924. 25 Cal. Jur. 526. The plaintiff concedes that the contention of the defendant is sound if the instrument is merely an option, but in that behalf he contends that it is an extension of credit and not an option. In support of his position he cites and relies on *Maurer v. King*, 127 Cal. 114, 59 P. 290, 291. In his reply brief the defendant claims that the *Maurer* Case is not in point because the contract there involved was in the nature of a guaranty. Conceding that the contract there involved, among other things, was a contract of guaranty, that fact was not the determining fact on which the decision was rested. That contract had three separable features which we have numbered. As so numbered the contract read: "(1) I guarantee that it will be worth fifty cents or more per share inside of two years from this date, in cash, (2) and if he holds said stock at the end of two years from this date, and so requests, I will take it from him, and pay him for it at fifty cents per share, (3) and I will pay all assessments on said stock that may be levied on it up to April 1, 1895, gratis—as witness my hand the day and date above written." Both contracts grew out of exchanges of property. In each case the corporate stock was transferred in lieu of cash. At page 117 of 127 Cal., 59 P. 290, 291, the court said: "*Maurer* had paid the consideration for the contract, but *Smith* had not fully performed. The stipulated two years was not a period within which *Maurer* was bound to do anything. It was an extension of credit to *Smith*. Within that time *Smith* could not be compelled to pay the \$500 in lieu of the stock. No doubt, *Maurer* was bound to exercise his option within a reasonable time after the expiration of the credit,

and he certainly did do so." In the instant case the trial court made a finding that the plaintiff made his demand within a reasonable time. The evidence is not before us, as the transcript contains merely the judgment roll. Under these circumstances we are unable to say that the trial court committed any error.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

110 Cal. App. 42

MANCINI v. PATRIZI.

Civ. 7401.

District Court of Appeal, First District,
Division 2, California.

Nov. 24, 1930.

Rehearing Denied Dec. 24, 1930. Hearing Denied by Supreme Court Jan. 22, 1931.

1. Corporations ⇨149.

Corporation issuing stock certificate reciting its transferability by indorsement *held* estopped to assert, against bona fide purchaser, restriction on transfer right of which he had no notice.

The stock certificate recited, "Transferable on the books of the company by indorsement hereon and surrender of this certificate," and there was nothing printed on the certificate in any way calculated to advise purchaser that corporation had attempted to place any restriction on right of transfer. However, a by-law of the corporation provided that no share of stock was transferable without holder first presenting same to office of corporation and offering same for sale to corporation.

2. Corporations ⇨57.

Corporation's by-laws are of no binding force on third persons without knowledge thereof.

3. Corporations ⇨149.

By issuing stock certificate in regular form, corporation is estopped, against bona fide purchaser without notice, to assert certificate has been gratuitously and fraudulently issued.

4. Corporations ⇨149.

By issuing stock certificate reciting its transferability by indorsement, corporation clothed holder with apparent authority to transfer title by indorsement.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Gaetano Mancini against Ettore Patrizi. Judgment for plaintiff, and defendant appeals.

Affirmed.

Anthony S. Devoto and Devoto & Richardson, all of San Francisco, for appellant.

J. J. Dunne, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This case grows out of a dispute that has already been much litigated and the basic facts have been twice previously before the appellate courts. *Mancini v. Setaro*, 69 Cal. App. 748, 232 P. 495; *Mancini v. Patrizi*, 87 Cal. App. 435, 262 P. 375. As in the two former cases, plaintiff and respondent has obtained judgment for the statutory penalty of \$400 for the refusal of defendant and appellant to transfer on the books of L'Italia Press Company, a corporation of which appellant is the president, eight shares of its capital stock represented by certificate No. 19. How respondent acquired this certificate is set out in the two opinions above cited and need not be repeated here, further than to say that he purchased it for value and without notice of the by-law relied upon by appellant to justify his refusal to recognize him as a stockholder. That by-law was adopted on October 14, 1909, and reads as follows: "No share of stock in this corporation is transferable without the holder thereof first presenting the same to the office of the corporation and offering the same for sale to said corporation."

In *Mancini v. Setaro*, 69 Cal. App. 748, 232 P. 495, the Supreme Court expressly reserved the question of the validity of this by-law in denying a petition for hearing after judgment in the District Court of Appeal. In *Mancini v. Patrizi*, 87 Cal. App. 435, 262 P. 375, the by-law was held void as authorizing a paying to the stockholder of part of the capital stock contrary to Civil Code, § 309.

In this case appellant has sought to avoid the effect of this latter decision by proving: (1) That there is in the treasury of the corporation \$16,000 of undistributed profits a portion of which could be used to purchase this stock without impairing the capital of the corporation; and (2) that respondent is a competitor of and bitterly hostile to L'Italia Press Company. This latter fact is claimed to bring the case within the exception laid down in *Stewart v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 P. 620. In our view of the case we may concede without deciding that under these facts the by-law in question might be effectively invoked against a purchaser with notice of its existence.

[1] In the case before us, however, respondent was a purchaser for value without notice or knowledge of the existence of this by-law.

The certificate contained the usual recital, "Transferable on the books of the company by endorsement hereon and surrender of this certificate," and there was nothing printed on the certificate in any way calculated to advise a purchaser that the corporation had attempted to place any restriction on this right of transfer. Having issued its certificate in this form, we must hold on well-settled principles that the corporation is now estopped to assert against a bona fide purchaser for value a restriction on the right of transfer of which he had no notice at the time of purchasing the stock.

[2-4] It is settled in this state that by-laws are of no binding force upon third persons having no knowledge of them. *Newton v. Johnston Organ Co.*, 180 Cal. 185, 191, 180 P. 7; *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359. And by the issuance of a certificate in regular form a corporation is estopped against a bona fide purchaser without notice of the facts even to assert that the certificate has been gratuitously and fraudulently issued. *Green v. Caribou Oil Co.*, 179 Cal. 787, 178 P. 950; *Smith v. Martin*, 135 Cal. 247, 67 P. 779. The application of these principles is determinative of this case. By issuing the certificate in the form in which it did the corporation clothed the holder with the apparent authority to transfer title to the shares of stock which it represented by indorsement in such manner as to entitle the transferee to have the stock transferred to him upon the books of the corporation without restriction. Respondent having purchased the stock in reliance upon that appearance of authority, the corporation must be held estopped to assert against him the restrictive by-law of which he had no notice or knowledge at the time of purchase.

We have carefully examined the cases from other jurisdictions cited by appellant in which similar by-laws have been enforced against purchasers of stock certificates and find nothing in them opposed to the conclusion here announced. In *Barrett v. King*, 181 Mass. 476, 63 N. E. 934, 935; *In re Laun*, 146 Wis. 252, 131 N. W. 366, and *Nicholson v. Franklin Brewing Co.*, 82 Ohio St. 94, 91 N. E. 991, 137 Am. St. Rep. 764, 19 Ann. Cas. 699, there were recitals on the certificate sufficient to put the purchaser on notice and the purchaser had actual knowledge of the restriction in *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 149 N. W. 754, 150 N. W. 1101; *Cook Ry. Signal Co. v. Buck*, 59 Colo. 368, 149 P. 95; *Baumohl v. Goldstein*, 95 N. J. Eq. 597, 124 A. 118, and *Sterling Loan & Investment Co. v. Littel*, 75 Colo. 34, 223 P. 753. No case has in fact been cited by appellant where the question of estoppel was raised or discussed in connection with such an attempted restriction upon the transfer of stock.

If we are correct in our conclusion, the judgment in this case should put a definite end to this protracted litigation.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

LINDENBAUM v. BARBOUR.*

Civ. 237.

District Court of Appeal, Fourth District,
California.

Oct. 31, 1930.

Rehearing Denied Nov. 19, 1930.

Hearing Granted by Supreme Court Dec. 29,
1930.

1. Highways ⇨166.

County board of supervisors may designate public highways as boulevards, and, under certain conditions, require vehicles to stop before entering or crossing (St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17).

2. Highways ⇨166.

County's designation of highways as boulevards and requirement that all vehicles stop before entering or crossing same can only become effective through action of board of supervisors (St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17).

3. Highways ⇨166.

Determination of facts warranting county regulation requiring vehicles to stop before entering or crossing certain highways held nondelegable legislative function (St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17).

Determination by board of supervisors pursuant to St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17, on which highways, conditions, and volume of traffic are sufficient to require cross traffic to stop before entering thereon, and establishing regulation requiring vehicles to stop before entering designated boulevards, involves exercise of judgment and discretion by members of board. The statute grants authority to boards of supervisors to prescribe local regulations of traffic, within certain limitations.

4. Highways ⇨166.

Placing of stop signs along designated boulevard without action in matter by county board of supervisors held ineffective to require traffic to stop before entering boulevard (St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17).

5. Automobiles ⇨9.

Ordinance giving motor vehicles on designated boulevard right of way and establishing traffic rule *held* in conflict with provision of Vehicle Act, and therefore invalid (St. 1923, pp. 560, 563, §§ 131, 145, as amended by St. 1925, pp. 412, 414, §§ 15, 17).

St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15, provides that, when two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed, and that the driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on the highway. The Vehicle Act gave no authority to local authorities to change or modify the provisions of the act governing rights of way at intersections.

6. Automobiles ⇨147.

Violation of provisions of void traffic ordinance cannot constitute negligence.

7. Automobiles ⇨246(14).

In action for injuries sustained in automobile collision, instruction, in effect telling jury defendant was negligent if he violated void ordinance, *held* prejudicial error.

Ordinance of board of supervisors defining right of way at intersection between designated boulevard and cross streets, and requiring vehicles approaching such boulevard to come to stop and yield right of way, enacted pursuant to St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17, was invalid because in conflict with St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15, defining right of way at intersection on public highway.

On Petition for Rehearing.

8. Appeal and error ⇨277.

Instruction given, although no objection to such instruction was made, was deemed to have been excepted to (Code Civ. Proc. § 647).

9. Appeal and error ⇨277.

Error of law during trial, which was excepted to even though exception has been reserved by operation of law, is sufficient grounds for reversal of judgment, if error is prejudicial.

10. Appeal and error ⇨768.

Appellate court is not bound to confine itself to consideration of questions presented in brief, but may make independent investigation of record, if it so desires.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Sarah Lindenbaum against L. P. Barbour. Judgment for plaintiff, and defendant appeals.

Reversed.

Culver & Nourse, of Los Angeles, and Swing & Wilson, of San Bernardino, for appellant.

Duckworth & Harrison, of San Bernardino, for respondent.

MARKS, Acting P. J.

This is an action for personal injuries following an automobile collision. It was tried before a jury, which returned a verdict in favor of respondent in the sum of \$2,500.

Foothill boulevard is a public highway running in a general easterly and westerly direction in the county of San Bernardino, state of California. Linden avenue intersects Foothill boulevard at right angles.

On the 19th day of June, 1927, respondent was riding in an automobile with her two sons traveling in an easterly direction on Foothill boulevard. Her older son, Julius, of the age of about twenty-one years, was driving the car. A younger son, Sydney, was riding on the front seat beside his brother. Respondent, at the time of the accident, was lying on the rear seat of the car. William Lindenbaum, the husband and father, who was the owner of the automobile, was working in San Bernardino. The 19th day of June, 1927, was his birthday, and on this day respondent and her two sons were proceeding to San Bernardino to visit and have dinner with him.

At and near the point of the accident, Foothill boulevard had a width of 54½ feet between curbs which were set out 14 feet from the property lines, giving the street a total width of 82½ feet. A strip in the center, 18 feet wide, was paved. The roadways between the pavement and the curbs were improved with oil and gravel. Linden avenue was 60 feet wide between the property lines. North of Foothill boulevard it was improved with an oil strip about 12 feet in width. South of Foothill boulevard it had a narrower oiled strip which was in poor condition. A boulevard stop sign was maintained on the northwest corner of the intersection just inside of the curb return on Foothill boulevard. A similar stop sign was maintained near the southeast corner of the intersection on Linden avenue at about the southerly line of Foothill boulevard.

As respondent was lying down on the rear seat of the automobile, she knew nothing of the circumstances preceding the collision. Sydney Lindenbaum, called as one of her witnesses, had not been paying particular at-

tention to the operation of the car in which he was riding, and his testimony is of little value to either party. Julius Lindenbaum testified for respondent, and was her main witness to the facts of, and the circumstances preceding the accident. He testified that he was driving easterly on Foothill boulevard approaching its intersection with Linden avenue at a speed of about 25 to 30 miles per hour; that, when he was about 60 feet westerly from the west line of the intersection, he saw appellant's automobile proceeding south on Linden avenue toward the intersection. Lindenbaum reduced the speed of the car he was driving to about 15 miles per hour at the time it entered the intersection. At that time he placed the automobile of appellant in the intersection with its front wheels upon or just approaching the north edge of the paved portion of Foothill boulevard. This placed respondent's car just entering the intersection and appellant's car with its front wheels about 32 feet southerly from the northerly intersection line. He further testified that appellant's car was about 10 feet from him at this time, and that it had not stopped opposite or near the boulevard stop sign. Lindenbaum applied his brakes and swerved his car to the right, its left front fender coming into collision with the right side of appellant's car just to the rear of the door. The force of the impact drove appellant's car to its left, and it came to rest on the east side of Linden avenue, east of the oiled portion thereof. The car in which respondent was riding was turned completely around by the impact, and it came to rest in the southerly portion of the street intersection, facing west. Its left front and rear fenders and its left running board were either torn off or badly crumpled. He fixed the speed of appellant's car, in approaching and crossing the intersection, at approximately 15 miles per hour.

Appellant specifies numerous errors in the rulings of the trial court on objections to the introduction of evidence, and complains of a number of instructions given to the jury. The principal ground upon which he seeks a reversal of the judgment is that the evidence does not show negligence on his part in the events leading up to the accident. He urges that under the California Vehicle Act he had the right of way at the intersection, as he entered it first and was traveling at a lawful rate of speed, and that the driver of the automobile in which respondent was riding was negligent in not yielding the right of way and in running into his car. To meet this contention, respondent relies solely upon the provisions of an ordinance of the county of San Bernardino providing for boulevard stops on Foothill boulevard and attempting to regulate motor traffic thereon and providing rights of way at intersections on this boulevard. The pertinent parts of this ordinance are as follows:

"Ordinance No. 261. Adopted November 9, 1925; effective December 9, 1925. An Ordinance of the County of San Bernardino regulating motor traffic upon certain highways in the County of San Bernardino and fixing a penalty for the violation thereof.

"Section 1. That * * * all motor vehicles driven upon Foothill Boulevard shall have the right of way over vehicles driven on Riverside Avenue, Etiwanda Avenue, Turner Avenue, Archibald Avenue and Hellman Avenue. * * *

"Section 2. And that all motor vehicles being driven on said * * * Foothill Boulevard, * * * shall have the right of way at all intersections of all other roads not herein mentioned when a stop sign is maintained at the side of the Roadway near such intersection.

"Section 3. That any and all persons driving and operating motor vehicles and approaching said * * * Foothill Boulevard, * * * at the intersection hereinabove mentioned in Section 1 hereof, and at other intersections upon which a Stop Sign is maintained shall come to a full stop at a point outside the boundary line of said Highways and within 30 feet thereof, and shall not again move until the intersection being approached is clear of traffic and there is sufficient space clear of motor vehicle traffic on either side of said intersection to permit such persons so approaching said intersections to cross same without in any way interfering with the traffic upon said highways so approached as aforesaid."

Section 145 of the California Vehicle Act (St. 1923, p. 563, § 145, as amended by St. 1925, p. 414, § 17) in effect at the time of the collision provided in part as follows:

"*Powers of Boards of Supervisors and Legislative Bodies of Cities.* Nothing in this act contained shall be so construed as to prevent boards of supervisors in their respective counties and the legislative bodies of incorporated cities from * * * designating certain public highways as boulevards and requiring that all vehicles shall be stopped before entering or crossing such boulevards, provided all such boulevards are clearly marked or signposted to give notice of such fact. * * *"

[1-3] In the foregoing section, in so far as it relates to boulevard stop signs, boards of supervisors are given the power, first, to designate certain public highways as boulevards; and, second, to require that all vehicles stop before entering or crossing the same, provided boulevard signs are maintained clearly indicating such stop. Thus it would seem that the powers of boards of supervisors are limited to the designation of the boulevards and the requiring of stops. It should be noted that these powers, in so far as they affect county highways, are given to boards of su-

pervisors and to no other body, organization, or person. It follows that the powers must, then, be exercised by boards of supervisors in order to become effective. First, the board can determine, from among the various highways of the county, the ones upon which the conditions and volume of traffic are sufficient to require the cross traffic to stop before entering thereon. Second, it can then establish the regulation requiring vehicles to stop before entering upon these boulevards. The exercise of these powers is a legislative function. *Wulzen v. Board of Supervisors*, 101 Cal. 15, 35 P. 353, 40 Am. St. Rep. 17; 5 Cal. Jur. 676; *Smith v. Strother*, 68 Cal. 194, 8 P. 852. It is a grant of authority by the Legislature of the state to the boards of supervisors to prescribe local regulations of traffic, within the limitations contained in the California Vehicle Act. Under such grant of power a board of supervisors cannot exceed the authority directly given to it. 5 Cal. Jur. 680, and cases there cited. The board of supervisors cannot delegate this legislative power to another. It involves the exercise of judgment and discretion on the part of its members, the responsibility for which they cannot escape by shifting it to another. *Egan v. City and County of San Francisco*, 165 Cal. 576, 133 P. 294, Ann. Cas. 1915A, 754; *Knight v. City of Eureka*, 123 Cal. 192, 55 P. 768.

[4] This ordinance of the county of San Bernardino provides that all vehicles approaching Foothill boulevard shall stop at its intersections with Riverside avenue, Etiwanda avenue, Turner avenue, Archibald avenue, and Hellman avenue, and "at all intersections of all other roads not herein mentioned when a stop sign is maintained at the side of the roadway near such intersections." As Linden avenue is not named in the ordinance as a street upon which traffic must stop before entering Foothill boulevard, it must be one of the intersections of "all other roads" therein mentioned, if included within the provisions of the ordinance. As the right to determine the roads upon which traffic must stop is a legislative function, it must be exercised by the board of supervisors, and cannot be delegated by it to another. We have searched the record carefully, and cannot find any intimation of any action taken by the board of supervisors of San Bernardino county regarding stops or stop signs along Foothill boulevard other than that contained in this ordinance. Seemingly the board has never required traffic on Linden avenue to stop before entering Foothill boulevard. In fact, one witness testified that the stop signs were placed at this intersection by a volunteer with no official connection with any of the legally constituted authorities of the county of San Bernardino. There is no other evidence in the record bearing upon the authority by which the stop signs at this intersection were established or maintained. It is

self-evident that a mere volunteer, not even remotely connected with a county government, may not usurp the legislative functions of a board of supervisors and create lawful boulevard stops by the promiscuous scattering of stop signs along a boulevard. The stop signs at the intersection in question had no lawful significance.

[5] It will also be observed that the ordinance in question went further than designating Foothill boulevard as a boulevard and requiring vehicular traffic to stop at certain intersections. It attempted to provide that motor vehicles on Foothill boulevard should have the right of way over vehicles on certain intersecting streets, and attempted to establish a rule governing the rights of way of motor vehicles at these intersections contrary to the rules established by the Legislature in the California Vehicle Act. Section 131 of this act in force at the time of the accident provided as follows:

"Right of Way. (a) When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed. (b) The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on said public highway." St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15.

It has been held that the provisions of this section give the right of way at an intersection to the vehicle entering it first, if traveling at a lawful rate of speed. *Lipp v. Moon*, 100 Cal. App. 618, 280 P. 710; *Wynne v. Wright*, (Cal. App.) 286 P. 1057. It is immediately apparent that the provisions of the ordinance of San Bernardino county attempting to establish rights of way at certain intersections on Foothill boulevard are in direct conflict with the provisions of section 131 of the California Vehicle Act in force at the time of the accident. The state law gave no authority to local authorities to change or modify the provisions of the California Vehicle Act governing rights of way at intersections such as the one we are considering. A board of supervisors has no power to change a law by ordinance under the circumstances presented by this case. *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172. We must therefore hold that the provisions of the ordinance are void in so far as they endeavor to change the state law regulating rights of way at intersections on Foothill boulevard. It follows as a matter of course that the effort of respondent to sustain the judgment because of the purported violation of the county ordinance by appellant must fail.

[6, 7] We are presented with an unusual situation in view of the condition of the record before us. We do not feel justified in

holding that Julius Lindenbaum was guilty of negligence, or of contributory negligence as a matter of law under the authorities cited in *White v. Davis* (Cal. App.) 284 P. 1086. There is just enough in his testimony to raise an issue of fact, on the questions of his negligence, or of his contributory negligence, and the negligence of appellant, if any, to require the case to be submitted to the jury. The jury returned a verdict in favor of respondent.

Thus far in this opinion we have set forth only the facts most favorable to the case of respondent which appear from the testimony of her son Julius. His testimony was thoroughly contradicted by all of the other witnesses in the case. Appellant and his wife testified that their car was stopped opposite the boulevard stop sign on the northwest corner of the intersection, where it remained stationary for one or two minutes to allow the traffic on Foothill boulevard to pass and the intersection to become clear. When this traffic had passed, appellant put his car in second gear and proceeded to cross the intersection. Before doing so, he and his wife looked in both directions on Foothill boulevard for approaching traffic, and the only vehicle in sight, according to their testimony, was the one in which respondent was riding. It was approaching the intersection from the west at a distance of 300 feet or more. Appellant proceeded across the intersection, and did not again look for, nor see, respondent's car until the time of the collision. His automobile was south of the paved portion of the street at the time of the impact.

A disinterested witness testified that he saw appellant stop opposite the boulevard stop sign and remain stationary for a brief period. His attention was next attracted by the screeching of brakes, and he saw the collision which occurred in the southerly portion of the intersection south of the pavement on Foothill boulevard. He examined the tracks made by the Lindenbaum car. At a point about 60 feet west from the intersection, there were black marks on the pavement made by the sliding of the left tires of the Lindenbaum car, the right wheels being off the pavement and on the graveled portion of the road. The tire marks showed that the Lindenbaum car bore to its right for a distance of about 60 feet before reaching the intersection and turned sharply to its right after reaching it. Another disinterested witness testified that he followed the black marks made by the left tires of the Lindenbaum car between 30 and 35 feet westerly from the intersection. In view of this very convincing evidence strongly indicating negligence, or at least contributory negligence, on the part of young Lindenbaum, we can find but one reasonable explanation for the verdict rendered in this case.

Ordinance No. 261 of the county of San Bernardino was admitted in evidence without any objection on the part of appellant. The trial court gave the following instruction to the jury:

"The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person."

With the ordinance in evidence, this instruction told the jury in effect that appellant was guilty of negligence if he violated any of its provisions. As we have seen, some of the provisions of this ordinance were contrary to law and void. The violation of such provisions could not constitute negligence. Therefore the giving of this instruction, with the ordinance in evidence and before the jury, constituted prejudicial error, and the judgment cannot be sustained.

Judgment reversed.

We concur: BARNARD, J.; WARMER, Justice pro tem.

On Petition for Rehearing.

PER CURIAM.

Respondent has filed her petition for rehearing in which she requests this court to reconsider the case upon two principal grounds. First, she urges that, as no objection was made to the introduction of ordinance number 261 of the county of San Bernardino, which is the boulevard stop ordinance, no error can be predicated on this ordinance. In support of this contention she cites 2 California Jurisprudence, pp. 234-263. Next she urges that, since the case was tried upon the theory of the validity of the ordinance, its validity cannot be questioned upon appeal, citing *Sommer v. Martin*, 55 Cal. App. 603, 204 P. 33.

[8, 9] The judgment in this case was not reversed because of the introduction of this ordinance in evidence, but because of an instruction to the jury which this court considered prejudicially erroneous with the ordinance in evidence and before the jury. "Giving an instruction, although no objection to such instruction was made, * * * are deemed to have been excepted to." Section 647, Code Civ. Proc. An error of law committed during a trial and excepted to, even though the exception has been reserved to a party and made by operation of law, has always been held grounds for the reversal of a judgment, if the error be prejudicial. In view of the evidence before us, we still consider this error of law prejudicial.

[10] Petitioner further complains that this court went beyond the points raised by appellant in stating its reasons for a reversal of the judgment. It is well-settled law in this state that, while an appellate court in deciding a case is not required to go beyond the errors pointed out in the briefs, it is not bound to confine itself to a consideration of the questions presented, but may make an independent investigation of the record should it so desire. 2 Cal. Jur. pp. 729, 730, and authorities cited. Permanent Supplement to Cal. Jur. 1928, pp. 133, 134. In our opinion, we went beyond the points raised in the briefs filed and made an independent investigation of phases of the case not argued by counsel because we regarded them of sufficient importance to justify our doing so.

The petition for rehearing is denied.

109 Cal. App. 707

**BAYSIDE FISH FLOUR CO. v. ZELLER-
BACH et al.**
Civ. 7616.

District Court of Appeal, First District,
Division 2, California.
Nov. 20, 1930.

1. Statutes ☞263.

Law speaks from time it goes into effect.

2. Statutes ☞263.

Statute has no force until taking effect, and acts done thereunder before such time are void.

3. Mandamus ☞154(7).

Mandamus petition to compel issuance of fish permit, alleging operation of plant under order of fish commission for revocable permit made before effective date of act authorizing permit, did not show application for permit under statute authorizing same and was insufficient (St. 1925, p. 595; St. 1929, p. 901).

St. 1925, p. 595, authorized Fish and Game Commission to issue permits to take sardines for the purpose of manufacturing same into product for human consumption; and St. 1929, p. 901, in effect August 14, 1929, authorized commission to grant revocable permits to use fish. Petitioner for mandamus to require fish and game commission to issue revocable permit to petitioner alleged that petitioner had been operating manufacturing plant continuously since 1924 by virtue of permit issued August 22, 1925, and alleged application for revocable permit July 8, 1929, which

was granted August 5, 1929, that on August 15 commission advised petitioner authorizing him to proceed until permit was actually issued, and that thereafter petitioner operated plant and was entitled to have commission issue a revocable permit, which commission refused.

Mandamus by the Bayside Fish Flour Company against I. Zellerbach and others.

Writ denied.

Roy Daily, of San Francisco, for petitioner.

Eugene D. Bennett, of San Francisco, for respondents.

STURTEVANT, J.

This is an application for a writ of mandate directing the defendant board to issue to the petitioner a revocable permit to take and use ten thousand tons of sardines to manufacture an edible fish flour. The petitioner alleges that it is a corporation having its principal place of business in San Francisco; that it owns and operates a " * * * manufacturing plant located in the city and county of Monterey, State of California * * *"; that it has been operating continuously since the year 1924 under and by virtue of a permit issued by respondents on the 22d day of August, 1925; and pleads in *hæc verba* said permit; that on the 8th day of July, 1929, the petitioner applied for a revocable permit, and pleads in *hæc verba* said application; that a hearing on said application was had on the 29th day of July, 1929; that on the 5th day of August, 1929, the defendant board entered in its minutes an order directing the issuance of a revocable permit for the season of 1928-1929; that on the 15th day of August, 1929, the defendant board caused a letter to be sent to the petitioner advising the petitioner of its action and authorizing petitioner to proceed until the permit was actually issued; that thereafter from August 15, 1929, to February 14, 1930, the petitioner operated its manufacturing plant; that petitioner's plant has a capacity to handle ten thousand tons of sardines during each season, that is, from August 1st of one year until February 15th of the following year. And then in paragraph VI it is alleged: "That petitioner is entitled under the law to have the Fish and Game Commission of the Department and Natural Resources of the State of California issue to petitioner a revocable permit, but which said commission refused to do although demand therefor has been made upon it and after this petitioner has complied with all conditions precedent requisite to have said revocable permit issued." It thus appears that the petitioner alleges an application for a permit in 1924 and an application for a permit in 1929. Although it is not clear that such was the intention of

the pleader, we will assume that in paragraph VI it attempted to allege another application. As to the last application we have quoted everything contained in the petition that purports to plead a compliance with the provisions of the statute.

[1, 2] Before proceeding further, it should be noted that by chapter 551 of the Statutes of 1919, p. 1203, the basic act to conserve fish was enacted. It took effect July 25, 1919. By its terms only offal might be used in a reduction plant without first obtaining a written permit from the defendant board. That statute was amended by chapter 340 of the Statutes of 1921 p. 458, which took effect July 29, 1921. By its terms it authorized the use of fish in a reduction plant when the fish were to be reduced into a product for human consumption. The statute, in that behalf, authorized the issuance of an order by the defendant board, said order to be granted for a period not longer than a seasonal run. Chapter 340 of the Statutes of 1925, p. 595, in effect July 23, 1925, by its terms authorizes the defendant board to issue permits to take sardines for the purpose of manufacturing the same into a product for human consumption. Chapter 525 of the Statutes of 1929, p. 901, in effect August 14, 1929, with certain exceptions, prohibited the taking of fish or the using of fish in a reduction plant. One exception is addressed to plants engaged in " * * * canning, drying, salting, smoking, or pickling." The other exception is worded as follows: " * * * Provided, further, that the fish and game commission may grant a revocable permit or permits in such amount and subject to such restrictions, rules or regulations as the fish and game commission may adopt or prescribe to take and use fish by a reduction or extraction process for the manufacture of edible products fit for, intended to be used and in fact used for human consumption providing it shall be shown and appear to the satisfaction of the fish and game commission that such use of such fish will not tend to deplete the species, or result in waste or deterioration of such fish; and provided, further, that no such permit shall be granted unless at least fifty per cent (50 %) of the wet weight of the whole ground fish or all of the oil extracted from such fish is manufactured into such products within the State of California." It becomes necessary to notice when each particular law took effect. A law speaks from the time it goes into effect. Until the time arrives when it is to take effect a statute has no force whatever for any purpose, and all acts purporting to have been done under it prior to that time are void. 23 Cal. Jur. 623; *Harrison v. Colgan*, 148 Cal. 69, 76, 82 P. 674. The permit granted August 22, 1925, rests on the provisions of chapter 340 of the Statutes of 1925. But all of the statutes except the act

of 1929 are silent as to revocable permits. The application made on July 8, 1929, and the minute entry made by the defendant board on August 5, 1929, must find support, if any, in the act of 1925, because chapter 525 of the Statutes of 1929 did not take effect until August 14, 1929. But, as just stated, the act of 1925 contained no passage regarding revocable permits. The statutory conditions in the act of 1925 are not the same as the conditions imposed by the act of 1929.

[3] The question then arises as to whether the petitioner has alleged facts showing that subsequent to August 14, 1929, it made an application under chapter 525 of the Statutes of 1929. It is sufficient to state that the pleader does not attempt to do anything in this behalf except to plead certain legal conclusions.

The defendants interposed a general demurrer and an answer. From what has been said above it is clear that the application can be disposed of by ruling on the demurrer and that it is unnecessary to take up the issues made by the answer.

The demurrer is sustained, and the application is denied.

We concur: NOURSE, P. J.; SPENCE, J.

110 Cal. App. 141

PEOPLE v. FONTES.

Cr. 1596.

District Court of Appeal, First District,
Division 1, California.

Dec. 1, 1930.

Rehearing Denied Dec. 15, 1930.

1. Witnesses $\S$ 277(2).

Accused becoming witness in own behalf waives protection of Code prohibiting reading of prior conviction or comment thereon, and may be cross-examined as to prior conviction (Const. art. 1, § 13; Pen. Code, § 1025).

Const. art. 1, § 13, provides that no person may be witness against himself, and Pen. Code, § 1025, declares that fact of prior conviction must not be alluded to at trial.

2. Criminal law $\S$ 722(2).

Reference by district attorney to defendant's companions as "gang" held not erroneous in prosecution for robbery and burglary.

Appeal from Superior Court, Alameda County; Stanley Murray, Judge.

John Fontes was convicted of robbery and burglary, and he appeals.

Affirmed.

Frederick Dubovsky, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Mar-ron, Deputy Atty. Gen., for the People.

TYLER, P. J.

Defendant and appellant was charged by information filed by the district attorney of Alameda county with the crimes of robbery and burglary and also a prior conviction. Defendant admitted the prior conviction, and entered a plea of not guilty to the charges contained in the first two counts. He was found guilty of robbery and burglary in the first degree.

It appeared in evidence that on January 22, 1930, defendant, in company with another, entered a store in the city of Oakland and asked to be shown certain goods. After the proprietor had complied with their request, defendant and his companion demanded money from him. Failing to receive it, they proceeded to beat him about the head and knocked his teeth out. They then took from his person an English one-pound note and other property. A pistol was used in the commission of the crime. Defendant and his confederate then drove away in an automobile.

It is here urged as ground for a reversal of the judgment that the trial court erred in forcing the defendant to admit his prior conviction; it being contended that such act was in violation of the provisions of section 13, art. 1, of the Constitution, which provides that no person may be a witness against himself. It is further urged that it is also a violation of the provisions of section 1025 of the Penal Code, which declares that the fact of a prior conviction must not be alluded to at the trial.

[1] The point is not one of first impression in this state. It has been held that, when a defendant presents himself as a witness in his own behalf, he becomes subject to all the ordinary rules of evidence, and, his truth, honesty, and integrity being in issue, he may be asked, as here, on cross-examination if he has ever been convicted of a felony. The provisions of section 1025 of the Penal Code to the effect that, where a defendant has suffered a previous conviction, and has pleaded guilty thereof, it shall not be read to the jury, nor commented on at the trial, are not intended to prevent the asking of such general question upon cross-examination of the defendant as a witness on his own behalf. By becoming such witness, he waives the protection of that section of the Code. *People v. Oliver*, 7 Cal. App. 601, 95 P. 172; *People*

v. Hickman, 113 Cal. 80, 45 P. 175; *People v. Bishop*, 134 Cal. 689, 66 P. 976.

[2] Appellant next complains of the action of the trial court in curtailing the cross-examination of the prosecuting witness. There is no merit in the objection. Full opportunity was afforded defendant to disprove the testimony of this witness. And, finally, appellant complains of the action of the district attorney in referring to defendant's companions as a "gang." We see no merit in this objection.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

110 Cal. App. 28

MERCER et al. v. DUNSCOMB et al.
Civ. 6999.

District Court of Appeal, First District,
Division 1, California.

Nov. 24, 1930.

Rehearing Denied Dec. 24, 1930. Hearing Denied by Supreme Court Jan. 19, 1931.

1. Corporations ⇨326.

Constitutional liability of corporate directors for moneys misappropriated *held* applicable only to misappropriation of corporate funds and not to funds intrusted to corporation for investment (Const. art. 12, § 3).

Third party deposited with corporation a certain amount of money for purpose of purchasing bonds. Substantially all of money was misappropriated to use and benefit of corporation by its directors. Const. art. 12, § 3, provides that directors of corporations shall be jointly and severally liable to creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation during the term of office of such directors.

2. Corporations ⇨361.

In action against corporate directors to recover funds misappropriated by officers, evidence showing general business practice to receive funds for investment and issue interim certificates therefor *held* admissible.

Such evidence was admissible to charge all directors as matter of law with knowledge of matter in which deposits were being kept and disposed of by officers of corporation, and therefore legally sufficient, in absence of explanatory evidence showing individual efforts on directors' part to safeguard and prevent loss, to establish

against them prima facie liability for misappropriation of deposits to use and benefit of corporation by officers.

3. Corporations ⇨344.

Directors' release by trustee in bankruptcy, for stated consideration, of liability to bankrupt corporation, *held* not release of liability to third party for funds misappropriated by officers.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Edith A. W. Mercer and another against Charles E. Dunscomb and others. From part of judgment favorable to defendant named and defendant Otis Marston, as executor of the estate of William H. Marston, deceased, plaintiffs appeal.

Reversed.

Thornton Wilson, of Oakland, and Pillsbury, Madison & Sutro, of San Francisco, for appellants.

Redmond C. Staats, of Berkeley, and James M. Koford, of Oakland (J. J. Earle, of Oakland, of counsel), for respondents.

PER CURIAM.

Plaintiffs sued the defendants above named for \$13,000, and obtained a judgment against two of them, Munro and Huey, for the sum of \$12,680.26. The third defendant, Cornwall was not served with summons, and consequently as to him no relief was granted; and the remaining two, Dunscomb and Marston, were absolved by the trial court from all liability on the indebtedness sued upon. From the latter part of the judgment plaintiffs have appealed.

As will hereinafter more particularly appear, the amount plaintiffs sued for had been deposited by them with the Security Bond & Finance Company, a corporation, of which the defendant Dunscomb and the deceased Wm. H. Marston were two of the five directors, for the purpose of purchasing for plaintiffs certain bonds, and substantially all of it was misappropriated to the use and benefit of the corporation by the defendants Cornwall and Huey, with the consent of Munro, the three being at the time the remaining members of the board of directors, and also, respectively, the vice president and manager, the secretary, and the president of the corporation.

The amended complaint contained two causes of action, separately stated. The first was based upon the liability created against directors of corporations by section 3 of article 12 of the state Constitution; but the trial court held that such liability applies only to the embezzlement or misappropriation of

funds belonging to the corporation, and that therefore, since the money here sought to be recovered admittedly belonged to plaintiffs and not to the corporation, the liability created by said constitutional provision could not be invoked by plaintiffs. The second cause of action, as against Cornwall, Huey, and Munro, was based upon the fact of the actual misappropriation by them of the intrusted funds; and, as against Dunscomb and Marston, upon allegations to the effect that such misappropriation was the result of the negligent manner in which the latter performed their duties as directors. The trial court found, however, that the evidence on this issue was legally insufficient to establish negligence on their part, and consequently, as stated, judgment was entered in their favor, but against the defendants Munro and Huey for \$12,680.26, the amount of the defalcation.

[1] The first question presented for determination is whether, as the trial court held, the directors' liability created by section 3 of article 12 of the Constitution applies only to the cases of embezzlement or misappropriation of funds belonging to the corporation; or whether, as plaintiffs contend, it extends to cases such as we have here—the misappropriation of funds intrusted to a corporation in the regular course of its business. The portion of said section 3 of article 12, which is pertinent, reads as follows: “* * * The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee.”

So far as our attention has been called, no case has been decided by the reviewing courts involving a state of facts analogous to those presented here; but on several occasions said constitutional provision has been construed in actions involving the embezzlement or misappropriation of corporate funds, and, in all of them it is clearly indicated, we think, that said constitutional liability extends only to the embezzlement or misappropriation of funds belonging to the corporation itself, in whose services the defaulting officer is employed.

As said in the case of Fox v. Hale & Norcross Silver Mining Co., 108 Cal. 369, 41 P. 308, 326: “It does seem that it was the intention of the framers of the Constitution to make each director of a corporation severally liable, whether individually culpable or not, for certain kinds of losses to the corporation occurring during his term of office; that is to say, he is made liable for embezzlement or misappropriation of corporate funds by officers of the corporation.” Later, in the case

of Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 81, 89 Am. St. Rep. 153, it was said: "The design plainly was to prevent speculating in *corporate funds* by directors, and to make them vigilant for their beneficiaries. * * * I think it clear that when an officer of a corporation knowingly appropriates funds intrusted to him for unlawful and unauthorized purposes, and *loss ensues to the corporation*, the directors are liable under this clause of the constitution." And again in Dean v. Shingle, 198 Cal. 652, 246 P. 1049, 1054, 46 A. L. R. 1156, the court says: "The design plainly was to prevent speculation and misappropriation of *corporate funds*. * * * But before the directors can be held liable for moneys so misappropriated as to make the officer misappropriating liable, and authorizing the creditors and stockholders to sue, it must be established: First, that there has been a misappropriation; and second, that *a loss to the corporation has resulted.*" (All italics ours.)

Moreover, in the case of Dean v. Shingle, supra, it is said that the action authorized to be maintained against directors under the constitutional provision above mentioned "is one, in effect, to recover assets of the corporation which constitute a fund to which all the creditors may look for satisfaction of their claims (Winchester v. Mabury, 122 Cal. 522, 524, 55 P. 393)"; and, continuing, the court said that the recovery, if any be had, constitutes a fund for the benefit of all the creditors; and that if, after satisfying their claims, any of the fund remains, it will belong to the stockholders. The foregoing construction would seem to be wholly at variance with the theory advanced by plaintiffs herein to the effect that said constitutional provision confers upon the creditors of a corporation the right to maintain separate actions against the directors for the recovery of money intrusted by said creditors to the corporation and by the officers thereof embezzled or misappropriated, because, manifestly, any money recovered in such actions would belong to the creditor who had intrusted it to the corporation, and would not, as contemplated by the decision in Dean v. Shingle, supra, "constitute a fund for the benefit of all creditors."

In support of their theory, plaintiffs emphasize certain language employed in the case of Fox v. Hale & Norcross Silver Mining Co., supra, in interpreting the meaning of the word "misappropriation" as used in said constitutional provision, wherein it was said: "* * * In my opinion the word 'misappropriation' is to be construed by the maxim, 'noscitur a sociis.' It means something like embezzlement, or in other words, it means the misapplication of funds intrusted to an officer for a particular purpose, by devoting them to some unauthorized purpose, and does

not apply to the payment of an extravagant price for services or materials properly appertaining to the business of the corporation—which is this case." But, as will be observed from the language quoted as well as from the other facts appearing in the opinion, only corporate funds were there involved, and it is apparent therefrom that the expression "funds entrusted to an officer" as there used meant only corporate funds intrusted to such officer and not funds intrusted to the corporation by others. For the reasons stated, we are in accord with the trial court's conclusion that the liability created by said constitutional provision applies only to the embezzlement or misappropriation of corporate funds.

[2] With respect to the second cause of action, plaintiffs make no claim that the evidence adduced at the trial was legally sufficient to justify a finding that Dunscomb and Marston were negligent, but it is contended that prejudicial error was committed in excluding certain evidence offered by them which they claim would have been legally sufficient to establish a prima facie case against the respondent defendants for the loss of said intrusted funds. The facts leading up to the rulings complained of were as follows: Said Security Bond & Finance Company was engaged in the business of buying and selling securities. It had offices in Berkeley, and operated in connection with its business a safe deposit department for the deposit of securities belonging to its clients. The plaintiff Edith Mercer was a resident of Palo Alto, and held power of attorney from her brother and coplaintiff Woodsum. For a number of years she had counseled with and followed the advice of Munro in making financial investments for herself and brother. The business was transacted through said corporation, and the securities it purchased for plaintiffs were left on deposit with the corporation for safe-keeping. In pursuance of such business relationship, and just prior to December 31, 1925, said corporation held in its possession and belonging to plaintiffs a number of bonds of the total par value of \$16,000, which Mrs. Mercer desired to sell and with the proceeds to purchase tax exempt securities. After consulting Munro, he advised the purchase of Palo Verde Irrigation District bonds, and she authorized the corporation to proceed accordingly. On January 2, 1926, said corporation informed plaintiffs that the transaction had been consummated, and issued and delivered to them a receipt dated January 2, 1926, containing a list of the bonds it claimed to have purchased, and stating that it was retaining the same in its possession for safe-keeping as gratuitous bailee. On May 20, 1926, the corporation closed its doors, and later went into the hands of a receiver, and was adjudged bankrupt.

Upon learning of the collapse of the corporation, plaintiffs presented their receipt to the receiver and demanded delivery of the bonds enumerated therein. It was then discovered that the statements set forth in the receipt were false; that no bonds whatever had been purchased for plaintiff, but, on the contrary, that the money they intrusted to the corporation for such purposes had been misappropriated by Cornwall, Huey, and Munro by mingling the same with the general funds of the corporation and expending all of it in carrying on its business; and that, in lieu of purchasing the bonds called for by said receipt and depositing the same in plaintiffs' safe deposit file, the officers named placed therein a so-called "Interim Certificate," which proved to be worthless. It read as follows: "Par Value \$13,000.00. Number 1304 Security Bond and Finance Company Interim Certificate Berkeley, California, December 31, 1925. This is to acknowledge that there is due Mrs. E. A. W. Mercer, Trustee for, or order Howard C. Woodsum thirteen thousand and no/100 (\$13,000.00) dollars, par value of Palo Verde Irrigation District 6's due various dates. When received by us we will deliver the same upon surrender of this certificate, properly endorsed. Should the above bonds not be issued, this certificate, properly endorsed, will be redeemed by us for thirteen thousand three hundred ninety and no/100 dollars, the sum originally paid for the same, together with interest thereon at the rate of six (6) per centum per annum from date of this certificate to the time of its redemption, provided, however, that interest shall cease to accrue thirty days after notice is transmitted to the holder thereof that the delivery of the above bonds will not be made. Security Bond and Finance Company, By H. Soderholm, Cashier. (Corporate Seal.)"

After having established the foregoing facts, plaintiffs offered to prove further that the general practice of the corporation was to mingle the money intrusted to it by its various clients for the purchase of securities with its general funds and to issue interim certificates therefor, without maintaining a reserve fund for the redemption of such certificates in case the securities were not purchased, that in 24 different instances it had done so, and "that the amount of such interim certificates outstanding between December 31, 1925, and May 20, 1926, varied from a maximum of \$159,684.35 on January 16, 1926, to a minimum of \$116,279.90 on dates between April 12 and 17, 1926." But the evidence was excluded on objection of the defendants.

We are of the opinion that under the law as laid down in the case of *Vujacich v. Southern Commercial Co.*, 21 Cal. App. 439, 132 P. 80, 81, such evidence was admissible. In that case the defendant corporation was engaged ostensibly in the grocery and liquor business,

its customers consisting mostly of laborers, who from time to time deposited their earnings with the corporation for safe-keeping. But, instead of keeping the intrusted funds separately, the officers of the corporation mingled the same with the corporation's funds, deposited the whole thereof to its credit in the bank, and afterwards misappropriated the same to its own use and benefit in purchasing and operating a distillery in another state. Thereafter the depositors brought suit against the corporation and its directors for the recovery of their money, and obtained judgment accordingly. No evidence was introduced to show, however, that two of the directors sought to be held liable, one of whom was Mrs. R. E. Hansard, the wife of J. L. Hansard, the manager of the corporation, had any actual knowledge of the illegal use of the intrusted money; and mainly upon that ground those two directors appealed, Mrs. Hansard contending that, in the absence of evidence showing actual knowledge of the illegal use of the intrusted funds, she was not personally liable for the misappropriation of any part thereof. This contention was held to be without merit, the court saying: "It is true that no directors' meetings were shown ever to have been held, and no evidence was introduced showing that actual knowledge was brought home to director R. E. Hansard of the condition of the affairs of the company, or its conduct with respect to the money of plaintiff and his assignors. On the other hand, this appellant did not testify or offer any proof showing that she had no such knowledge, or that she could not have obtained it by the exercise of ordinary diligence as a director of the company. Where the business of receiving deposits by a corporation is so general as it was with the corporation defendant herein, it must be presumed that the directors had full knowledge of the manner in which such moneys were kept or used; and unless a showing is made of some excuse, such as a protest offered by the director not consenting to the misappropriation and of steps taken by such director to prevent loss from accruing to the depositors, such director becomes personally liable to the persons damaged."

It seems clear, therefore, that under the foregoing doctrine plaintiffs in the present case were entitled to show, if they could, that it was the general business practice of said corporation to receive deposits from its numerous clients and to issue these interim certificates therefor; because, as held in that case, proof of such fact would have been legally sufficient to charge all of the directors as a matter of law with knowledge of the manner in which said deposits were being kept and disposed of, and consequently legally sufficient, in the absence of explanatory evidence showing individual effort on their

part to safeguard and prevent the loss of such deposits, to establish against them prima facie liability for the misappropriation of such deposits to the use and benefit of the corporation by the officers thereof. No such explanatory evidence was introduced on behalf of Dunscomb and Marston, the former not having testified in the case, and, as stated, Marston having died before the action was begun. The rulings excluding plaintiffs' evidence were therefore prejudicial.

In justification of the exclusion of such evidence, the respondent defendants contend that, by the weight of outside authority, while a director may be held liable to a creditor for loss sustained as a result of the director's misfeasance or malfeasance, he cannot be held liable in the absence of express enactment for mere nonfeasance, such as inaction, inattention, or indifference to the duties of his office; in other words, that proof of affirmative acts violative of some right of the party suffering the loss or injury is essential to such liability. But the facts of the cases declaring such rule differ materially from those presented here and in the Vujacich Case, and therefore, in our opinion the principle adhered to in those cases is not applicable here. Many of those cases involved liability of directors for loss of corporate funds, as distinguished from intrusted funds; and, as we have seen, such rule of liability has been greatly enlarged in this state in cases where the loss occurs through misappropriation or embezzlement of corporate funds, by the adoption of the rule of liability embodied in section 3 of article 12 of said Constitution, the decisions of this state having repeatedly held that in such cases the directors are severally and personally liable "whether individually culpable or not." *Fox v. Hale & Norcross Silver Mining Co.*, supra; *Dean v. Shingle*, supra. Some of the other cases cited deal with the liability of directors of insolvent banks which received deposits after the bank had apparently become insolvent; consequently those cases do not involve the relationship of bailor and bailee. Others involve only the question of the individual liability of directors for personal injuries resulting from the negligent manner in which the corporation operated its business. True, one case, *Cohen v. Maus*, 297 Pa. 454, 147 A. 103, dealt with the question of the personal liability of directors for the conversion by the officers of the corporation of plaintiffs' goods which he had left temporarily in the possession of the corporation, after having purchased and paid for the same. But, as will be noted, only a single bailment was there involved, there being no claim made as here and in the Vujacich Case, supra, that the corporation was engaged in the general practice of retaining possession of goods, which obviously is the essential

element in charging directors with constructive knowledge of the manner in which the subject-matter of the bailments are being kept and disposed of. On the other hand, we have the case of *Frontier Milling, etc., Co. v. Roy White Co-op. Mercantile Co.*, 25 Idaho, 478, 138 Pac. 825, which would seem to be not only similar in principle to the case at bar and to the Vujacich Case, but which fully sustains the legal doctrine declared in the Vujacich Case. There the corporation issued warehouse receipts to its numerous customers for grain stored with the corporation, and which was afterwards appropriated by the officers of the corporation to its use; and it was held in effect that under such circumstances the directors were presumed to know the relationship existing between the corporation and its customers, and that, if by the exercise of reasonable diligence and care on their part they could and would have known that the grain was being unlawfully diverted and embezzled by their own officers, they were personally liable for the loss sustained (citing cases). In the case at bar it was alleged in substance in the second cause of action that between December 30, 1925, and April 10, 1926, Cornwall and Huey "then and there well knowing that the sum of \$13,000 * * * had been entrusted to said corporation for the purpose above stated, used said sum of \$13,000 to pay debts of the corporation owing to persons other than plaintiffs, and thereby embezzled and misappropriated said sum of \$13,000"; also that the defendants Huey, Cornwall, and Munro knew that the bonds mentioned in said receipt had not been purchased, and that the said sum of \$13,000 had been misappropriated and embezzled by the defendants Cornwall and Huey; and that, by the exercise of reasonable care, Dunscomb and Marston "could and would each have discovered prior to April 10, 1926, all of said matters and things of which the defendants M. A. Huey, Neill C. Cornwall, Niel E. Munro, had knowledge. * * *" The foregoing allegations were legally sufficient, in our opinion, to bring the case within the rule of the Vujacich and Idaho cases, and therefore warranted the introduction of the excluded evidence.

[3] The respondent Dunscomb pleaded in bar of the action a release from the trustee in bankruptcy to the effect that, in consideration of the payment by Dunscomb to the trustee of the sum of \$10,000, the trustee released Dunscomb "of any and all liability * * * to the estate of said bankrupt resulting from the directors * * * and of all claim or claims that the trustee in bankruptcy as such could make or assert against the said Chas. E. Dunscomb." The trial court found that said release had been given, but stated no conclusion as to its legal effect. However, it is evident that it can have no effect upon the

merits of the present action, for the reason that it relates entirely to the liability of a director of a defunct corporation arising under the Federal Bankruptcy Law (11 USCA) which is entirely foreign to the liability here-in sued upon.

The judgment is reversed.

110 Cal. App. 81

CRAWFORD et al. v. FOSTER et al.
Civ. 184.

District Court of Appeal, Fourth District,
California.

Nov. 25, 1930.

Rehearing Denied Dec. 20, 1930. Hearing Denied by Supreme Court Jan. 22, 1931.

1. Automobiles ⇨181(2).

Phrase "without giving compensation therefor," in statute respecting motorist's liability to guest, indicates intention not to limit compensation to person specifically paying for transportation in cash or equivalent (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

California Vehicle Act, St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, defines "guest" as person who accepts ride in any vehicle without giving compensation therefor. "Compensation" means that which constitutes or is regarded as an equivalent or recompense; that which makes good the lack or variation of something else; that which compensates for loss or privation; amends; remuneration; recompense.

[Ed. Note.—For other definitions of "Compensation," see Words and Phrases.]

2. Automobiles ⇨181(2).

"Guest," within statute respecting motorist's liability, is one who accepts driver's hospitality and takes ride for his pleasure or business, without making any return or conferring any benefit upon driver (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

[Ed. Note.—For other definitions of "Guest," see Words and Phrases.]

3. Automobiles ⇨181(2).

Prospective buyer of automobile accepting ride to test fitness is not "guest" within statute respecting motorist's liability to guest (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

4. Statutes ⇨181(1), 184.

Terms of statute should be construed with their intent and purpose in view.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by C. H. Crawford and another against Major G. Foster and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Swing & Wilson, of San Bernardino, for appellants.

E. B. Drake, of Los Angeles, for respondents.

BARNARD, J.

This is an action for damages on account of injuries received by plaintiff Mary W. Crawford on September 28, 1929, while riding in an automobile which was being demonstrated to the plaintiffs by defendant Martens, as the agent of defendant Foster. Foster was in the business of selling Essex automobiles in Ontario, Cal., and Martens was one of his salesmen. On September 27, 1929, plaintiff C. H. Crawford called at the defendants' place of business and manifested an interest in the purchase of an automobile. He told Martens that he would not buy a car unless his wife was satisfied. There was evidence that the two plaintiffs proposed to buy a car together, with funds of which they were equal owners. By arrangement, Martens called at their home on the following day and took both plaintiffs out for a demonstration, during which he drove the car across a dip in the pavement in such a manner that Mrs. Crawford was thrown from her seat and suffered the injuries complained of. The complaint sets up two causes of action, the first being predicated upon negligence. It is alleged that in the sale of Essex automobiles it is necessary to demonstrate such automobiles to prospective purchasers; that the plaintiffs were prospective purchasers of the car then being demonstrated to them by the defendant Martens; and that the vehicle was negligently operated during the actual demonstration thereof to the plaintiffs. A second cause of action is based upon gross negligence. The jury returned a verdict in favor of the plaintiffs upon the first cause of action, and in answer to special interrogatories submitted to it, found that the plaintiff Mary W. Crawford was a prospective purchaser of the automobile, and that the defendant Frank M. Martens was not guilty of gross negligence in driving the car in question. In the instructions of the court the jury was told that "it was the duty of the defendants, if they were demonstrating, by the said Frank M. Martens, the said automobile to the plaintiffs as prospective purchasers thereof, to have used ordinary care, caution and prudence."

[1-3] The defendants have appealed from the judgment which followed, the only question raised being whether Mary W. Crawford

was a guest within the meaning of section 141¾ of the California Vehicle Act, which became effective August 14, 1929. The pertinent part of this section reads as follows:

"Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle.
* * *

"Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct, or gross negligence of such owner, driver or person responsible for the operation of such vehicle; provided, that in any action for death or for injury or damage to person or property by or on behalf of a guest or the estate, heirs or legal representatives of such guest, the burden shall be upon plaintiff to establish that such intoxication, wilful misconduct or gross negligence was the proximate cause of such death or injury or damage.

"For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor." St. 1929, p. 1580.

Appellants argue that the Legislature having thus defined the word "guest," the definition is binding upon the courts, citing *In re Monrovia Evening Post*, 199 Cal. 263, 248 P. 1017. And, further, that the language used must be strictly applied even though it appear probable that a different object was in the mind of the legislature, citing *City of Eureka v. Diaz*, 89 Cal. 467, 26 P. 961. While these rules apply when the language of an act is plain and unambiguous, it is often necessary, in ascertaining the intent of the legislature, not only to examine the language used, but to look further, if doubt or uncertainty still exists. In this case, while an attempt is made, in the final paragraph of the act, to define the word "guest" as therein used, in deciding whether Mrs. Crawford came within that definition, we must determine what is meant by accepting a ride without giving compensation therefor. The language used leaves a doubt as to what sort of compensation is intended. Appellants argue that to give compensation implies a transfer, a bestowal, or a parting with some thing. In effect, their view would define a guest as one who accepts a ride without actually handing over some definite payment therefor. To thus assume that the recompense or compensation contemplated by the act is the payment of a cash fare or its equivalent appears to us to place altogether too narrow a construction up-

on the words used. Webster's New International Dictionary defines "compensation" as follows: "That which constitutes, or is regarded as an equivalent or recompense; that which makes good the lack or variation of something else; that which compensates for loss or privation; amends; remuneration, recompense." Automobile dealers and salesmen are not only willing but anxious to exchange their time and the use of a car for the time and attention of a person who is in the market for such a car. There can be no question that in actual business the one is regarded as an equivalent or recompense for the other. It will be noted that the definition in the statute does not say "without paying therefor," but rather says "without giving compensation therefor." This indicates an intention not to limit the same to a person definitely and specifically paying for his transportation in cash or its equivalent, but to include in its scope a person who gives such recompense for the ride as may be regarded as a compensation therefor; that is, a return which may make it worth the other's while to furnish the ride. The value of advertising is measured by the prospects secured. The giving of an opportunity to make an actual demonstration of the goods, by such a prospect, is equally worth while to a dealer. In *Searcy v. Grow*, 15 Cal. 118, the word "compensation" is defined as "that return which is given for something else; in other words, a consideration." A consideration may be any benefit conferred or any prejudice suffered. Civ. Code, § 1605. The taking of a demonstration of an automobile, with its accompanying possibilities of profit, would not only seem to be a benefit to the dealer, but a return fully proportionate to any benefit conferred on the prospect. We think the meaning of the language used is that a guest is one who is invited, either directly or by implication, to enjoy the hospitality of a driver of a car; who accepts such hospitality; and who takes a ride either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver of the car, other than the mere pleasure of his company. And, further, that one who is looking at an automobile with a view of purchasing the same, and who accepts a ride therein as a part of the examination thereof, solely to test its fitness for his use, is not accepting a ride as a matter of hospitality, but is rendering value received for his transportation. Such a person is no more a guest of the dealer than is one who examines and tests goods offered for sale in a store, but the one is just as much a customer as the other.

The relationship between the parties here is not entirely dissimilar to that existing between the owner of a store and a customer using an elevator therein. In such a case, the Supreme Court has said:

"Naturally this facility of transportation would increase its patronage and necessarily its profits in business. In fixing the price at which its goods and merchandise must be sold so as to return a profit, necessarily the operating expenses of the establishment, including this elevator service, must be taken into consideration and provided for. The prices charged and paid by customers for goods would include a reimbursement to appellant for its expenses entailed in the operation of the elevator for its patrons, and hence would constitute a sufficient reward for their carriage, so as to bring appellant within the category of a carrier of passengers for hire and subject to the same duties and responsibilities." *Champagne v. Hamburger*, 169 Cal. 683, 147 P. 954, 958.

The indirect benefit to the merchant is in that case held to be compensation for a ride in an elevator. A similar benefit appears in the instant case, which we think must be held to be a compensation, given and received, for the ride in question. While the respondents may not have been passengers for hire, having given compensation for the ride, they were not guests.

While there are exceptions, notably in the case of persons staying at a hotel, in its ordinary use the word "guest" connotes something other than a business transaction. The taking of a prospective purchaser out to ride in a car for the purpose of demonstrating its good qualities is a usual and ordinary incident in the automobile business. While the question now before us has not heretofore been passed upon in this state, the general situation of an automobile being demonstrated to a prospective purchaser by a dealer is not new. It is significant that in such cases heretofore, the prospective purchaser, when referred to, has usually, if not always been designated as a passenger, or a buyer, rather than as a guest. We feel that this designation has not been accidental. The words "passenger" or "buyer," as used in such cases, better convey the meaning intended than would the word "guest," because such a demonstration partakes more of the nature of a contractual relationship than of the entertainment of an invited guest, or the conferring of a favor by a host, with no hope of return and no profit in view. It is not undertaken by the dealer as an act of hospitality, or a favor, but as a real and vital part of his business, with an eye to his own profit. It is participated in by the customer, not as a means of obtaining free transportation, but as an integral part of a business transaction. It may be considered as a distinct benefit to the dealer.

In Massachusetts, although they have no statute similar to the one here in question, the rule has been established that where an invited guest is riding in a machine with the

owner thereof, he cannot recover for injuries sustained, unless the owner and driver of the car was guilty of gross negligence. *Mas-saletti v. Fitzroy*, 228 Mass. 487, 118 N. E. 168, L. R. A. 1918C. 264. Ann. Cas. 1918B, 1088; *West v. Poor*, 196 Mass. 183, 81 N. E. 960, 11 L. R. A. (N. S.) 936, 124 Am. St. Rep. 541. But in applying the rule, the courts of that state have distinguished between cases where one is a mere guest of another and has been permitted to ride gratuitously, and cases where one, in riding, is conferring some benefit upon the driver of the car. *Lyttle v. Monto*, 248 Mass. 340, 142 N. E. 795; *Jackson v. Queen*, 257 Mass. 515, 154 N. E. 78; *Labatte v. Lavallee*, 258 Mass. 527, 155 N. E. 433; *Loftus v. Pelletier*, 223 Mass. 63, 111 N. E. 712. Not only is such a distinction a logical one, but that it was intended by the statute here in question is indicated by the use of such broad words as "giving compensation," instead of words limiting the meaning to the payment of a fare, or the transfer of a definite consideration.

[4] It has been held that the terms of a statute should be construed with their intent and purpose in view. *Evans v. Selma Union High School Dist.*, 193 Cal. 54, 222 P. 801, 31 A. L. R. 1121. The purpose and object that the Legislature had in mind sometimes throws light upon the meaning of the language used. The situation that this section was apparently designed to prevent is well known. As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation. Neither this feeling nor the reasons therefor apply to a situation arising out of an ordinary business transaction, such as the efforts of a dealer to sell an automobile to a customer. Doubtless, the Legislature intended to change the rule heretofore adopted in this state, that a mere invited guest could recover for simple negligence, and to provide that such a person could not recover in the absence of a showing of gross negligence. However, we think the language used in this section has no application to a case where a dealer is anxious to demonstrate his goods to a prospective purchaser in the hope of making a sale; where the expense of making the demonstration trip is a usual and not inconsiderable part of the overhead expense of the business; where this expense may be presumed to be paid out of the returns from the business; and where a real benefit and advantage accrues to the dealer, in the opportunity to make a sale and profit thereby. In such a

case, whether a particular trip results in a sale or not, the prospective customer is giving such compensation as removes him from the status of a "guest," within the meaning of the act we have been considering.

The judgment appealed from is affirmed.

We concur: CARY, P. J.; MARKS, J.

110 Cal. App. 177

MOGLE et ux. v. HUNT et al.
Civ. 159.

District Court of Appeal, Fourth District,
California.
Dec. 3, 1930.

Rehearing Denied Jan. 2, 1931. Hearing Denied by Supreme Court Jan. 29, 1931.

1. Negligence ⇨136(9).

Contributory negligence is question of law only when reasonable men can draw but one inference, that plaintiffs' negligence proximately contributed to injury.

2. Automobiles ⇨245(80).

Driver, swinging to left when meeting truck starting to make left turn *held* not guilty of contributory negligence as matter of law (St. 1923, p. 557, § 123).

St. 1923, p. 557, § 123, provides that in crossing intersections driver must keep vehicle on right half of highway unless obstructed or impassable. Plaintiffs' automobile and defendant's truck were meeting. Evidence showed truck driver signaled for and started to make left turn, but thinking plaintiff was not yielding right of way swung back to right, and that plaintiff who had already swung to the left to yield right of way, turned still further to the left in effort to avoid the collision.

3. Trial ⇨296(9).

Instruction as to truck driver's duty to make left turn after signaling *held* not erroneous in connection with other instructions (Const. art. 6, § 19).

Instruction given, and claimed to violate Const. art. 6, § 19, told jury that when driver gave signal for turn in given direction, other operators had right to assume he would turn in that direction, and that it was negligence for him to turn in any other direction without signaling such intended change of direction. Court also charged that if truck driver, after giving signal, continued on straight course on his own right-hand portion of highway because continuation of turn would make

collision imminent, it was his duty to forego making left turn.

4. Automobiles ⇨246(58).

Instructions as to last clear chance in automobile collision *held* warranted by the evidence.

5. Appeal and error ⇨216(2).

Instructions as to last clear chance in collision between truck and automobile, though not as full as they might have been, *held* without prejudice when no further instructions were requested.

The instructions given told jury that if they believed from the evidence that plaintiffs were negligent in passing to left hand side of road at time of collision between their automobile and defendant's truck, and by so doing placed themselves in a position of peril, and that defendant saw and knew that plaintiffs were in such position of peril but could by the exercise of ordinary care have avoided the injury complained of, defendants were liable, and that if they believed from the evidence that plaintiffs negligently placed themselves in position of peril which was known to defendant and that defendant could have by the exercise of reasonable or ordinary care avoided the accident or collision, but failed to exercise such reasonable or ordinary care, and that such failure was the proximate and efficient cause of the accident, such conduct was negligence and defendant would be liable.

6. Automobiles ⇨246(58).

Instruction on hypothesis that imminent peril of plaintiffs just before automobile collision was caused by defendant's negligence *held* warranted by the evidence.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by A. G. Mogle and wife against Vernon P. Hunt and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Hiram T. Kellogg, of Los Angeles, for appellants.

Swing & Wilson, of San Bernardino, for respondents.

CARY, P. J.

The plaintiffs, husband and wife, brought this action against defendants to recover for injuries received in a collision between plaintiffs' automobile and defendants' truck. A jury returned a verdict against defendant Vernon P. Hunt, and from the resulting judgment this appeal is prosecuted.

Defendants contend as ground for reversal: (1) That plaintiffs' recovery is barred by their contributory negligence, and (2) that certain errors in instructions were prejudicial.

The facts follow. The accident took place on the outskirts of the city of San Bernardino. Tippecanoe avenue runs north and south. Mission boulevard enters Tippecanoe avenue at right angles from the east and there ends. The collision occurred at the intersection thus formed. Plaintiffs' roadster, north bound, and defendants' truck, south bound, both on Tippecanoe avenue, were approaching this intersection at approximately the same time. As the defendants' truck arrived at a point some 200 feet north of the center of the intersection, its driver signaled for a left turn, which would have taken the truck east into Mission boulevard. At this moment plaintiffs' car was an equal distance south of the center of the intersection and both vehicles were on their own right half of the pavement and were proceeding at a speed somewhere between 12 and 20 miles per hour. There are no traffic warts or buttons at this intersection, nor are there any markings indicating the course to be traveled in turning from Tippecanoe avenue into Mission boulevard. When the truck had reached a point 75 feet north of the center of the intersection, the truck driver repeated his signal and started to make the turn. In doing so he did not proceed past the center of the intersection as required by the California Vehicle Act, but cut the corner, hugging the east side of the curve from Tippecanoe avenue into Mission boulevard. At the same moment plaintiffs' automobile, then approximately the same distance south of the center of the intersection, turned slightly to its left intending to yield the right of way to the truck and allow it to complete its turn. The truck driver, apparently believing that plaintiffs were going to continue their course straight north and thus render the completion of the truck's turn into Mission boulevard impossible, suddenly abandoned his turn, swinging his truck to his right and wobbling uncertainly from side to side, headed back to his right or westerly side of Tippecanoe avenue. Plaintiffs, seeing the truck headed, as they thought, straight for them, veered still further to their left or westerly side of the road in an unsuccessful endeavor to avert a collision. The defendants' truck headed southwest and the plaintiffs' automobile headed northwest crashed at the westerly edge of the intersection.

[1, 2] The defendants argue that plaintiffs were guilty of contributory negligence as a matter of law because they turned to their left of the road, thereby violating section 123 of the California Vehicle Act (St. 1923, p. 557), which provides that in crossing intersections a driver must keep his vehicle on the right half of the highway unless such right half is obstructed or impassable, and defendants cite the rule that where the violation

of a statute by plaintiff contributes proximately to the accident it constitutes negligence per se and will bar a recovery. But contributory negligence is a question of law only when from the facts reasonable men can draw but one inference—that the negligence of the plaintiffs proximately contributed to their injuries. In all other cases the question is one of fact for the jury. *Flores v. Fitzgerald*, 204 Cal. 374, 376, 268 P. 369. We have read in full the testimony and feel that it is far from presenting a situation so clear that but one inference—that the negligence of the plaintiffs contributed proximately to the accident—could be drawn therefrom. We therefore hold this point to be without merit.

[3] Instruction No. 14, given at plaintiffs' request, is as follows: "You are instructed that when the driver of an automobile upon a public highway has given a signal indicating that he intends to turn in a given direction, other operators of vehicles upon the highway have a right to assume that such driver so giving such signal will turn in the direction indicated by such signal, and it is negligence for the driver of a vehicle so giving such signal to turn or travel in any other direction than that indicated by the signal, without first indicating or signaling such intended change of direction."

Defendants contend that by this the court, in violation of the constitutional inhibition (Const. art. 6, § 19), told the jury that the defendants were guilty of negligence as a matter of law regardless of the apparent danger which may have confronted the driver of the truck and regardless of anything he may have done. They argue that many situations might arise where, when he sees that some other vehicle does not intend to heed his signal, a truck driver might suddenly be compelled to change his course without having time to give another signal. If we view this instruction by itself, the criticism is well founded, but instructions must be construed as a whole. By defendants' instruction No. 30, given by the court, the jury were told that if after giving the signal for a left turn the truck driver continued on a straight course on his own right-hand portion of the highway because he saw that plaintiffs' car and his own truck were in such proximity that a continuation of his turn would make a collision imminent, it was the truck driver's duty to forego making his left turn. When the two instructions are construed together we are of the opinion that the effect of the second was to render any error in the first without prejudice.

[4, 5] Instructions numbered 22 and 23, given at plaintiffs' request, are as follows:

No. 22. "You are instructed that if you believe from the evidence that the plaintiffs were negligent in passing to the left-hand side of the road at the time of the collision involved herein, and by so doing placed them-

selves in a position of peril, and that the defendant saw and knew that the plaintiffs were in such position of peril, but could by the exercise of ordinary care have avoided the injuries complained of, the defendants in this case are liable."

No. 23. "If you believe from the evidence that the plaintiffs negligently placed themselves in a position of peril, which was known to the defendant, and that said defendant could have, by the exercise of reasonable or ordinary care, avoided the accident or collision but failed to exercise such reasonable or ordinary care, and that such failure on the part of such defendant to use reasonable or ordinary care was the proximate and efficient cause of the accident, such conduct of the defendant, if you so find, is negligence and the defendants would be liable for the damages suffered as a result thereof."

Defendants contend that these instructions neither severally nor collectively state the law with reference to the doctrine of last clear chance, in that they omit two necessary elements: (1) That as the result of the plaintiffs' negligence plaintiffs were in a situation of danger from which they could not escape by the exercise of ordinary care, and (2) that the truck driver realized, or ought to have realized, plaintiffs' inability to escape therefrom, citing *Darling v. Pacific Electric Railway*, 197 Cal. 702, 707, 242 P. 703. It is contended further that there was no evidence which would warrant the court in giving any instruction on the doctrine of last clear chance. We are of the opinion that there was sufficient evidence to warrant the submission of this question to the jury. While the instructions could very properly have been amplified by the inclusion of the elements specified, yet whether as they stand they require a reversal of the case is another matter. In *Townsend v. Butterfield*, 168 Cal. 564, 567-569, 143 P. 760, an instruction stating the last clear chance doctrine in a most abbreviated form was held not prejudicial, the court stating that had appellant desired a more full and elaborate instruction on the subject it was his duty to have requested it and not having done so he could not be heard to complain. This case has been followed in *Galwey v. Pacific Auto Stages, Inc.*, 96 Cal. App. 169, 177, 273 P. 866; *Kroll v. Rasin*, 96 Cal. App. 84, 89, 273 P. 820; *Rogers v. Interstate Transit Co.* (Cal. Sup.) 290 P. 571; and *Wirthman v. Isenstein*, 182 Cal. 108, 110, 111, 187 P. 12. In the case at bar defendants made no request for any instruction on the subject. Under the authorities above cited the fact that the instructions were not as full and elaborate on this point as they might have been must be held to be without prejudice.

[6] Instruction No. 24, given at plaintiffs' request, is as follows: "If the evidence con-

vinces you that the plaintiffs found themselves placed in sudden peril by or through the negligence of the defendant, their conduct under such circumstances is to be judged in view of the circumstances and surroundings and not by the standard applicable to one not conscious of being in danger. The plaintiffs under such circumstances, if you so find, were required to use ordinary care to protect themselves, which was the care an ordinary prudent person would use under the same or similar circumstances, considering the danger, proximity of the truck, its speed and movement, plaintiffs' position on the highway, and all the other facts and circumstances proved to have existed or occurred at the time of the accident. It must be remembered that a person in great peril, when action is necessary to avoid it, is not required to exercise that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances."

Defendants object to this instruction, arguing that under the uncontroverted evidence the plaintiffs placed themselves in a position of peril, and that, since the imminent peril rule may be invoked only by one who is himself without fault (*Vedder v. Bireley*, 92 Cal. App. 52, 60, 61, 267 P. 724), plaintiffs may not take advantage of the rule. But under the evidence the question of whether plaintiffs placed themselves in a position of peril, or whether the truck driver's change of course after starting his turn had created such situation, was, as we have held above, a question of fact and not of law.

Defendants finally contend that the instructions taken as a whole are so contradictory and conflicting as to necessitate a reversal. We have carefully examined the instructions and do not find them open to the criticism urged. In this connection, however, it appears that, with a single exception, every instruction offered by either party was given—32 by plaintiffs and 34 by defendants. They were apparently given grouped just as respective counsel had offered them, all of plaintiffs' being first, followed by all of defendants'. While we are aware that this is a common practice, it would tend to render instructions more easy of comprehension if, instead of giving the instructions in two distinct groups as respectively tendered by the parties litigant, the court would first segregate from each group the instructions bearing on the same subject and then after eliminating those which are but repetition give them grouped according to their subject matter and in sequence. We believe that by this means the court's instructions which at best are difficult for a jury to grasp would be the more readily comprehended.

The judgment is affirmed.

We concur: MARKS, J.; BARNARD, J.

109 Cal. App. 599

BELM v. PATRICK.
Civ. 7190.

District Court of Appeal, First District,
Division 1, California.
Nov. 18, 1930.

1. Witnesses ⇨276.

In action for breach of marriage promise, testimony whether defendant was not told by plaintiff that she had registered at hotel as defendant's wife *held* relevant and proper on cross-examination (Code Civ. Proc. § 2055).

2. Appeal and error ⇨1058(2).

Any error in exclusion of evidence *held* cured by subsequent testimony.

In action for breach of marriage promise, objection was sustained to question whether plaintiff did not at one time live with another than defendant as wife, but later, in response to similar question, she testified she had never lived with such man.

3. Appeal and error ⇨1056(2).

In action for breach of marriage promise, testimony whether another than defendant gave plaintiff earrings *held* not sufficient material to make rejection prejudicial.

4. Witnesses ⇨286(4).

In action for breach of marriage promise in which state of plaintiff's feelings was shown, question whether there was "anything to drink there that night" *held* improper on redirect examination.

5. Appeal and error ⇨882(10).

Defendant could not complain of exclusion of testimony where court merely suggested testimony was immaterial, stating, however, that defendant might proceed, whereupon counsel withdrew question.

6. Breach of marriage promise ⇨18.

Where defendant, sued for breach of marriage promise, relies on plaintiff's unchastity, it must be specially pleaded (Civ. Code, § 62).

7. Breach of marriage promise ⇨22.

Defendant sued for breach of marriage promise may prove plaintiff's bad character for chastity as bearing on question of damages by showing particular acts previous to as well as during engagement.

8. Appeal and error ⇨1056(1).

In action for breach of marriage promise, exclusion of testimony respecting plain-

tiff's conduct on occasion when referring to separation she declared "she didn't care" *held* not prejudicial.

9. Breach of marriage promise ⇨27.

Jury may consider defendant's wealth in estimating damages for breach of marriage promise.

10. Trial ⇨62(3).

Rejection of testimony in rebuttal respecting defendant's financial condition *held* abuse of discretion, in action for breach of marriage promise (Code Civ. Proc. § 2050).

11. Appeal and error ⇨971(3).

Witnesses ⇨267.

Court has discretionary power over cross-examination, which will not be disturbed unless discretion was abused.

12. Witnesses ⇨268(16).

In action for breach of marriage promise, exclusion of cross-examination whether witness knew any reason for plaintiff being introduced as defendant's wife *held* not abuse of discretion.

13. Trial ⇨236(2).

Charge respecting testimony of witnesses who had willfully sworn falsely to material point *held* proper (Code Civ. Proc. § 2061).

The jury was charged substantially in the language of Code Civ. Proc. § 2061, and the court further explained that the section had reference to witnesses willfully false. The court also stated in effect that while witness willfully false in part should be distrusted as to all testimony, weight to be given part not willfully false was question for jury's determination.

14. Breach of marriage promise ⇨35.

In action for breach of marriage promise, instruction respecting plaintiff's services as housewife *held* not misleading.

The court instructed that testimony showing parties had lived together for some years, and that plaintiff performed services usually rendered by housewife, was admitted only as evidence on question whether there was promise of marriage, and further that plaintiff was not entitled to recover on any ground other than breach of alleged promise.

15. Damages ⇨151.

Exemplary damages need not be demanded by that name in complaint, but facts justifying recovery thereof must be pleaded (Civ. Code, § 3294).

16. Breach of marriage promise ☞30.

To authorize exemplary damages for breach of marriage promise, something more than mere refusal without sufficient excuse to perform contract must be shown (Civ. Code, § 3294).

17. Breach of marriage promise ☞35.

Instruction on exemplary damages *held* improper under pleading and evidence in action for breach of marriage promise (Civ. Code, § 3294).

18. Breach of marriage promise ☞18.

Plaintiff's want of chastity not being pleaded as defense in action for breach of marriage promise, evidence thereof could be considered only in mitigation of damages.

19. Appeal and error ☞1031(1).

Injury is not presumed from errors of law (Const. art. 6, § 4½).

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Alexandria Belm against Jesse Patrick, also known as J. Patriceo, etc. Judgment for plaintiff, and defendant appeals.

Reversed.

Joseph A. Brown, of San Francisco, for appellant.

William M. Malone, of San Francisco, for respondent.

PER CURIAM.

This action was brought by plaintiff, Alexandria Belm, against the defendant, Jesse Patrick, for damages for an alleged breach of promise to marry.

The complaint averred that on November 15, 1927, the parties agreed to marry, and that the promise was repeated on several occasions, the last promise being on February 25, 1928. It was charged that defendant breached the contract on August 3, 1928, by marrying another person. A trial by jury was had and a verdict rendered in favor of the plaintiff for \$2,500. Following a motion for a new trial, which was denied, the defendant appealed from the judgment. As grounds therefor it is contended that the trial court erred in its rulings upon the admissibility of certain evidence and in its instructions to the jury.

The parties—both of whom were married at the time—commenced to live together in 1921. The plaintiff was then a waitress in a dance hall near the water front in San Francisco, and the defendant conducted an establishment in the same neighborhood, where, according to his testimony, soft drinks were

sold. Shortly after their relations commenced the defendant procured a divorce from his wife, and in 1926 the plaintiff was divorced from her husband, the expense incurred being paid by the defendant. The parties continued to live together until June 28, 1928, when they separated.

[1] The defendant was called as a witness under section 2055 of the Code of Civil Procedure; and it appeared from his testimony that the parties while living together had on one occasion visited Yosemite Valley. He was asked if he was not told by the plaintiff on this occasion that she had registered at the hotel as his wife. An objection to the question was overruled, and the ruling is assigned as error. This fact was relevant, and the question was proper on cross-examination.

[2, 3] On the cross-examination of the plaintiff she was asked whether she did not at one time live with one Silva as his wife. An objection thereto was sustained, and this is also assigned as error. Later, in response to a similar question by defendant, she testified that she had never lived with Silva. Any error in the ruling complained of was cured by this testimony. She was also asked whether Silva shortly before the alleged breach of promise gave her a pair of earrings. An objection to this question was also sustained. While the question was proper on cross-examination, the fact was not sufficiently material to make its rejection prejudicial error.

[4] Another witness called by the defendant testified on cross-examination to the state of plaintiff's feelings after she and the defendant had separated. This testimony tended to prove that the breach caused her mental suffering. Defendant's counsel then asked the following question: "Was there anything to drink there that night?" To which an objection was sustained. The question was improper on redirect examination and the ruling was correct.

[5] The defendant further complains that he was not permitted to testify in rebuttal that, contrary to plaintiff's claim, he never had sexual intercourse with her. There is no merit in this contention, as the court merely suggested that the testimony was immaterial, stating, however, that the defendant might proceed, but his counsel thereupon withdrew the question.

[6, 7] Defendant also sought to show by the testimony of a witness that the latter had sexual intercourse with the plaintiff in 1919. An objection thereto was sustained on the ground that the offered testimony was not relevant to the issues. Defendant by his answer merely denied the promise to marry and the damage alleged. While neither party is

bound by a promise made in ignorance of the other's want of personal chastity, and either is relieved therefrom by unchaste conduct on the part of the other unless both participate therein (Civ. Code, § 62), it is nevertheless the rule that where a defendant relies upon the plaintiff's unchastity it must be specially pleaded (Reed v. Clark, 47 Cal. 194; Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422; Herriman v. Layman, 118 Iowa, 590, 92 N. W. 710; Bracken v. Dinning, 141 Ky. 265, 132 S. W. 425; Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Kniffen v. McConnell, 30 N. Y. 285); nevertheless a defendant may prove the bad character of plaintiff for chastity as bearing on the question of damages (Cox v. Edwards, supra; Gerlinger v. Frank, 74 Or. 517, 145 P. 1069), and this may be shown by particular acts of unchastity (Wigmore on Evidence, § 213; Sheahan v. Barry, 27 Mich. 217, 221; Stratton v. Dole, 45 Neb. 472, 63 N. W. 875; Gerlinger v. Frank, supra; Burnett v. Simpkins, 24 Ill. 265; Dupont v. McAdow, 6 Mont. 226, 9 P. 925; Albertz v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584; Freeman v. Bennett (Tex. Civ. App.) 195 S. W. 238; Houser v. Carmody, 173 Mich. 121, 139 N. W. 9; Carney v. McGilvray, 152 Miss. 87, 119 So. 157, 159; Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. Rep. 561), previous to as well as during the continuance of the engagement (9 Cor. Jur., Breach of Marriage Promise, § 77, p. 359, and cases cited).

[8] Another witness for the defendant testified that the plaintiff on one occasion, in referring to the separation, declared that "she didn't care because she had plenty of friends on the water front who would take care of her." He was then asked as to her conduct on this occasion. The witness replied that it was bad, but the court declined to allow counsel to pursue the inquiry, and this is also assigned as error. Her conduct on this occasion would add but little to the force of her declarations, and the rejection of the testimony, though the same had some relevancy, was not prejudicial.

[9] The plaintiff testified to statements by the defendant as to his wealth. It has been held that a jury may consider such evidence in estimating damages. Reed v. Clark, supra.

[10] Plaintiff's testimony in this particular was not denied by the defendant upon his examination in chief. Later his counsel requested permission to recall him, stating, "We wish to place the defendant on the stand again regarding his financial condition." Permission to do so was refused. Section 2050 of the Code of Civil Procedure provides that "A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after

the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion." The defendant had not rested his case. Statements as to his financial condition were related in detail by the plaintiff from which it might be concluded that he was worth approximately \$50,000; and it is evident from the record that his counsel inadvertently omitted to inquire regarding the matter while the defendant was on the stand. The evidence was material on the question of damages, and it cannot be contended that it would have worked a surprise on the plaintiff. Under the circumstances, we think the court should have allowed the defendant to be recalled, and that its refusal was an abuse of discretion. Barry v. Bennett, 45 Cal. 80.

[11, 12] It was also testified that the defendant on one occasion introduced the plaintiff as his wife. The witness was asked on cross-examination if he knew any reason for her being so introduced. An objection to the question was sustained. Like many other questions asked by defendant's counsel, the materiality of the evidence sought to be elicited is not apparent nor was its purpose suggested to the trial court. While, so far as appears, the question was not improper, the court has discretionary power over cross-examination, which will not be disturbed on appeal unless its discretion has been abused (Grimbley v. Harrold, 125 Cal. 24, 57 P. 558, 73 Am. St. Rep. 19), and we cannot say that in this instance there was an abuse of discretion.

[13] The jury was charged substantially in the language of section 2061 of the Code of Civil Procedure, which has been held to be proper. O'Rourke v. Vennekohl, 104 Cal. 254, 37 P. 930. The court further explained that the section has reference to witnesses willfully false and not to those who from defective memory or understanding may have testified otherwise than according to the facts. The court also stated in effect that while a witness willfully false in part should be distrusted as to all his testimony, the weight to be given to the part not willfully false was a question for their determination. The instruction correctly stated the law. As the court said in White v. Disher, 67 Cal. 402, 403, 7 P. 826, quoting from a previous decision: "The rule is that the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; that is to say, the jury, being convinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but willfully and with a design to deceive, must treat all his testimony with distrust and suspicion, and reject all, unless they shall be convinced, notwithstanding the base character of the witness, that he has in other par-

ticulars sworn to the truth." It was for the trial court or the jury to determine to what extent the falsity of a part of the testimony of a witness affects the weight to be given the rest of his testimony (*Rolland v. Porterfield*, 183 Cal. 466, 191 P. 913), and the rule of rejection does not apply when the witness is innocently mistaken (*People v. Strong*, 30 Cal. 151; *People v. Sprague*, 53 Cal. 491).

[14] It was testified that the parties lived together for some years and that the plaintiff performed the services usually rendered by a housewife. The court instructed the jury that this testimony was admitted only as evidence upon the question whether there was a promise of marriage, and further that the plaintiff was not entitled to recover on any ground other than the breach of the alleged promise. The defendant criticizes the language of the instruction, claiming that the jury might have concluded therefrom that in case they found for the plaintiff it would be proper to make an allowance for her services as a housekeeper. The instruction was sufficiently clear and did not in our opinion mislead the jury.

[15-17] The defendant also complains of the following instruction: "Where you find damages must be paid by the defendant, in addition to the actual damages sustained you must consider what is known as exemplary damages, that is, damage to be awarded over and above those actually suffered by the plaintiff by way of punishment to defendant. In the event you find for the plaintiff and come to consider this phase of the matter, do so in the light of all the facts of the case."

Section 3294 of the Civil Code provides that in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover exemplary damages. While exemplary damages need not be demanded by that name in the complaint, it is necessary that the facts justifying a recovery of such damages be pleaded (*Moore v. Hopkins*, 83 Cal. 270, 274, 23 P. 318, 17 Am. St. Rep. 248; *Syfert v. Solomon*, 95 Cal. App. 228, 272 P. 810; 17 Cor. Jur., Damages, § 309, p. 1005); and in actions for a breach of a marriage promise something more than a mere refusal without sufficient excuse to perform the contract must be shown in order to authorize such an award (*Goddard*

v. Westcott, 82 Mich. 180, 46 N. W. 242; *Baumle v. Verde*, 33 Okl. 243, 124 P. 1083, 41 L. R. A. [N. S.] 840, Ann. Cas. 1914B, 317; *Dupont v. McAdow*, supra; *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784). It has also been held that in the absence of such allegations it was error to award punitive damages though the evidence showed malice and oppression on the part of the defendant. *Lorenz v. Hunt*, 89 Cal. App. 8, 16, 264 P. 336. In the present case the complaint contains no allegations of fraud or deceit, or that the defendant entered into the engagement with no intention of performing or was actuated by evil motives, nor does the evidence establish any of these facts or more than a refusal without sufficient excuse to perform the contract. Under such circumstances, as was held in *Moore v. Hopkins*, supra, the instruction was erroneous.

[18] The jury was further instructed as follows: "If you find that a promise of marriage was made in this case and breached, and considering the question of damages, by way of mitigation thereof you can take into account any indelicate and unbecoming conduct, if any has been shown, on the part of the woman the plaintiff." It is claimed that by this instruction the jury was erroneously charged that evidence of plaintiff's conduct was material only on the question of damages. There was no error in the instruction for, as above stated, her want of chastity was not pleaded as a defense to the action, and such evidence could only be considered in mitigation of damages.

[19] Injury is not presumed from errors of law. *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 P. 238. It must appear affirmatively after an examination of the entire case, including the evidence, or from the intrinsic nature of the error itself, in order to justify a reversal. Const. art. 6, § 4½. But after examining the evidence, and considering the nature of the case, we are of the opinion that the errors mentioned, namely, the refusal to permit evidence of plaintiff's sexual relations with other men, the rejection of testimony in rebuttal as to defendant's financial condition, and the instruction that the jury might return a verdict for exemplary damages, were prejudicial; that it is reasonably probable that the same materially affected the action of the jury and resulted in a miscarriage of justice.

The judgment is reversed.

110 Cal. App. 116

ROBB v. CARDOZA (two cases.)**SAME v. MULHERN.**

Civ. 7331.

District Court of Appeal, First District,
Division 1, California.

Nov. 29, 1930.

Rehearing Denied Dec. 29, 1930.

1. Bills and notes ⇨497(2).

Mere want of consideration for note does not operate to place upon holder burden of proving that he or predecessor acquired title as holder in due course (Civ. Code, § 3136).

2. Bills and notes ⇨497(2).

Evidence showing note was without consideration is inadmissible, in absence of evidence showing indorsee was not bona fide transferee for value and without notice (Civ. Code, §§ 3136, 3140).

3. Bills and notes ⇨497(2).

Proof of original want of consideration for note is not sufficient alone to establish defective title or place burden upon plaintiff to prove himself holder in due course (Civ. Code, §§ 3109, 3136, 3140).

4. Appeal and error ⇨931(1).

In determining whether trial court's findings support conclusions or judgment, findings must receive such construction as will uphold rather than defeat judgment.

5. Appeal and error ⇨931(3).

Appellate court in determining whether trial court's findings support conclusions or judgment may from facts found infer ultimate facts in support of judgment.

6. Appeal and error ⇨931(3).

Appellate court cannot infer from findings ultimate facts which would support judgment when such do not necessarily follow from facts found.

7. Bills and notes ⇨539.

Finding of want of consideration for note held not necessarily to warrant conclusion that indorsee was not holder in due course (Civ. Code, § 3133).

8. Bills and notes ⇨337.

To constitute notice of infirmity in note or defect in title, indorsee must have actual knowledge, or knowledge of such facts that action in taking instrument amounted to bad faith.

9. Bills and notes ⇨337.

Mere knowledge of facts sufficient to put prudent man upon inquiry or mere suspicion of infirmity or defect of title will not preclude

indorsee of note from occupying position of holder in due course, unless remaining passive amounts to bad faith.

10. Bills and notes ⇨539.

Finding, if made, that notes were procured by fraudulent representations regarding financial condition of payee, would not sustain conclusion that indorsee was not holder in due course (Civ. Code, § 3133).

11. Bills and notes ⇨358.

Indorsee of note as security for pre-existing debt is holder for value in usual course of business (Civ. Code, § 3133).

12. Bills and notes ⇨497(2).

Where indorsee is shown to be holder for value in due course, burden is upon defendant to show indorsee had notice of maker's equities, unless evidence creates presumption that indorsee knew facts.

13. Bills and notes ⇨539.

Findings showing indorsee knew notes were executed for stock in insolvent corporation, and that notes were taken as security for pre-existing debt, held not to warrant conclusion that indorsee was not holder in due course (Civ. Code, § 3133).

Trial court found that makers received no consideration from payee for note; that payee indorsed note to bank as additional and collateral security upon pre-existing indebtedness; that bank at time had full knowledge of fact that notes were given in purchase of shares of capital stock in payee corporation, which had been unable to pay indebtedness to bank; that bank at time of notes held chattel mortgage upon certain chattels owned by payee as security for payment of indebtedness; and that part of chattels mortgaged had disappeared.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Two separate actions by M. Robb against T. J. Cardoza and a third action by M. Robb against W. P. Mulhern, tried together. Judgment for defendants in each case, and plaintiff appeals.

Reversed.

Charles H. Sooy, of San Francisco, for appellant.

Goldman & Nye and Reed M. Clarke, all of San Francisco, for respondents.

PER CURIAM.

The above actions were brought on three promissory notes executed by the respective

defendants to Big Creek Ranch Inc., a corporation, and by it indorsed before maturity to the Pacific National Bank of San Francisco. The bank assigned the notes to plaintiff for collection.

As defenses the defendants in each action alleged that the note was given without consideration, and that the bank was not a holder in due course. In two of the actions it was also alleged as a defense that the execution of the note was induced by false representations as to the financial conditions of the payee corporation.

The cases were tried together. The trial court made no finding on the defenses last mentioned, but found in each case that the note was given without consideration, and that the bank was not a holder in due course. In each case the conclusions from the findings were that the bank was not a holder in due course, and that defendant was entitled to judgment. Judgments were entered accordingly, and plaintiff has appealed therefrom. The appeals are presented upon the same transcript and briefs, and it is contended as grounds for the appeals that the findings do not support the conclusions of law or the judgments.

The findings, so far as material, are as follows:

"That said promissory note was executed and delivered by defendant to Big Creek Ranch Inc., a corporation, on the 10th day of November, 1926; that said defendant received no consideration whatsoever from said Big Creek Ranch Inc., and that the said Big Creek Ranch Inc. on or about the 30th day of November, 1926, transferred, endorsed and delivered the said promissory note to said Pacific National Bank of San Francisco as and for additional and collateral security upon an indebtedness by a promissory note then due, owing and unpaid from said Big Creek Ranch Inc. to the said Pacific National Bank of San Francisco; that at the time said Pacific National Bank of San Francisco took said promissory note as such additional and collateral security it had full knowledge of the following facts concerning said note executed by said defendant to said Big Creek Ranch Inc., a corporation, to-wit:

"1. That said note had been made, executed and delivered by defendant to said Big Creek Ranch Inc. for the purchase of certain shares of the capital stock of said Big Creek Ranch Inc., a corporation.

"2. That said Big Creek Ranch Inc., a corporation, was indebted to the said Pacific National Bank of San Francisco in the sum of approximately twenty-seven thousand dollars (\$27,000.00).

"3. That said Big Creek Ranch Inc. was not then and for a considerable time prior

thereto had not been able to pay the sum then due and owing from it to said Pacific National Bank of San Francisco, to wit, approximately the sum of twenty-seven thousand dollars (\$27,000.00), or any portion thereof.

"4. That the said Pacific National Bank of San Francisco had demanded payment of said note from said Big Creek Ranch Inc. on a number of occasions at and subsequent to the due date of said promissory note, but that said Big Creek Ranch Inc. had not been able to pay and had not paid the sum then due and owing, or any portion thereof.

"5. That said Big Creek Ranch Inc. did not have money on hand with which to meet its indebtedness to the said Pacific National Bank of San Francisco.

"6. That the said Pacific National Bank of San Francisco at the time of the delivery to it of said promissory note of the defendant herein held a chattel mortgage upon certain cattle owned by said Big Creek Ranch Inc. as security for the payment to it by said Big Creek Ranch Inc. of said indebtedness, and that upon a count of said cattle shortly theretofore made the number of said cattle was found by said Pacific National Bank of San Francisco to be less than the number of cattle that had theretofore been mortgaged to said Pacific National Bank of San Francisco by said Big Creek Ranch Inc."

The statute provides that every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument is defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course (Civ. Code, § 3140), and that the title of any person who negotiates an instrument is defective when he obtained the instrument or any signature thereto by fraud, duress, force, or fear or other illegal means, or for an illegal consideration (Civ. Code, § 3136). It is also provided that an absence or failure of consideration is a matter of defense against any person not a holder in due course. Civ. Code, § 3109.

[1] The rule appears to be well settled that a mere want of consideration for the instrument does not operate to throw upon the holder the burden of proving that he, or the one under whom he claims, acquired the title as a holder in due course, as section 3136 of the Civil Code, which defines defective title, does not include a want or failure of consideration. 19 Cal. Jur., Neg. Instr., § 177, p. 1042; 8 Cor. Jur., Bills & Notes, § 1294, pp. 987, 988, and cases cited; Page v. Hallam & Co., 212 Ill. App. 462; Wheat v. Goss, 193 Ind. 558, 141 N. E. 311; Bank of Polk v. Wood, 189 Mo. App. 62, 173 S. W. 1093; Title Guarantee

& Trust Co. v. Pam, 232 N. Y. 441, 134 N. E. 525; Cole Banking Co. v. Sinclair, 34 Utah, 454, 98 P. 411, 131 Am. St. Rep. 885.

[2-6] Moreover, it has been held that in such actions evidence that the note was without consideration is inadmissible in the absence of evidence tending to show that a plaintiff indorsee was not a bona fide transferee for value and without notice of the alleged equities of the defendant. *Lynch v. Holbrook*, 49 Cal. App. 380, 193 P. 505. Consequently, proof of an original want of consideration for the instrument was not sufficient alone to establish that plaintiff's title to the instruments was defective, or to throw upon him the burden of proving that the one under whom he claimed was a holder in due course. And while the findings are to receive such a construction as will uphold rather than defeat the judgment, and from the facts found ultimate facts may be inferred in support of the judgment, it is not within the province of the appellate court to infer from the findings ultimate facts which would support the judgment when such do not necessarily follow from the facts found. *Rossini v. St. Paul, etc., Ins. Co.*, 182 Cal. 415, 188 P. 564; *Sargent v. Shumaker*, 193 Cal. 122, 131, 223 P. 464; 2 Cal. Jur., Appeal and Error, § 513, p. 876.

[7] That the bank was not a holder in due course within the provisions of section 3133 of the Civil Code does not necessarily follow from the finding that there was a want of consideration for the notes; and under such circumstances, as held in the above cases, the ultimate facts cannot be inferred by this court.

Respondent claims, however, that the remaining findings sufficiently show that the bank was not a holder in due course. These facts are that the bank had knowledge that the notes were executed for the purchase of stock in the Big Creek Ranch, Inc., that this company was insolvent, and that security given the bank for a loan, namely, certain cattle, had disappeared; and, further, that the taking of the notes as collateral security under the circumstances amounted to bad faith.

In support thereof two cases are cited. In *Hamilton v. Mihills*, 92 Wash. 675, 159 P. 887, 889, a note for its bonds and stock was executed by the defendant to a corporation, and endorsed by the latter to its president as collateral security. The defense was fraud and that the indorsee was not an innocent holder. Judgment was entered for the defendant. The appellate court in passing upon the sufficiency of the evidence to support the finding that the plaintiff was not an innocent holder said: "At the time he took these notes * * * and for some time prior thereto had been, president of the company and in active management of its affairs. He must have known that the only assets of the company

were merely options on the limestone land. It is conceded that he knew the note was given for bonds and stock. It cannot be doubted that he knew both bonds and stock were practically valueless."

In *Mizell Live Stock Co. v. Sutton*, 23 Ga. App. 270, 98 S. E. 102, the note sued upon was given for shares of stock in a corporation and was indorsed to the plaintiff. The stock was sold to the maker of the note by an agent. The Georgia statute provided that all promissory notes given for the purchase of stock in any incorporated company and sold by a traveling salesman or agent should have expressed on its face the consideration therefor. It was held that actual notice to the purchaser of the note that it was given for the purchase of stock in a corporation which was sold by an agent was as effective to put the purchaser of the note upon notice that he was taking it subject to the equities between the original parties as if the consideration had been expressed upon the face of the note.

[8-13] Neither of the above cases supports respondents' contention. Under the law of this state, to constitute notice of an infirmity in a negotiable instrument, or a defect in the title of the person negotiating the same, the person to whom it is negotiated must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith; and mere knowledge of facts sufficient to put a prudent man upon inquiry without actual knowledge, or mere suspicion of an infirmity or defect of title, does not preclude the transferee from occupying the position of a holder in due course, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith. *Goodale v. Thorn*, 199 Cal. 307, 249 P. 11. While parts of the testimony tended to show that two of the notes were procured by fraudulent representations as to the financial condition of the payee corporation, there was no finding that that was the case; nor would such a finding, if made, have been sufficient alone to sustain the conclusion that the endorsee bank was not an innocent holder. The rule is well settled that the indorsee of a promissory note as security for a pre-existing debt is a holder for value in the usual course of business (*Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318; *Smitton v. McCullough*, 182 Cal. 530, 189 P. 686; *Hunt v. Glassell*, 47 Cal. App. 774, 191 P. 373; *Griswold v. Morrison*, 53 Cal. App. 93, 200 P. 62; *People's State Bank v. Penello*, 59 Cal. App. 174, 210 P. 432; *Williams v. Walker*, 66 Cal. App. 672, 226 P. 939); and, as held in *Goodale v. Thorn*, supra, and *Blochman Commercial, etc., Bank v. Moretti*, 177 Cal. 256, 170 P. 419, when these facts are shown, unless the evidence shows that the note was taken under circumstances creating the presumption that

the indorsee knew the facts impeaching its validity, the burden is cast upon the defendant to show that the indorsee took with notice of the defendant's equities. The facts which the bank knew were quite similar to those in *People's State Bank v. Penello*, 67 Cal. App. 103, 227 P. 190, where it was held that the same furnished no sufficient ground for the inference that the bank had knowledge of the fraudulent inception of the notes at the time they were endorsed. And here the facts found furnish no evidence of actual knowledge of the infirmity or defect; nor do they necessarily or even reasonably support the conclusion that the bank's representative was as a prudent man thereby put upon inquiry, or that the acceptance of the note under the circumstances amounted to bad faith.

It is our conclusion that the findings are insufficient to support the conclusions of law or the judgments appealed from. The judgments are, accordingly, reversed.

109 Cal. App. 667

ELLIS v. McNEESE.

Civ. 4210.

District Court of Appeal, Third District,
California.

Nov. 19, 1930.

1. Landlord and tenant ⇨164(1).

In absence of fraud, concealment, or covenant in lease, landlord is not liable for injuries from defective premises.

2. Landlord and tenant ⇨164(6).

To be liable for defective premises, landlord must have knowledge thereof; proof that defect was discoverable with reasonable care being insufficient.

3. Landlord and tenant ⇨162.

Landlord who reserves portion of premises for common use by himself and tenants, or by different tenants, must use ordinary care to keep such portions safe, and is liable to tenant, injured while putting premises to reasonably intended use.

4. Landlord and tenant ⇨169(11).

If landlord reserved stairway for common use of different tenants, and clothesline was attached when leased, it became question of fact whether he should have contemplated probability of tenant's leaning against railing to take clothes from line.

5. Landlord and tenant ⇨164(1).

If lessee, rather than landlord, reserved stairway for common use by sublessees, land-

lord was not obligated to keep stairway safe, or liable to sublessee injured by defective railing.

6. Appeal and error ⇨1064(2).

Instruction stating rule, and erroneously implying evidence warranted application, was prejudicial.

7. Trial ⇨191(1).

Instruction assuming existence of fact, improperly withheld from jury, *held* erroneous.

8. Landlord and tenant ⇨164(1).

Where landlord reserved no part of stairway for himself or other tenants, ordinary landlord tenant relationship existed, to which rule of caveat emptor applies.

9. Trial ⇨251(1).

Instruction submitting immaterial issue, impliedly authorizing recovery thereon, *held* erroneous.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Walter Ellis against Samuel J. McNeese: Judgment for plaintiff, and defendant appeals.

Reversed.

J. Wiseman Macdonald, of Los Angeles, for appellant.

Rosecrans & Emme and Bayard R. Rountree, both of Los Angeles, for respondent.

Mr. Presiding Justice FINCH delivered the opinion of the court.

This is an appeal by the defendant from a judgment in favor of the plaintiff for damages on account of personal injuries alleged to have been caused by the defendant's negligence.

There is little conflict in the evidence. At all the times mentioned herein the defendant was the owner of a three-story building, divided into six flats, each flat having both a front and rear entrance. From a photograph contained in the transcript, showing the rear end of the building, and also from the testimony of the plaintiff, it appears that an independent outside stairway was provided for each of the flats in the second and third stories. For six or seven years before, and at the time of the accident, Mrs. Norma Vir Den held a lease on three of the flats, one on the second floor, one on the third, and the location of the third flat not appearing from the evidence. The plaintiff and his family resided in one of the flats on the third floor, under a sublease from Mrs. Vir Den. The rear stairway leading down from the plain-

tiff's flat had a guard rail on either side thereof, consisting of a 2 by 4 inch scantling, apparently 16 or 18 feet in length, toenailed at either end thereof to upright 4 by 4 inch posts, and further supported by very light spindles toenailed to the treads of the stairs. Attached to the outer guard rail, about 3 feet from the upper end thereof, was a pulley constituting one end of "a pulley type clothes line," the pulley at the other end being attached "to the back fence." This clothesline was in use at the time Mrs. Vir Den took possession.

The plaintiff testified: "In the evening of that day I was taking some clothes off the line * * * and just as I got the clothes over here to where I could get them off the line * * * this guard rail gave way with me and I dropped three stories to the ground. * * * The line did not stick in any way. It pulled in easily. * * * When I went to reach for the clothes to get them, I had to lean against this banister to a certain extent, because I had to reach over to get my clothes. * * * As near as I can figure, I didn't have any weight at all, hardly, against the rail."

The plaintiff also testified: "Other persons besides myself and family used that stairway." His wife testified to the same effect. There is no evidence that other tenants used the stairway in question or that it was designed or intended to be used by tenants of other apartments. Mrs. Vir Den testified that no part of the premises were reserved for the defendant.

[1, 2] "In the absence of fraud, concealment, or covenant in the lease, a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises." 15 Cal. Jur. 704; Gately v. Campbell, 124 Cal. 520, 57 P. 567; Toner v. Meussdorffer, 123 Cal. 462, 56 P. 39; Daley v. Quick, 99 Cal. 179, 33 P. 859; Farber v. Greenberg, 98 Cal. App. 675, 277 P. 534; Nelson v. Myers, 94 Cal. App. 66, 270 P. 719; Priver v. Young, 62 Cal. App. 405, 216 P. 966. It is not sufficient to show that by the exercise of reasonable care the landlord could have discovered the defective condition, but in order to hold him liable it must appear that he knew of such defect. Ayres v. Wright (Cal. App.) 284 P. 1077.

[3] A qualification of the foregoing rule is that, "where a portion of the premises is reserved by the landlord for use in common by himself and tenants, or by different tenants, a duty is imposed upon him to use ordinary care to keep those particular portions of the premises in a safe condition; and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor." Hassell v. Denning, 84 Cal. App. 479, 482, 258 P. 426, 427; Brown

v. Pepperdine, 53 Cal. App. 334, 336, 200 P. 36. This qualification, however, does not apply unless the injury occurred while the injured party was putting the unsafe portion of the premises to a use reasonably intended. Smelser v. Deutsche Evangelische, etc., 88 Cal. App. 469, 475, 263 P. 838; De Motte v. Arkell, 77 Cal. App. 610, 626, 247 P. 254; Shellman v. Hershey, 31 Cal. App. 641, 650, 161 P. 132; Durkin v. Marshall Field & Co., 161 Ill. App. 505; Glain v. Sparandeo, 119 La. 339, 44 So. 120; Orcutt v. Kittery Point Bridge Co., 53 Me. 500; Stickney v. City of Salem, 3 Allen (Mass.) 374; Eisenhower v. Ceppl, 238 Mass. 458, 131 N. E. 184; Kinney v. Onsted, 113 Mich. 96, 71 N. W. 482, 38 L. R. A. 665, 67 Am. St. Rep. 455; Kelley v. Lawrence, 195 Mo. 75, 92 S. W. 1158; Walsh v. Frey, 116 App. Div. 527, 101 N. Y. S. 774; Kucera v. Grigsby, 24 Ohio App. 457, 156 N. E. 249; Gavin v. O'Connor, 99 N. J. Law, 162, 122 A. 842, 30 A. L. R. 1383; Robinson v. Leighton, 122 Me. 309, 119 A. 809, 30 A. L. R. 1386; Landers v. Brooks, 258 Mass. 1, 154 N. E. 265, 49 A. L. R. 562. In many of the cases cited, the alleged injuries resulted from leaning against defective railings. Some of the cases were not actions between landlords and tenants but between parties in such relations that the defendants were under obligation to exercise reasonable care for the safety of the plaintiffs. Powers v. Raymond, 197 Cal. 126, 239 P. 1069, is a case analogous in point of law.

[4, 5] There are other cases holding that, under the particular facts and circumstances thereof, it was a question of fact whether leaning on a railing was one of the intended uses thereof. Pavlovchik v. Lupariello, 101 Conn. 567, 127 A. 18; Price v. Florsheim, 13 La. App. 298, 127 So. 22; Urserleo v. Rosengard, 248 Mass. 542, 143 N. E. 497; McGinley v. Alliance Trust Co., 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334. If the defendant reserved the stairway involved in this case for the use of other tenants in common with the plaintiff, thereby becoming bound to use ordinary care to keep it in a safe condition, and if the clothesline was in place at the time he leased the three flats to Mrs. Vir Den, then it became a question of fact whether he should have contemplated that a tenant would probably lean against the railing in drawing in clothes on the line. On the other hand, if there was no such reservation, then the defendant can be held liable only on proof of a hidden defect of which he had knowledge and which the injured tenant did not know. There is an entire absence of proof tending to show that there was any such reservation. If Mrs. Vir Den rented the two flats on the third floor from the defendant, then he was under no obligation to keep the stairway in a safe condition, even if she reserved the common use of the stair-

way for both tenants on that floor. Such a reservation would be hers and not that of the defendant.

[6] The court instructed the jury that: "Where a portion of the premises is reserved by the landlord for use in common by different tenants, a duty is imposed upon him to use ordinary care to keep those particular portions of the premises in a safe condition; and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor." The giving of this instruction was prejudicially erroneous in that it implies, contrary to the evidence, that there was proof of such reservation.

[7] For like reasons it was error to instruct the jury that: "You are the sole judges of the fact as to whether the plaintiff and the defendant, or either of them, had notice of the circumstances sufficient to put a prudent man upon inquiry as to the defective condition of the stairway and guard rail, and whether by prosecuting such inquiry he should have learned of such fact." This instruction implies that it was the duty of the defendant to keep the stairway in a safe condition, and assumes that it was in a defective condition. It was a question of fact for the jury to determine whether the railing was in a safe condition for the uses for which it was intended.

[8] Another instruction stated: "If you find from the evidence that the defect or insufficiency of the railing of the stairway which caused it to give way was of such a nature that it could not, by the use of ordinary care, be ascertained or known by the plaintiff, but that it was known or should have been known by the defendant, then you must find that the defendant was guilty of negligence." This instruction, not only assumes that the railing was defective, but, contrary to the decision in *Ayres v. Wright*, supra, states that the defendant was guilty of negligence if such defect "should have been known" to him. Since it does not appear that the defendant reserved any part of the stairway for the use of himself or other tenants, his relation to the plaintiff is the ordinary one of landlord and tenant, to which the rule of caveat emptor applies. *Toner v. Meussdorffer*, supra. That rule would be robbed of all its force if the landlord were to be held liable for hidden defects of which he had no knowledge but of which he could have learned by reasonable investigation.

[9] In another instruction it is stated: "If you find that the greater weight of all the evidence is in favor of the negligence of the defendant, * * * you should accept that as a proved fact in the case, while, if the evidence on that issue is * * * evenly

balanced or preponderates against such negligence, it is not proven, and you should find that the defendant was not negligent." This instruction clearly implies that if the defendant was negligent the jury should find for the plaintiff. As stated, under the facts proved, the question of the defendant's negligence is not a material issue. The question for the jury to determine, under such facts, was whether the defendant was guilty of concealment, whether he knew of the alleged defects and failed to disclose them.

Other grounds urged for a reversal of the judgment, which are not covered by what has been said herein, are sufficiently answered by the authorities cited in respondent's brief, and therefore they need not be discussed.

The judgment is reversed.

109 Cal. App. 695

MONTGOMERY v. GLOBE GRAIN & MILLING CO. et al.

Civ. 73.

District Court of Appeal, Fourth District, California.

Nov. 19, 1930.

Rehearing Denied Dec. 12, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

1. Automobiles ⇨245(9).

In action by railing painter injured on bridge approach when stage and truck collided, evidence held to support nonsuit in favor of truck owner.

There was no evidence indicating that there was any negligence on part of truck driver. Truck was proceeding upon its own right-hand side of road at speed of not more than 15 miles per hour, and when it arrived opposite plaintiff upon its own side of road, its left front fender was brushed by left front fender of stage; injury to plaintiff apparently being caused by stage pulling sharply to right to avoid more serious collision and pinning plaintiff to guard rail, injuring him.

2. Appeal and error ⇨277.

Erroneous instruction is error of law deemed excepted to as matter of law (Code Civ. Proc. § 647).

3. Trial ⇨285.

Instruction must relate to and be measured by circumstances of case in which given.

4. Appeal and error ⇨837(6).

On appeal from order granting new trial, court may consider whole evidence to determine whether instruction was error.

5. Automobiles ⇨194(2).

Under contract, owner of stage *held* not "independent contractor," as regards stage company's liability for injuries to bridge railing painter.

Contract between stage company and owner provided that company agreed to maintain depots and agencies to handle passengers, to give owner schedule of departures and not to sell transportation for other schedule until owner's bus was filled to capacity nor operate other busses on his run, and to pay owner certain compensation per passenger or per mile. Owner agreed to place such equipment into service, was required to operate on schedules over route and with equipment and drivers required by company, to maintain equipment satisfactorily, carry no other passengers, report accidents, reserve to company general supervision over operation, and agreed that contract should be construed as a lease.

[Ed. Note.—For other definitions of "Independent Contractor," see Words and Phrases.]

6. New trial ⇨6.

Much is committed to trial court's discretion in considering grounds for new trial.

7. Appeal and error ⇨979(2).

Granting new trial, evidence indicating directed verdict should not have been given for defendant, *held* not abuse of discretion.

Appeals from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Joseph H. Montgomery against the Globe Grain & Milling Company, Yellowway, Incorporated, and the California Highway Indemnity Exchange. From a judgment of nonsuit in favor of defendant first named, plaintiff appeals; and from an order granting a new trial as to the other defendants after judgment in their favor, they appeal.

Affirmed.

L. Kearney, of Los Angeles, for appellant plaintiff.

B. P. Gibbs, of Los Angeles, appellants defendants.

A. G. Ritter and H. P. Hibbard, both of Los Angeles, for respondent.

MARKS, Acting P. J.

This is an action for damages for personal injuries alleged to have been suffered by the plaintiff in an automobile accident in San Bernardino county on the 25th day of June, 1927. The case was tried before a jury. At the close of the plaintiff's case a motion for

nonsuit was granted in favor of the Globe Grain & Milling Company. A judgment was later entered in favor of this company, from which the plaintiff has appealed. At the close of the evidence, upon motion of Yellowway, Inc., and California Highway Indemnity Exchange, an instruction was given directing the jury to return a verdict in favor of these defendants, and judgment was entered in their favor. The plaintiff then moved the court for a new trial as to all defendants. The motion was denied as to the Globe Grain & Milling Company and granted as to the other defendants, who thereupon took an appeal. We therefore have before us two appeals, one by the plaintiff from the judgment of nonsuit in favor of the Globe Grain & Milling Company, and the other by the defendants from the order granting the plaintiff's motion for new trial. These appeals are prosecuted upon one record.

The accident causing the injuries to the plaintiff occurred upon the approach to a bridge over the Mohave river, between Victorville and Oro Grande in San Bernardino county. The plaintiff was employed by the highway department of the state of California and was engaged in painting the railing on the westerly side of the approach to this bridge. He was standing with his feet in the road leaning forward with his head and part of his shoulders under the rail. The bridge runs in a general northerly and southerly direction. The roadway, after leaving the northerly end of the bridge, makes a curve to the west, and at the point of the accident it was eighteen feet in width between the guard rails. A truck belonging to the Globe Grain & Milling Company crossed the bridge proceeding northerly and when its front was opposite the plaintiff it came into collision with a stage approaching the bridge from around the curve. This stage bore upon its side the names "Mohawk" and "Yellowway." As the left front fender of the stage brushed the left front fender of the truck, the stage was pulled sharply to the right and pinned the plaintiff to the guard rail, breaking his legs and otherwise seriously injuring him.

The motion for nonsuit made in behalf of the Globe Grain & Milling Company was granted upon the ground that there was no evidence of any negligence on the part of this company. Whether or not this judgment is supported by the evidence is the sole question to be decided upon plaintiff's appeal.

[1] We have examined the record carefully and can find no evidence of any negligence on the part of the Globe Grain & Milling Company or the driver of its truck. The truck was proceeding upon its own right-hand side of the road at a speed of not more than fifteen miles per hour. It was seen by plaintiff when it was at a distance of about two hundred feet

from him. When it was opposite him and proceeding at a lawful speed upon its own side of the road its left front fender was brushed by the left front fender of the stage. The injury to plaintiff was apparently caused by the stage pulling sharply to the right to avoid a more serious collision with the truck. There being no evidence indicating that there was any negligence on the part of the driver of the truck of the Globe Grain & Milling Company, the judgment in its favor must be affirmed.

Hereafter in this opinion in considering the appeal of Yelloway, Inc., and California Highway Indemnity Exchange, we will refer to them as appellants, and to the plaintiff as the respondent.

Yelloway, Inc., was a corporation organized and existing under and by virtue of the laws of the state of Colorado, and California Highway Indemnity Exchange was an incorporated association organized for the purpose of insuring its members against claims for loss or damage resulting from motor vehicle accidents. It had written a policy of insurance upon the stage involved in this action under the terms of which it was made a defendant.

Yelloway, Inc., was engaged in selling transportation by motorbus to passengers between the cities of Denver and Los Angeles. It maintained an office in the city of Denver, at which tickets were sold to many of the passengers who were upon the bus at the time of the accident. The stage was registered in the name of W. C. Olson as registered owner and the Mack International Truck Corporation as the legal owner. Olson had been made a defendant in the action, but as he had not been served with summons the case against him was dismissed.

The motion for new trial was made by respondent upon the grounds of the failure of the evidence to support the verdict, and that the verdict was contrary to the evidence, and for errors of law occurring during the trial. The order granting the motion for new trial was general in its terms and did not specify that it was granted upon the grounds of the insufficiency of the evidence to sustain the verdict. Appellants contend that as this order was general in its terms this court cannot now review the evidence to determine whether or not the instruction by the trial court to the jury directing it to return a verdict in favor of these appellants was contrary to or was supported by the evidence. They maintain that this instruction was a conclusion of law drawn by the trial court from the evidence and does not constitute such error of law as will furnish grounds for a reversal of the judgment..

[2, 3] It is a well-settled rule of law in California that an erroneous instruction given by the court to the jury is an error of law that is considered excepted to as a matter of law. Section 647, Code Civ. Proc. While an in-

struction gives the law of the case to the jury, its applicability, and oftentimes its correctness, depends upon the evidence in the case. An instruction should not be considered as merely an abstract statement of a principle of law, but it must relate to and be measured by the circumstances of the case in which it was given. To determine the question of whether there was any error in giving it frequently requires an examination of the evidence in the case. *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 776, 89 P. 1109; *Shipley v. San Diego Electric Ry. Co.* (Cal. App.) 289 P. 662. In the case of *Sullivan v. Market Street Ry. Co.*, 136 Cal. 479, 69 P. 143, the question involved was similar to the one which we are considering. In the *Sullivan Case* it was said:

"This is an appeal from an order granting a new trial. The order reads as follows: 'In this action, the plaintiff's motion for a new trial herein having been argued and submitted, now, by the court, it is ordered that said motion be, and the same is, hereby granted, for the reason only that the court erred in giving, as modified, defendant's instruction relative to the presumption of negligence, being the instruction to which plaintiff's exception No. 7 was reserved in the statement on motion for new trial herein.' * * *

"By the above instruction, the judge in effect said to the jury that, in his opinion, there was not sufficient evidence to establish the charge of negligence against the defendant, and thus violated the provision of the constitution forbidding him to charge the jury 'with respect to matters of fact.' Upon his attention being called thereto, upon the motion for a new trial, he very properly set the verdict aside. Moreover, the instruction is practically the equivalent of a direction to the jury to find for the defendant, and evidently they so understood it; and unless the testimony in favor of the contention, on the part of the plaintiff, that it was the fault of the motorman that the accident occurred, was so slight as not to justify the case being submitted to the jury, the instruction should not have been given. The judge of the court below, therefore, in granting a new trial must have been of the opinion that there was sufficient testimony in favor of the plaintiff to justify the case being submitted to the jury. To reverse the order of that court, under the circumstances, this court would have to hold, against the opinion of the trial judge, that the testimony was insufficient to warrant the case going to the jury. This brings the case within the general rule that the appellate court will not disturb the action of the trial court based upon a substantial conflict in the evidence."

[4] To the same effect are the cases of *Hampton v. Occidental, etc., Co.*, 139 Cal. 706, 73 P. 579; *Jansson v. National Steamship Co.*, 189 Cal. 187, 208 P. 90; *Dunne v. Hines*,

50 Cal. App. 345, 195 P. 276. We therefore conclude that the giving of an erroneous instruction is an error of law and that to determine whether there was any error committed in the giving of such instruction this court may consider all of the evidence in the case.

[5-7] The sole question involved in this appeal, and the one which apparently influenced the trial court in granting the motion for new trial, is whether the stage driven by Olson and which injured the plaintiff, was under the control of the appellant Yellowway, Inc. In order to determine whether the court erred in giving its instruction to the jury to return a verdict for appellants we must consider the evidence bearing upon this question.

We find in the record a written contract executed by Yellowway, Inc., and the Western Auto Travel Agency, Inc., as the first parties and W. C. Olson as the second party. This contract particularly set forth the terms under which Olson operated, and from this contract it appears that the parties of the first part had spent large sums of money in advertising their routes of transportation and had established a sufficient volume of business to warrant the operation of additional busses between the destinations named. They agreed to maintain suitable depots, offices, and agencies in Denver and Los Angeles to handle passengers; to advertise the bus equipment used in the business, including the equipment of Olson, and to sell tickets over his run at their own expense; to give Olson his schedule of departures from the terminals upon his run and not to sell transportation for any other schedule until Olson's bus was filled to capacity, nor to operate any other busses on his run. Olson was to be paid \$20 for each passenger transported between the terminals and 2 cents per mile for passengers transported between intermediate points. Olson agreed to place his bus equipment upon the run between Denver and Los Angeles and to provide bus equipment for each schedule of departure required by the first parties. He was required to operate on the schedules and over the route established by the first parties and with equipment and drivers satisfactory to them; to maintain his equipment in good mechanical condition, clean and in presentable appearance satisfactory to the first parties. Olson further agreed to have his bus equipment distinctly painted and lettered according to the directions of the first parties and to conform to any changes in this regard requested by them. He further agreed to carry no passengers except those provided by the first parties and to accept and transport all passengers provided by them and to deliver such passengers to their respective destinations upon the schedules established by them. They were also given an option to purchase Olson's equipment, and, further, they were given the right to transfer Olson and his equipment to any

other run which in the opinion of their officers might prove more profitable. Olson was required to report to the first parties any accident in which his bus participated. The contract reserved to the first parties general supervision over the operation of the Olson bus and contained the following paragraph:

"This contract shall be construed as a lease on said equipment from second party (Olson) to first parties (Yellowway, Inc., and The Western Auto Travel Agency Inc.) with all rights or priority for use of the highway, and all rights of operations upon which a franchise might be applied for shall accrue to the parties of the first part."

This contract bore the signatures of Yellowway, Inc., by R. W. Taggart, president, and the Western Auto Travel Agency Inc., by R. W. Taggart, president.

On the trip in question the bus left a Yellowway station or office in Denver where the passengers had purchased their tickets and had the name "Yellowway" painted on its sides.

Appellants contend that under the terms of the contract Olson was an independent contractor, and he being such, no liability attached to Yellowway, Inc. "An independent contractor * * * is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 183 P. 178, 183. The right or power to control the activities of one by another is the element which distinguishes the relation of employer and employee and that of independent contractor. *Press Pub. Co. v. Industrial Accident Com.*, 190 Cal. 114, 210 P. 820.

In the case before us it appears from the contract that Yellowway, Inc., reserved such right of control over the operations of Olson that we believe he cannot be considered an independent contractor transporting passengers for hire. This is evidently the conclusion reached by the trial court in granting the motion for new trial. Much is committed to the discretion of the trial court in considering grounds for new trial. *Thompson v. California Construction Co.*, 148 Cal. 35, 82 P. 367. Under the facts of this case we cannot say that the court below abused its discretion in granting the motion in so far as these appellants are concerned.

The judgment in favor of the Globe Grain & Milling Company is affirmed. The order granting a new trial as to the defendants Yellowway, Inc., and California Highway Indemnity Exchange is affirmed.

I concur: BARNARD, J.

Mr. Justice pro tem. WARMER, deeming himself disqualified, does not participate herein.

110 Cal. App. 198

HERSH et al. v. GARAU et ux. (McCONNELL et al., Interveners).

Civ. 7490.

District Court of Appeal, Second District,
Division 1, California.

Dec. 4, 1930.

1. Appeal and error ⇨417(1).

Notice of appeal to confer jurisdiction need not specifically designate court to which appeal is taken.

2. Appeal and error ⇨412.

Record on defendants' appeal, in action for breach of contract, *held* to sufficiently establish right of named attorney to give notice of appeal.

Answer of defendant to complaint in intervention was signed by attorney who gave notice of appeal, but his name did not appear on answer to complaint. It further appeared by recitals in the findings of fact and in the judgment that the defendants were represented at the trial by a member of a certain law firm and attorney in question.

3. Appeal and error ⇨766.

Appellants' failure to give references in brief to pages of transcript from which excerpts of testimony were taken *held* not to warrant affirmance of judgment (Code Civ. Proc. § 953c; District Court of Appeal Rules, Rule 8).

4. Appeal and error ⇨763.

Appellants' motion to file supplemental brief, obviating objection to original that references to transcript from which excerpts of testimony were taken were omitted, was denied (Code Civ. Proc. § 953c; District Court of Appeal Rules, Rule 8).

Appeal from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Action by Sara F. Hersh and husband against Aurelio Garau and wife, wherein Allen R. McConnell, as trustee in bankruptcy of Green Mill, Inc., and Ellis I. Hirschfeld separately intervened. On plaintiffs' motion to dismiss the appeal, and motion to affirm the judgment.

Motion to dismiss the appeal denied, and motion to affirm the judgment denied on condition.

Haas & Dunnigan, Walter F. Haas, and W. E. McClintock, all of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents.

CONREY, P. J.

[1] The grounds of motion to dismiss are that in the notice of appeal there was no statement naming the court to which the appeal was taken, and that the notice of appeal is fatally defective because not signed by an attorney of record of the appealing parties. Specific designation of the court to which the appeal was taken was not necessary to vest in the proper court jurisdiction of the appeal. *Rabe v. Lloyd*, 187 Cal. 282, 201 P. 598.

[2] The notice of appeal was signed by the attorneys as follows: "Walter F. Haas, W. E. McClintock, by W. E. McClintock." It is contended by respondents that McClintock was not an attorney of record, and therefore was without authority to give a notice of appeal in the action. In the clerk's transcript, it appears that the answer of defendants Garau to the complaint in intervention was signed by Haas & Dunnigan, W. E. McClintock, by W. E. McClintock. It is true that the name of McClintock was not signed to the answer of the same defendants to the previously filed answer of the defendants to the plaintiffs' complaint. It further appears by recitals in the findings of fact and in the judgment of the court that the said defendants Garau were represented at the trial by the law firm of Haas & Dunnigan by Walter F. Haas and W. E. McClintock. We think that this record is sufficient to establish the right of Mr. McClintock to act in the matter of giving notice of appeal from the judgment.

[3, 4] The motion to affirm the judgment is based upon the ground that the opening brief of appellants does not comply with the provisions of section 953c of the Code of Civil Procedure, and does not comply with the requirements of rule 8 of this court in this: That included in sundry specified pages of the brief are numerous pages of excerpts of testimony where no reference is given to the line or page of the typewritten transcript. In the said brief there are a considerable number of instances wherein statements of testimony are given or quotations of testimony are given without specifying the page of the transcript where this testimony would be found. In some other instances the proper citation is made. The brief was in this respect carelessly prepared, and was not as free from objections presented against it as was the brief considered by us in *Pacific States Corporation v. Rosenshine*, 290 P. 609. In response to the motion to affirm, appellants have filed a counter motion that they be permitted to file a supplemental brief which they have tendered for filing in order to obviate the force of the objections made against their first brief. We find no sufficient reason for granting this motion. No good reason is offered for the filing of a supplemental brief. The record of the trial is contained in two very large volumes.

It is not reasonable for appellants to call upon opposing counsel in the preparation of their brief, or to call upon this court in its examination of appellants' brief, to examine a supplemental brief for the purpose of tracing the unidentified quotations contained in the opening brief. The method proposed by appellants would only create additional confusion and cause additional waste of time. We do not think, however, that it is in the interest of justice that we should punish appellants for the inadvertent omissions of counsel by affirming the judgment, where an inspection of the opening brief satisfies us that counsel have acted in good faith, although without due diligence in the preparation of their brief.

The motions are denied.

It is ordered that appellants be allowed fifteen days from the filing of this order, within which time they may interline in their filed opening brief all of the omitted citations of pages and lines of the portions of record referred to by them, and serve upon opposing counsel a new and complete copy of their brief as thus corrected and amended. If appellants fail to act in conformity with the permission thus given, an order will be entered affirming the judgment.

We concur: YORK, J.; HOLLZER, Justice pro tem.

110 Cal. App. 221

UNDERHILL v. PETERSON.

Civ. 168.

District Court of Appeal, Fourth District,
California.

Dec. 4, 1930.

1. Appeal and error §757(1).

Statute requiring appellant to print portions of record relied on for reversal is mandatory (Code Civ. Proc. § 953c).

2. Appeal and error §931(1).

On appeal, every substantial conflict in evidence must be resolved in favor of finding.

3. Appeal and error §1010(1).

Fact findings are conclusive upon appellate court, if supported by any evidence in record.

4. Automobiles §244(6).

Evidence, especially in view of ordinance, held to support finding driver of automobile in noncommercial section, striking pedestrian crossing street, where there was no crosswalk, was not negligent.

Evidence tended to show that pedestrian collided with rear of automobile when she was crossing at place where there was no crosswalk, in noncommercial section of city. Ordinance provided that outside business district no pedestrian should cross roadway other than at right angles to curb, and in crossing at place other than crosswalk should yield right of way to all vehicles. Violation of ordinance was declared misdemeanor.

5. Negligence §83.

Application of "last clear chance" doctrine stated.

Doctrine applies where injured party has placed himself in position of danger from which he cannot extricate himself or of which he is absolutely unconscious, and injuring party, seeing or knowing facts from which reasonable man would believe other to be in peril, and being able to avoid injury by use of ordinary care, fails to use such care and thereby causes injury.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words and Phrases.]

6. Automobiles §227(3).

"Last clear chance" doctrine held not to apply where pedestrian's peril, created by her negligence, arose when it was too late for motorist to avoid collision.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Nannie J. Underhill against Gus A. Peterson. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

Burton E. Hales, of Redlands, for appellant.

Swing & Wilson, of San Bernardino, for respondent.

WARMER, Justice pro tem.

This is an appeal by the plaintiff from a judgment against her in an action to recover damages caused by plaintiff's colliding with the defendant's automobile while she was crossing a public street in the city of Redlands, county of San Bernardino, Cal. The case was tried without a jury, and the court found among other things:

"I. The court hereby finds that at the time and place referred to in plaintiff's complaint, one W. E. Holmlund was driving and operating an automobile belonging to the defendant. The court further finds that it is not true that said W. E. Holmlund was driving and operating said automobile in a careless, negligent, and illegal manner. The court further finds

that said W. D. Holmlund was then and there driving and operating said automobile in a careful and prudent manner and that the plaintiff then and there ran into and collided with said automobile near the rear right wheel thereof and by reason of such collision, the said plaintiff was thrown to the roadbed of the highway, and thereby sustained the injuries set forth in Paragraph I of Plaintiff's complaint.

"II. * * * The court further finds that none of the injuries received and none of the damage sustained by plaintiff was caused by the negligence or careless operation of said automobile by said W. E. Holmlund or by the defendant. * * *

"IV. The court further finds that the said plaintiff, at the time and place referred to in said complaint, was guilty of contributory negligence and then and there failed to exercise reasonable or any care for her own safety, and did then and there negligently and carelessly proceed from a position of safety into said public highway in the pathway of said automobile therein referred to, and exposed herself to danger from said automobile and other vehicles then and there traveling upon said highway, and then and there recklessly, negligently and carelessly ran into and collided with said automobile referred to in said complaint; that any injuries alleged to have been sustained by the plaintiff, as set forth in said complaint, were caused by the negligent acts of the plaintiff, aforesaid, and resulted from the contributory negligence of the plaintiff, as herein set forth."

The accident occurred on Colton avenue in said city of Redlands. Colton avenue is a public street running east and west. Berkeley drive is a public street running into the said Colton avenue. However, it does not extend south of Colton avenue. The point of impact was about 100 feet west of Berkeley drive on said Colton avenue. The defendant's employee was driving the defendant's automobile west on said Colton avenue. Plaintiff had been across the street from her home on the south side of Colton avenue visiting with some friend, and just after the time the street lights were turned on she arrived at a point on the north side of Colton avenue where she desired to cross said avenue on her way to her home. There was no crosswalk at the place. There were only two persons who saw what happened, plaintiff and defendant's employee, who was driving the car. There was a pepper tree near the north curb of said Colton avenue about the place where plaintiff started to cross said avenue, said tree having a spread of about 8 feet. East of said tree was a weir box. Plaintiff was standing a little west of said tree and nearly underneath it between the curb and the sidewalk. A number of cars passed while plaintiff waited at this point. When plaintiff thought it was

safe she began to cross the street, moving in a slightly diagonal direction to the southwest. Said Colton avenue is paved and is 45 feet wide.

Plaintiff testified in part as follows:

"I was watching the car that came from the west. * * * I never saw this car coming.

"Q. After you entered you did not look, did you? A. No.

"* * * A. I didn't see it until it was right on me."

Defendant's employee testified in part as follows:

"Q. What sort of a vehicle was it? A. Dodge touring. * * *

"Q. * * * did it have any special equipment? A. Well, the side of the top is—I think they call it a California top.

"Q. What was the condition of your automobile mechanically? A. Good.

"Q. And what was the condition of the top of the automobile? A. It was good.

"* * * A. I should say she was about a hundred feet below Berkeley drive standing just off the curb.

"Q. When you say a hundred feet below, tell us the directions. A. West.

"Q. Were the street lights burning at that time? A. Yes, sir.

"Q. And you saw Mrs. Underhill where was she standing? I mean the first time? A. About a yard from the curb in the street.

"Q. Did she continue to stand there or did she move? A. She stood there until I was closer to her and then she moved.

"Q. And then from that point on tell us what happened? A. Well, the car that was meeting me passed and she started to walk so I bore to the left, which is south, and blew the horn and as I did that she started to run and I was practically almost opposite her at the time and it seems as though she ran into that rear curtain.

"Q. With what results? A. It broke it.

"Q. Broke what? A. The glass in the curtain. * * *

"Q. It is up above the back seat, however, isn't it? A. Yes, sir.

"Q. In addition to breaking the glass in the curtain, what else did it break? A. It tore the fabric around this bolt.

"Q. And aside from these two things that happened to the curtain, what else was damaged on your car? A. Nothing that I know of. * * *

"Q. About how fast were you traveling when you first saw Mrs. Underhill west about a hundred feet from where you were? A. About 20 miles an hour.

"Q. Did you continue that speed or reduce it? A. I reduced it.

"Q. When did you reduce it? A. As I started to turn towards the left.

"Q. How far were you from Mrs. Underhill, approximately, when you started to turn towards the left—just before that, about how far were you traveling from the north curb as you came westerly there, approximately? A. I should say about 5 feet, maybe.

"Q. How far were you away from Mrs. Underhill when you swerved to the left? A. About 50 feet.

"Q. When did you blow your horn? A. Just as she started walking. It was while I started to turn to the left. * * *

"Q. Now then, she didn't run into the front end of your car did she? A. She ran into the back end. * * *

"Q. And about how far had Mrs. Underhill gone to cross the street when you blew your horn? A. When I first saw her she was about a yard off the curb.

"By the Court:

"Q. Moving or standing? A. No, standing when I first saw her but then she took a few steps before I blew the horn so she would be that distance away from the curb.

"By Mr. Hales:

"Q. That is, when you blew the horn, you say she was about how far from the curb when you first saw her? A. A yard.

"Q. And she took a few steps and then you blew the horn and what did she do after you blew the horn? A. Proceeded to run.

"Q. How fast were you traveling? A. At that time I would say about 15 miles an hour. * * *

"Q. Did you try to stop your automobile? A. No; I slowed up but I expected Mrs. Underhill to stand there; she was stopped there and waiting for this other car to go by.

"Q. Which way was the other car going? A. It was going east.

"Q. Where were you on Colton avenue when you commenced to turn to the left? A. I would say I was about 20 feet from Mrs. Underhill.

"Q. That is about the time you blew the horn? A. Yes. * * *

"Q. Why didn't you go behind her? A. There was not room.

"* * * A. She was not there all the time. * * *

"Q. Were there any marks or anything on the side of your car besides this glass and the curtain that was broken? A. Not that I saw.

"Q. What happened to the fabric of that curtain? A. It was torn. * * *

[1, 2] The glass broken from the rear side window was found to be somewhat to the north of the center of the said Colton avenue. Respondent moves this court for an affirm-

ance of the judgment for failure of the appellant to comply with the provisions of section 933c of the Code of Civil Procedure and cites a number of authorities in support of his motion. The appellant's brief contains a very small portion of the evidence. It is questionable if it complies with said section. The attention of the bar has been directed repeatedly to the mandatory character of the provisions of said section. *Jeffords v. Young*, 197 Cal. 224, 239 P. 1054; *Estate of Berry*, 195 Cal. 354, 233 P. 330; *Dahlberg v. Dahlberg*, 202 Cal. 295, 260 P. 290; *Bryant v. Kelly*, 203 Cal. 721, 265 P. 817. We have cited the above cases to again call the attention of the bar to the mandatory character of the provisions of said section. In the instant case the motion is denied. The record being short, we have concluded to decide the case upon its merits. In *Emerick v. Johnson*, 64 Cal. App. 460, 221 P. 675, 676, the court, in speaking of a case where a diagram had been used by the trial court to illustrate the testimony of certain witnesses and such diagram was not before the appellate court, said: "This diagram not being before us, we must assume that it lent aid to the findings made by the court." See, also, *Godeau v. Levy*, 72 Cal. App. 13, 236 P. 354, and *Gootar v. Levin* (Cal. App.) 293 P. 706, decided November 20, 1930. On appeal every substantial conflict in the evidence must be resolved in favor of the finding. *Robertson v. Finkler*, 27 Cal. App. 322, 149 P. 784.

"In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion." *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157, 1158.

[3, 4] The above findings are conclusive on this court if they are supported by any evidence in the record. The plaintiff first urges that the evidence does not support the finding that the defendant was not negligent. The appellant has made some showing by small excerpts from the testimony, but when we read the entire record we find that the defendant was driving at about 20 miles per hour in a public street in the city of Redlands October 5, 1928, at about dark and about 100 feet from the plaintiff, who was standing near the curb on the north side of Colton avenue apparently waiting for traffic to pass; as the defendant advanced he slowed down somewhat, and when approximately 50 feet distant he noticed the plaintiff begin to walk across the street. He turned his machine to the left and gave a usual warning sound. The plaintiff was too close to the north curb at that time for the defendant to pass behind her. About the time the defendant gave the warning signal he was moving along said

street bearing toward the center thereof and when but a few feet away from plaintiff the plaintiff began to run and ran into the side of the defendant's machine near the rear thereof, breaking the glass in the rear side window. Defendant stopped within 15 feet from the point of collision. Defendant's machine was proceeding at a reasonable and lawful rate of speed. He gave the usual and proper warning. Plaintiff alleges that because there might have been space enough behind plaintiff for defendant to have passed behind plaintiff at the moment of the impact that therefore defendant was guilty of negligence for not so doing. With this contention we cannot agree. Plaintiff was crossing a street at a place where there is no cross-walk. Defendant approached and gave timely warning of his approach and plaintiff immediately began to run. This the defendant could not reasonably have been expected to have anticipated. At that moment the defendant was tending to the extreme center of the street to give to plaintiff all possible chance to escape injury. However, plaintiff, without looking where she was going, ran headlong against defendant's car as it was passing. Viewing the evidence in the light most favorable to the findings we cannot say that the defendant's employee was guilty of any act of negligence in the operation of said automobile as a matter of law. The evidence abundantly supports the finding. This is the more true because at the time there was in force in the said city of Redlands an ordinance known as Ordinance No. 693. Section 10 thereof is as follows: "Outside of business district no pedestrian shall cross a roadway other than by a route at right angles to the curb, and in crossing at any place other than a cross-walk shall yield the right of way to all vehicles upon the roadway."

Section 43 of said ordinance is as follows:

"Any person violating any of the provisions of this ordinance or any rule or regulation of the board of trustees or city marshal pursuant thereto shall be guilty of a misdemeanor."

[5, 6] The place where the accident occurred is outside of a business district. Hence if said ordinance is to be given any meaning at all it must place upon the person crossing a street at a place where there is no crosswalk the duty to yield to the motorist the right of

way and the defendant had a right to assume plaintiff would comply with the mandatory provision of said ordinance. Appellant urges that if she be held to be guilty of negligence the doctrine of last clear chance should apply. This doctrine applies where the injured party has placed himself in a position of danger from which he cannot extricate himself or of which he is absolutely unconscious, and the defendant seeing or knowing facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care, fails to use such care and thereby causes injury. *Arnold v. San Francisco-Oakland Terminal Railways*, 175 Cal. 1, 164 P. 798. The facts in the instant case reveal that the driver saw the plaintiff some 100 feet away. At that time plaintiff was in no position of peril and before such doctrine can apply a position of peril must exist. The position of peril in this case came only at the moment after plaintiff began to run and that fact brought notice to the driver of the condition of peril. The defendant could not have had any notice of a position of peril until such existed. We are satisfied that the plaintiff was crossing said street in a careless and negligent manner, exercising practically no care for her own safety and that she may have been unconscious of any danger. However, we are also satisfied that due to the watchful care of the defendant's driver plaintiff was in no position of peril and there would have been no accident had plaintiff not suddenly changed her pace and ran, thus suddenly creating a position of peril; whether in a continued reckless disregard of her own safety and the rights of others or due to a sudden confusion on her part and a supposed effort to flee from danger, becomes immaterial, because at that moment, and not until then, was there a position of peril; and then the defendant's driver was too close to do anything other than he did do to avoid the tragedy. Nothing in the defendant's conduct falls short of the standard of ordinary care. Hence the doctrine known as the doctrine of last clear chance cannot and does not come to the aid of the plaintiff.

For the foregoing reasons the judgment is affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

110 Cal. App. 16

DENNIS et al. v. CITY OF ORANGE et al.

Civ. 229.

District Court of Appeal, Fourth District,
California.

Nov. 22, 1930.

1. Waters and water courses ⇨179(6).

Whether excavation in bed of creek proximately caused damages by erosion to plaintiff's land, originally separated from creek by defendant's land, *held* for jury.

2. Negligence ⇨46.

Owner must use property so as not to infringe on others' rights (Civ. Code, § 3514).

3. Landlord and tenant ⇨170(1).

Landlord, re-leasing to tenant creating conditions, amounting to nuisance, is liable for injuries resulting.

4. Landlord and tenant ⇨170(1).

Condition of leased premises causing waters of creek to be thrown against bank along plaintiff's land and undermining it constituted "nuisance," for which landlord was liable.

[Ed. Note.—For other definitions of "Nuisance," see Words and Phrases.]

5. Waters and water courses ⇨179(6).

Whether condition of defendants' premises was such as to cause waters of creek in time of flood to be thrown against bank along plaintiff's adjoining land and to undermine it was fact question.

6. Trial ⇨296(11).

In action for damages to land from flood waters, instruction considered with other instructions *held* not to authorize damages for future injuries.

Language of instruction objected to was that, if excavation of channel "caused, was causing, and would cause the water flowing in creek to flow upon or against plaintiffs' premises which water would not have thus flowed but for such excavating, defendants would be liable." Context of instruction showed that quoted language referred to damage already caused, and in another instruction covering measure of damages these were limited to those already suffered.

7. Trial ⇨260(6).

Refusing instruction regarding proximate cause of injury to plaintiff's land *held* not error, where covered by instructions given.

The refused instruction was based on claim that proximate cause of injuries to

plaintiff's land was narrowing of stream bed shortly above point of injury and the consequent deflection of water by causes other than excavations by defendant's lessee in bed of stream. This was covered in at least three instructions, where some such phrase as "which water would not have thus flowed but for such excavating, dredging, lowering, and diverting" was used.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Wallace B. Dennis and another against the City of Orange and others. From a judgment for plaintiffs, defendant named appeals.

Affirmed.

Harry L. Dearing, of Orange, and L. A. West and Reeves Aylmore, both of Santa Ana, for appellant.

McFadden, Holden & Friis, of Anaheim, for respondents.

BARNARD, J.

This is an action to recover damages for the washing away of a part of plaintiffs' land by flood waters flowing down Santiago creek, near the city of Orange. The defendant city owns certain land lying in the bed of this creek, together with certain land along the west bank thereof. This bank is about twelve feet higher than the normal bed of the creek. The plaintiffs' land adjoins this land owned by the city, and prior to April, 1926, was entirely separated from the creek by a narrow strip of the city's land, although at one end it came very near the bank of the creek. Prior to February, 1927, two rows of 26 year old eucalyptus trees, 75 feet tall, stood along the bank of the creek, mostly upon the strip of land owned by the city, a few being upon the plaintiffs' land where it approached nearest to the bank of the creek. The bank of the creek with these trees upon it had thus stood uninjured for many years prior to April, 1926. On August 16, 1924, the city of Orange leased its above-described land to one George A. Simpson for the purpose of excavating sand, rock, and gravel from the bed of the creek thereon. This lease provided that no excavating should be done within 30 feet of the west bank of Santiago creek. No excavating was done by Simpson upon the property, and on August 4, 1925, with the consent of the city of Orange, he assigned this lease to Kavanagh & Twohy. The new lessees began operations immediately, and continued the same until February, 1927, during which time they excavated and removed large quantities of sand, rock, and gravel for commercial purposes, thereby creating large channels and pits on the property leased, and, in

addition, excavated channels to permit the escape of water. The evidence shows that, during and following severe storms and heavy rainfalls, flood waters flow in Santiago creek with great rapidity, and in the neighborhood of the land here in question, during such flood conditions, the current of water in the creek swishes from side to side of the stream bed, striking first one bank and then the other, and that unprotected land is undermined and eaten out by the water when a deflection of the current is caused by any obstruction or unusual circumstance. Such a flood occurred in April, 1926, when a small portion of the narrow strip of bank owned by the city of Orange, at a point where the plaintiffs' land came nearest to the creek bed, was washed away, thus directly exposing a small part of plaintiffs' land to the creek. On September 21, 1926, the city of Orange brought a suit against Kavanagh & Twohy for the cancellation of their lease, alleging in their complaint that those defendants had excavated closer than 30 feet to the west bank of Santiago creek, contrary to the terms of the lease, and further alleging as follows: "That said defendants have committed waste on said premises by diverting the natural channel of said Santiago Creek and causing the same to flow with increased force against the westerly bank of said creek, causing an erosion of said bank to such an extent that large quantities of soil valuable for agricultural purposes have fallen into said creek and have been washed away, and a large number of full-grown eucalyptus trees growing upon said bank to be undermined by said waters and causing them to fall into said creek and be entirely destroyed." Thereafter this suit was settled, the old lease was canceled by mutual agreement, a new lease was entered into between the city and Kavanagh & Twohy, and the lessees continued with their excavating operations. Thereafter, in February, 1927, a heavy rainfall, lasting several days, but which, according to appellant, fell in a usual manner, caused a flood in Santiago creek, during which a portion of the plaintiffs' land with approximately 125 sixteen year old full-bearing orange trees was washed away, and considerable other damage done to plaintiffs' property.

To recover for this damage, this action was brought against the city of Orange and Kavanagh & Twohy, the complaint, among other things, alleging that Kavanagh & Twohy had carelessly and negligently excavated and dredged a channel along the foot of the west bank of Santiago creek, nearer than 30 feet to the bank, and along a portion of the plaintiffs' premises; that they had lowered the natural channel of the creek and diverted the waters thereof from their previous location and level; that this dredging caused the waters in the creek to flow with increased

force and depth against the west bank thereof; that such diversion of the water in the creek had caused certain eucalyptus trees to fall into the creek, and was of such a nature as to cause further erosion of the west bank of said creek; that the city of Orange, with knowledge of all of this and of the nuisance thereby created, had canceled the lease under which Kavanagh & Twohy were operating, and entered into a new lease with the same tenants; that, before said new lease was delivered, the city of Orange neglected and refused to abate the nuisance, and failed to restore the channel to its previous condition or to otherwise protect plaintiffs' premises from the waters of Santiago creek; and that, by reason of the acts done by Kavanagh & Twohy, and the failure of the city of Orange to abate the nuisance, the land of the plaintiffs was damaged as set forth in the complaint. The answer of the city of Orange denies that the city had knowledge of any excavation by Kavanagh & Twohy within 30 feet of the west bank of the creek until after the same had been done, and alleges that any such excavating was contrary to the terms of the lease; denies that said city ever created any nuisance or authorized the creation of any nuisance, or authorized any dredging contrary to or in violation of its agreement; and denies that any injuries to plaintiffs' land was caused by the failure of the city to abate the nuisance or its failure to restore the channel to its previous condition. As a separate defense, the city alleges that the injury to plaintiffs' land was caused by the installation in the creek bed, above the city's land, of certain protection work put in by another party, and by the installation by Kavanagh & Twohy of a large rock and gravel plant near the east bank of Santiago creek, over which the city had no control or supervision. The action was tried before a jury, resulting in a verdict in favor of the plaintiffs for \$8,000. From the judgment which followed, the city of Orange alone has appealed.

[1] Appellant insists that the proximate cause of the damages to respondents' land was a diversion of the flood waters in the creek caused by certain protection work installed above, and by the gravel plant installed by Kavanagh & Twohy, over which the city had no control, and not any excavating done or any act of the city; it being claimed that the injuries to respondents' land would have occurred irrespective of any excavating carried on in the bed of the stream. Reliance is placed upon the testimony of one witness, who stated that, in his opinion, in the condition the bank was in at the point where the plaintiffs' land approached the creek, the land would have washed out if no excavating had taken place. The evidence upon this phase of the case is very volumi-

nous, and we feel it is unnecessary to summarize it all here. Not only does the record show that in so stating this witness was referring to another minor excavation, and not to those which are the basis of this action, but other witnesses testified that the flood in question did weaken and undermine the bank along respondents' property, and along the narrow strip of the city's property, which lay between it and the creek. The condition of the bed of the creek and the surrounding country for some distance up the stream, and the action of the water from the beginning to the height of the flood, were all quite fully and accurately described to the jury. A considerable section of the bank with many tall eucalyptus trees that had stood there for years fell into the creek at once, and were washed away about the third day of the flood, showing that an undermining process had been under way. As the bank was eaten away, not only further portions of the protecting strip of land owned by the city, but about an acre and a half of respondents' land, disappeared. There was evidence that, prior to the April, 1926, freshet, in order to divert water from the main workings of the lessees, a channel had been excavated to take the water over along the west bank of the creek along the plaintiffs' property. There was also expert evidence that this would endanger this bank by making it more subject to an undermining process. Without further reviewing the evidence on this point, we may say that, after reading the same, we are fully satisfied that there was ample evidence from which the jury could find that the excavations made by Kavanagh & Twohy were the proximate cause of the damages to respondents' land rather than the obstructions which are blamed by the appellant. The evidence relied upon by appellant raises no more than a conflict, which was resolved against it by the verdict of the jury.

The point most strenuously urged by appellant is that, even though the proximate cause of the injury to respondents' land was the excavations made by Kavanagh & Twohy, the city of Orange is not liable, in the absence of a showing of negligence upon the part of the city. In this connection, the court's instructions to the jury are vigorously attacked. The many points raised along this line all relate to a vital conflict between the theories of the respective parties to this controversy, and may be treated under one head. The respondents rely upon the proposition that a nuisance was created by the excavations made during the existence of the first lease in the bed of Santiago creek, and that the city of Orange, having relet the property without abating this nuisance, is liable for injuries suffered by an adjoining landowner, irrespective of the question of negligence, as

apart from the nuisance. On the other hand, the appellant insists that no nuisance was shown; that it was lawful to remove the gravel; that liability could arise from such lawful removal only through negligence in doing the same; and that the city is not liable for any negligence of which the lessees may have been guilty. While the right of appellant to use its property for any legitimate purpose and its power to lease the same cannot be disputed, on the other hand, one must use his own property in such a manner as not to infringe upon the rights of another. Civ. Code, § 3514.

[2, 3] While, ordinarily, an owner of property is not liable for injuries to others arising through something done by his tenant, there is an exception in the case of conditions upon property which constitute a nuisance, in so far as the rights of others are concerned, which conditions, although not originally created by the owner, exist upon the leased premises at the time they are demised. *Kalis v. Shattuck*, 69 Cal. 593, 11 P. 346, 58 Am. Rep. 568; *Rider v. Clark*, 132 Cal. 382, 64 P. 564; *Shellman v. Hershey*, 31 Cal. App. 641, 161 P. 132; *Runyon v. City of Los Angeles*, 40 Cal. App. 383, 180 P. 837; *Lucid v. Citizens' Investment Co.*, 49 Cal. App. 257, 193 P. 161. The principal legal question involved in this case is whether the same rule exists where the conditions are caused by a tenant, and thereafter the lease is renewed or a new lease given to the same parties, as was the case here. While no California authorities upon this point have been called to our attention, the question has been passed upon in a number of cases in other jurisdictions. The underlying reason for the rule that a landlord is not responsible for conditions created or maintained upon leased premises by a tenant is the fact that the tenant has exclusive possession of the property, and, the right of entry of the landlord being suspended during the term of the lease, his responsibility for removing objectionable conditions is likewise suspended. It naturally follows that, when a landlord renews a lease or releases the premises to the same tenant, the very making of a new lease shows that at that time the landlord has a right of entry to the premises, and logically, having a right to enter and remedy the defect, if he releases with the dangerous conditions existing, the usual rule then applies that he is liable for injuries resulting from a condition, amounting to a nuisance, which exists at the time the premises are demised. In such a case the Supreme Court of Oregon in *Fleischner v. Citizens' Real Estate & Inv. Co.*, 25 Or. 119, 35 P. 174, 176, said as follows:

"Upon the surrender of the old lease, the company was invested with the right of entry, and, as the nuisance was in existence

upon the premises, it must be presumed to have been aware of the fact, and hence it is liable for its continuance under the exception to the general rule that it had demised premises with a nuisance then in existence thereon. The law is well settled that if the tenant creates a nuisance upon the premises during the term, by an unusual or extraordinary use thereof, although the landlord cannot be made chargeable for the consequences in the first instance, yet, if he subsequently renews the lease with the nuisance thereon, he becomes chargeable for its continuance."

In *McLaughlin v. Kelly*, 230 Pa. 251, 79 A. 552, 554, 50 L. R. A. (N. S.) 305, the court said:

"If the sidewalk becomes defective while in the occupancy and control of a tenant resulting in injury to a third person, the tenant is liable, and, if the defect existed at the time of the demise, the landlord is responsible to the injured party. This is ruled in many cases. [Citing cases.] The landlord cannot relieve himself from liability by placing the tenant in possession of the property. It is his duty to remove the nuisance or defect before he delivers the premises to the tenant, and, if injury results on account of his failure to perform this duty, he is not relieved from liability by reason of the tenant's possession. To relieve a landlord from liability under such circumstances would be, as said by Barrows, J., in *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, contrary to public policy and substantial justice, for it would not infrequently operate to deprive the injured party of all remedy except against an irresponsible tenant through whom a negligent landlord would reap the profits, without bearing the responsibilities of his proprietorship.

"While the defendant had been the owner of the property for 20 years or more, it seems that during all that time it had been in possession of a tenant. As noted above, the defendant let the premises until April 1, 1905, and during the preceding January he relet to the same tenant for a term of three years from April 1, 1905. The accident occurred in November, 1906. It was claimed by the plaintiff on the trial, and she submitted testimony to show, that the defect in the sidewalk existed at the time the premises were let to the tenant who was in possession when the plaintiff fell in the hole and was injured. It is contended by the defendant that by reason of the tenancy he was not in possession of the premises and therefore could not have repaired the grating. But this position is not tenable. The ground of the defendant's liability for the nuisance is that it existed at a time when he had the opportunity or power to abate or remove it and failed to do so. When the lease was executed and the term was created, the finding of the jury is

that the defect existed. It was then his duty before renewing the lease to have abated the nuisance. It was within his power to do so, and his failure to exercise that power imposes liability. 'Nor do I perceive how the liability of the landlord in such cases,' says Magie, J., in *Ingwersen v. Rankin*, 47 N. J. Law, 18, 54 Am. Rep. 109, 'will be diminished by the fact that he renewed the tenant's lease without retaking actual possession. Such a conclusion would be opposed to the principles creating and governing his liability. If a nuisance is created during a term already existing, no liability falls on the landlord pending that term, for the reason that he has no legal means of abating the nuisance. He cannot enter upon his tenant's possession for that purpose, and would be a trespasser if he did so. But when the term expires his right of entry and power to abate at once arise, and for that reason a liability commences. If he declines to re-enter and abate the nuisance, and relets the premises, the liability which arose at the termination of the term will be neither discharged nor abated. The test of his liability in such case is his power to have remedied the wrong. If he has, but fails to exercise, such power, his liability remains. The cases seem to be uniform in this view.' The same doctrine prevails in England [citing cases]."

In *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391, it was held that a landlord is not responsible for injuries caused by conditions existing upon the premises during the continuance of the lease, if the premises are in good repair when the lease is made but later become dangerous, unless he has expressly agreed to keep the premises in repair, or unless he has renewed the lease after the need of repair has shown itself. To the same effect, see *Matthews v. De Groff*, 13 App. Div. 356, 43 N. Y. S. 237; *Lusk v. Peck*, 132 App. Div. 426, 116 N. Y. S. 1051. In *Timlin v. Standard Oil Co. et al.*, 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845, it was held that, where the owner of premises knows, or by the exercise of reasonable care can ascertain, that there is upon the premises a nuisance dangerous to the public or to an adjoining owner, it is his duty to abate the nuisance before leasing the property; and, further, that, if he leases the property without doing this, he is liable to any one injured in consequence of the nuisance, although he himself did not create the same.

[4, 5] In the case before us, if the condition of the premises in question, at the time the property was re-leased to Kavanagh & Twohy in November, 1926, was so dangerous as to constitute a menace to the property of the plaintiffs, and was such as would, inevitably, with the coming of high water in Santiago creek in times of natural floods, cause the waters of this creek to be deflected and thrown

against the west bank of the creek, near and along plaintiffs' land in such a manner as to undermine the same, these conditions were such an encroachment upon the rights of plaintiffs as to constitute a nuisance. Whether or not such was the case was a question of fact. *People v. Park and Ocean R. R. Co.*, 76 Cal. 156, 18 P. 141; *Blanc v. Klumpke*, 29 Cal. 156; *People v. Davidson*, 30 Cal. 379. It was therefore proper to submit this question to the jury, which was done. The jury was instructed that, if they found from a preponderance of the evidence that Kavanagh & Twohy excavated a channel near and along the boundary line of the property of the city and of the plaintiffs, and along the foot of the west bank of the creek, and thereby lowered the natural bed of the creek, and lowered and diverted the natural channel thereof, and such diverting and lowering caused, or would cause, the water in the creek to flow with increased depth and force against the west bank of the creek, and that this was causing, and would cause, an erosion of this bank, and would cause water to flow upon or against the plaintiffs' premises which would not have otherwise done so, then Kavanagh & Twohy are liable for having created a nuisance and for any damage resulting therefrom. The jury was further instructed that, if a nuisance was thus created during the term of the George A. Simpson lease, and if said nuisance continued and was in existence when that lease was vacated and a new lease made to Kavanagh & Twohy, then the city of Orange is also liable for the continuance of such nuisance and from any damages resulting therefrom. Further, that, if at the time of the second lease to Kavanagh & Twohy a nuisance existed upon the property, the city of Orange is liable for the continuance thereof and the injuries resulting therefrom; that, upon the vacating and setting aside of the George A. Simpson lease, the city of Orange had a right of entry to the property, with the right to enter thereon and abate any nuisance existing; and that, if it failed to exercise such right and to abate any such nuisance, it was also liable.

[6] A number of other instructions along this line were given, which, all taken together, correctly instructed the jury as to the law in this regard. The jury were definitely instructed that, if they found a nuisance had been created upon the property during the first lease, which was still there when the second lease was entered into, the city was also liable for any damages sustained by the plaintiffs by reason of such nuisance. It was thus left to the jury whether the dredging done under the first lease constituted a nuisance, and also whether this nuisance continued and still existed when the second lease

was executed. Appellant contends that certain language used in instructions 7 and 8, to wit, "caused, was causing and would cause the water flowing in said creek to flow upon or against the plaintiffs' premises which water would not have thus flowed but for such excavating," indicated to the jury that they could award damages for injuries that might occur in the future. Not only does the context show that this language referred to damage already caused, but, in another instruction covering the measure of damages, these were limited to those already suffered.

While a number of objections are made by the appellant to various instructions given, it is unnecessary to treat them individually, as they all go to the proposition that it was necessary to show specific negligence on the part of the city, and that the city was not liable for conditions created by Kavanagh & Twohy. The views we have expressed upon the fundamental question involved render it unnecessary to go into detail in reference to each instruction complained of. Taking all of the instructions together, we feel that the jury were fully and fairly instructed as to the law, in view of the evidence shown by the record. See *Henderson v. Los Angeles Tractor Co.*, 150 Cal. 689, 89 P. 976; *Davis v. Button*, 78 Cal. 247, 18 P. 133, 20 P. 545.

[7] Complaint is also made of the refusal of the court to give an instruction based upon the claim that the proximate cause of the injuries to plaintiffs' land was the narrowing of the stream bed shortly above the point of injury, and the consequent deflection of the water by causes other than the excavations in the bed of the stream. This was fully covered by at least three instructions, where some such phrase as "which water would not have thus flowed but for such excavating, dredging, lowering and diverting" was included. The jury were thus instructed that, unless they found that the waters of the creek were diverted and thrown against the bank in question by the excavating and dredging complained of, in a manner that would not have otherwise occurred, they should not find for the plaintiffs. It was hardly necessary to repeat that, if the injury was caused by this other independent condition, the defendants were not liable.

After an examination of the voluminous record and briefs herein, we feel that the case was fully and fairly presented to the jury, and that the only serious question of law involved, as heretofore indicated, must be decided in favor of the respondents.

The judgment is affirmed.

We concur: MARKS, Acting P. J.;
WARMER, Justice pro tem.

PEOPLE v. BATEMAN. *

Cr. 1590.

District Court of Appeal, First District,
Division 2, California.

Dec. 2, 1930.

Rehearing Granted Dec. 17, 1930.

1. Criminal law ⇨112(9).

Superior court of county where property was stolen or received had jurisdiction of prosecution for receiving stolen goods (Pen. Code, §§ 496, 781).

Pen. Code, § 496, provides for the punishment of every person who, for his own gain, buys or receives any personal property, knowing it to have been stolen. Section 781 provides that when public offense is committed in part in one county and in part in another, or acts or effects thereof constituting or requisite to consummation of offense occur in two or more counties, jurisdiction is in either county.

2. Criminal law ⇨422(6).

Where there was evidence of conspiracy charged, evidence on that subject was admissible, though consisting of statements of third persons out of defendant's presence.

Defendant was charged with receiving stolen goods and with conspiracy. He was acquitted on conspiracy charge, but there was no objection nor motion calling for ruling limiting use of the evidence.

3. Criminal law ⇨673(2).

Evidence admissible on conspiracy charge and admitted without request for limitation of use could be used for all relevant purposes.

4. Criminal law ⇨1036(3).

Objection that evidence admissible on conspiracy charge should not have been used in support of other charge could not be first made on appeal.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

L. L. Bateman was convicted of receiving stolen goods, and, from the judgment and an order denying a new trial, he appeals.

Affirmed.

Frank P. Doherty and H. A. I. Wolch, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

STURTEVANT, J.

The grand jury presented an indictment against L. L. Bateman, Raymond Bateman,

James Arp, and W. C. Dorris. The indictment was framed in two counts. In the first count it was charged that the defendants conspired to commit the offense of receiving stolen goods. In the second count it was charged that the defendants committed the offense of receiving stolen goods. The defendants pleaded not guilty. A trial was had before the trial court sitting with a jury. The jury returned a verdict acquitting the defendant L. L. Bateman on the conspiracy charge, and it returned a verdict convicting him on the other charge. From a judgment entered on the verdict and from an order denying a motion for a new trial, that defendant has appealed.

The transcript contains upwards of 1,000 pages. During the trial 50 or 60 witnesses were called and examined. Some of the witnesses gave evidence regarding acts and declarations of the alleged conspirators. Other witnesses testified to other facts and circumstances, but the defendant does not claim that the trial court erred in ruling on the admission of evidence or in giving instructions.

[1] The defendant claims the court, from which the appeal was taken, had no jurisdiction to try the action. This claim rests on the fact that the record does not contain direct evidence that the act of "receiving" the property was committed by the defendant in said county. If it was so "received" in San Francisco, the trial court had jurisdiction. The evidence shows that the property was stolen in San Francisco, and, if the defendant "received" it in Kern county, the superior court of either county had jurisdiction to try the action. Pen. Code, § 781. The statute (section 496, Pen. Code), defining the crime, the commission of which the defendant stands convicted, provides: "Every person who for his own gain, * * * buys or receives any personal property, knowing the same to have been stolen; * * * is punishable." Manifestly, said property may be stolen in one county and "received" in another county. Section 781 of the Penal Code provides: "When a public offense is committed in part in one county and in part in another, or the acts or the effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." *People v. Disperati*, 15 Cal. App. 120, 113 P. 889, and *People v. Stakem*, 40 Cal. 599, contain nothing to the contrary. Neither case rested on section 496, Penal Code.

[2] The defendant claims that, in the absence of evidence of a conspiracy, statements or conversations by third persons out of the presence of the defendant and not a part of *res gestæ* are inadmissible. Conceding that such is a correct statement of the law, the

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 295 P. 530.

point is not presented by the facts in the record. Here there was some evidence of a conspiracy, and the rule contended for has no application. The issue of conspiracy was present at all times until the jury brought in a verdict of not guilty as to the count charging conspiracy. Hence, evidence on that subject was admissible. No objection or motion was made which had the effect of bringing forth a ruling by the trial court as to the admissibility of such evidence as proof of the charge of conspiracy or which limited the use which the jury might make of the evidence contained in the record. Hence there was nothing on which the defendant may predicate error on the part of the trial court in admitting the evidence.

[3, 4] In this connection the defendant claims the verdict was contrary to the evidence. The point rests on the fact that the defendant was acquitted on the count charging conspiracy, and the defendant claims that there is no evidence in the record proving the other count. This contention assumes there is no other evidence in the record. But there is a large amount of other evidence in the record. The real point is the defendant complains because perchance the jury used and acted on the declarations of conspirators. It is true there was much evidence offered by the prosecution proving or tending to prove many declarations and acts of the alleged conspirators made or done against an alleged coconspirator. Such evidence was admitted to prove the count charging a conspiracy. No objection was made, and as the case then stood, the evidence was admissible and no objection could properly have been made. As the evidence admitted was competent to prove the issue of conspiracy, but incompetent to prove the other issues on trial, the defendant should have made an application for an order limiting the use for which such evidence was admitted. But he did not do so. Therefore, the evidence went into the record unrestricted and thereafter it could be used for all relevant purposes. 23 C. J. 56, § 1798; 10 Cal. Jur. 1054, § 305; *Lucy v. Davis*, 163 Cal. 611, 616, 126 P. 490; *Menefee v. Raisch Imp. Co.*, 78 Cal. App. 785, 789, 248 P. 1031. Moreover, as the evidence was in the record, it was the duty of the jury to consider it, it was the duty of the trial court to consider it at all stages of the case, and an objection may not be made for the first time in a court of review. *McCloud v. O'Neill*, 16 Cal. 392, 397; *Curia v. Packard*, 29 Cal. 194; *Janson v. Brooks*, 29 Cal. 214, 223; *Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co.*, 176 Cal. 461, 466, 168 P. 1037; *Parsons v. Easton*, 184 Cal. 764, 769, 195 P. 419; *Yule v. Miller*, 80 Cal. App. 609, 616, 252 P. 733; *Fishel v. Ball*, 83 Cal. App. 128, 133, 256 P. 493.

Much of the evidence given during the trial was given by Mrs. Wells. Some statements were made in the briefs to the effect that she was an accomplice. However, the defendant conceded that, if the defendant received the stolen property before he and Mrs. Wells made a certain trip to San Francisco and if the case made by the prosecution does not rest on the fact that defendant received said property in San Francisco after he and Mrs. Wells arrived in San Francisco, then and in that event Mrs. Wells was not an accomplice. It was the theory of the prosecution, and there was evidence showing, that he received the property several months prior to said trip. Therefore, the point need not be discussed any further.

We find no error in the record. The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

109 Cal. App. 656

COWAN v. HILL et al.

Civ. 7015.

District Court of Appeal, First District,
Division 2, California.

Nov. 19, 1930.

Rehearing Denied Dec. 19, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

1. Evidence $\S$ 594.

Uncontradicted testimony of witness may not be rejected, unless inherently improbable.

2. Appeal and error $\S$ 994(2, 3).

Determination of what circumstances render uncontradicted testimony inherently improbable so as to warrant rejection rests primarily with trial court or jury.

3. Trial $\S$ 139(1).

Weight to be given to all the testimony is peculiarly within province of jury.

4. Evidence $\S$ 589.

In action on contract to sell stock, plaintiff's uncontradicted testimony that he accepted defendant's offer held inherently improbable under evidence, warranting jury in disregarding such testimony.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by L. F. Cowan against R. M. Hill and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Geary & Geary and C. J. Tauzer, all of Santa Rosa, for respondents.

BURROUGHS, Justice pro tem.

This is an action upon a contract alleged in the complaint to have been entered into between the plaintiff and the defendants. The cause was tried by the court with a jury, and a verdict in favor of the defendants was returned. Judgment was entered in accordance with the verdict. The plaintiff appeals.

The appeal is based upon the ground that the jury was not justified in finding for the defendants because the uncontradicted testimony of the plaintiff shows that he accepted the defendants' offer and that therefore the parties were bound by a contract. The offer referred to consisted of a letter written by the defendants to the plaintiff as follows:

"Petaluma Power & Water Co.

"144 Main Street,

"Petaluma, Calif.

"March 24th, 1927.

"Mr. L. F. Cowan, 155 Montgomery St., San Francisco, Calif.

"Dear Sir: In the matter of our conversation at the office of my brother on the 22nd instant, and your offer, at that time, of par for the Common Stock, the Preferred Stock and the issued bonds of the Petaluma Power and Water Company.

"I have had this matter up with Messrs. Doyle and Maclay, and they refused to accept the aforesaid offer. As a result of our deliberation I am authorized to advise you the lowest figure that will be accepted by the Company for its plant is as follows:

3000 shares of Common Stock at	
\$115.00	\$345,000.00
100 Bonds at \$100.00.....	100,000.00
860 shares of Preferred Stock at	
\$100	86,000.00
Total	\$531,000.00

"This price will exist only and until the expiration of the option of Mr. Mellersh which expires on March 31st, 1927.

"Very truly yours,

"R. M. Hill

"Thomas Maclay

"Frank P. Doyle."

This letter was good as an offer of sale from its date until March 31, 1927. The plaintiff, in answer to a question by his counsel, said: "On March 30th, 1927, about two o'clock in the afternoon, I called Mr. Ray Hill * * * at the office of the Petaluma Power and Water Company, in Petaluma. I was informed that he was at his home at Sebastopol. I then called Mr. Hill at Sebastopol. I told

him that I had his letter of March 24th, of 1927, before me, that I accepted his offer as outlined in his communication of March 24th, 1927. I then asked Mr. Hill when he could deliver his securities. Mr. Hill stated it would be necessary for him to consult his associates, which he would do, and call me back that afternoon."

Upon this subject defendant Ray Hill testified as follows:

"Q. With reference to a telephone conversation, or telephone conversations, as of March 30th, 1927, do you recall the substance of the conversation which you had on the telephone with Mr. Cowan on that day? A. No.

"Q. You do not recall what was said by him or by you? A. I have a faint recollection that he called on the phone wishing to arrange a meeting, which meeting was arranged for and which meeting was held at Petaluma on the first day of April.

"Q. That is all you remember of the conversation? A. That is all I remember.

"Q. After the first conversation, did you communicate with your associates, Messrs. Maclay and Doyle? A. I communicated with my associates to arrange a meeting."

Appellant contends that his testimony that he accepted the offer of March 24, 1927, being uncontradicted, was binding on all parties to the action, and could not be arbitrarily rejected by the jury. There can be no question that it is a general rule that uncontradicted evidence cannot be arbitrarily rejected, unless the evidence is inherently improbable. An array of authorities are cited to that effect. *Tillotson v. Findley*, 87 Cal. App. 654, 262 P. 438; *Walker v. Clark*, 80 Cal. App. 520, 252 P. 334; *Caldwell v. Weiner* (Cal. App.) 258 P. 125; *Giannini v. Southern Pacific Co.*, 98 Cal. App. 126, 276 P. 618; *Hayward v. Rogers*, 62 Cal. 348. The foregoing cases support the general rule above cited, but *Caldwell v. Weiner*, 258 P. 125, was decided in the District Court of Appeal. It contains language which seems to support the views of appellant. The cause was, however, taken over by the Supreme Court, and in the opinion of that court, reported at 203 Cal. 543, 264 P. 1100, 1101, it is said: "It would seem that this case, with all the circumstances appearing in the record, comes within the rule of *Blanc v. Connor*, 167 Cal. 719, 141 P. 217, and *Davis v. Judson*, 159 Cal. 121, 113 P. 147, to the effect that while it is a general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions, and the most positive testimony may be contradicted by the circumstances in evidence in connection with the matter which satisfy the court of its falsity and the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to

disregard his positive testimony as to a particular fact."

[1, 2] In *Davis v. Judson*, 159 Cal. 121, at page 128, 113 P. 147, 150, it is held: "The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." *Dierks v. Newsom*, 49 Cal. App. 789, 194 P. 518; *Quock Ting v. United States*, 140 U. S. 417, 11 S. Ct. 733, 851, 35 L. Ed. 501; *Pacific Coast, etc., Fruit Co. v. Sheriffs*, 31 Cal. App. 136, 159 P. 986; section 1847, Code Civ. Proc. Other cases in point could be cited, but we deem the foregoing cases establish the rule that the uncontradicted testimony of a witness may not be rejected by the court, unless it is inherently improbable. The question as to what circumstances render the testimony of a witness subject to rejection rests primarily with the trial court or jury who heard the witness, noted his demeanor on the witness stand, heard all of the other testimony, and was thus in a better position to pass upon the testimony and its weight and its sufficiency. In the light of this rule, we will now examine the evidence to ascertain if the statement of plaintiff to the effect that in the conversation held on March 30, 1927, with R. M. Hill he told the latter he accepted his offer contained in the letter of March 24, 1927, is of such a nature that there are no matters or circumstances which at all impair its accuracy.

[3, 4] It is claimed by the respondents that the testimony of the plaintiff is inherently improbable, and therefore the court had the power to reject such testimony. D. B. Hill testified that he saw the plaintiff at a meeting about 10 or 10:30 a. m. April 1, 1927. There were present at said meeting Messrs. Cowan, Doyle, Maclay, R. M. Hill, Geary, and the witness. During that meeting Mr. Cowan wanted to buy the common stock of the corporation for \$100 a share. Mr. Cowan and the witness had quite an argument, and he did quite a bit of figuring with Cowan to show that the common stock was worth \$115 per share. Mr. Cowan further testified that he had no knowledge that the defendants did not have all the stock in the company until the meeting at Petaluma on April 1, 1927. The

testimony of Dolph B. Hill is to the effect that on February 12th and 14th he told Mr. Cowan that they did not own all the stock, but that they did own the control with the interest of their friends. Mr. T. C. Mellersh testified that at the meeting of February, 1927, he was present, and that Hill told Cowan that among them they had control of the company. Thos. Maclay testified to the same effect as the last witness. There was also a letter dated February 28, 1927, written by Mr. Cowan to defendant R. M. Hill, making an offer of purchase of the stock of the company, in which it is said, "You will give notice immediately to all of your stockholders of the effect of this agreement." Mr. Cowan also testified that the first time he ever heard that he would be required to put up a cash payment of \$50,000 was when it was put in the substituted contract sent to his office; that the subject was never mentioned at the meeting of April 1, 1927. That such conversation did take place at the meeting above named is testified to by Dolph B. Hill and Thomas Maclay. According to the testimony of D. B. Hill during the meeting of April 1, 1927, Cowan wanted to buy the common stock for \$100. The company had on hand a surplus of some \$33,000 on April 1, 1927. Cowan said the subject of this surplus was not discussed. Other witnesses say that it was the subject-matter of discussion, and that he was advised that it would not be considered in the trade. Witness D. B. Hill testified that to his knowledge Cowan had never accepted the offer of \$115 for the common stock. The most he ever offered was \$100. Mr. Maclay testified that at this meeting of April 1, 1927, Cowan argued that the stock was worth only \$100 while Hill was trying to convince him it was worth \$115. Cowan did not recall stating at the meeting of April 1, 1927, that on March 31, 1927, if he had sent a telegram that he had written on March 31, 1927, the defendants would have been bound by their letter of March 24, 1927. That he did so state is testified to by D. B. Hill and Thomas Maclay.

From the foregoing it is clear that on material matters the plaintiff has been contradicted. It is also clear that on April 1, 1927, two days after the telephone conversation in which plaintiff testified he accepted the offer to sell made on March 24, 1927, plaintiff and the defendants were engaged in a controversy over the price of the common stock, also over the disposition of the surplus funds. These points might be said to render the testimony of Cowan inherently improbable, when taken in connection with his statement that he closed the contract on March 30th, in accordance with the offer of \$115 per share for the stock with no agreement as to the surplus funds on hand. We are of the opinion that it was peculiarly within the province of the jury to determine the weight to be given to all the testimony. They were

instructed that: "In determining the credibility of witnesses, the weight and sufficiency of their evidence, you should observe the appearance of the witness upon the stand; the character and manner of testifying; the bias or prejudice, if any appears; their interest or absence of interest in the outcome of the case; their memory or recollection, whether good or bad, clear or indistinct; their opportunity of knowing the facts concerning which they testify; their intelligence; ability to express themselves; their frankness or absence of the same, and any other trait exhibited by the witness which will enable you to properly weigh and consider their evidence with a view of ascertaining and rendering a true and a just verdict."

We deem it unnecessary to detail the evidence any further or to cite any additional authorities.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

FLETCHER v. ORIGINAL PIT BARBECUE
et al.*
Civ. 5651.

District Court of Appeal, Second District,
Division 2, California.
Dec. 3, 1930.

Rehearing Granted Dec. 23, 1930.

Appeal and error ⇨766.

Appeal was dismissed where appellant's six-page brief had no headings showing nature of points discussed (Rules of Supreme Court and of District Court of Appeal, Rule 8).

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Fletcher, a corporation, against the Original Pit Barbecue and others. From a judgment of the Superior Court affirming a judgment of the municipal court in favor of defendants, plaintiff appeals.

Appeal dismissed.

George P. Cook, of Los Angeles, for appellant.

Nowland M. Reid, of Long Beach, for respondents.

IRA F. THOMPSON, J.

Plaintiff brought an action in the municipal court where, after issue joined, a trial was

had resulting in a judgment for defendants. An appeal was taken to the Superior Court, where the judgment was affirmed.

This appeal is from the judgment last mentioned. However, the appellant's brief entirely disregards the provisions of rule VIII of the Rules of the Supreme Court and District Courts of Appeal, and falls squarely within the rule as announced in *Barnes v. Cocke*, 99 Cal. App. 700, 279 P. 190, except that here the brief consists of nine numbered or six printed pages. We there said: "There is no pretense of a heading to show the nature of the point to be discussed. It evidences an entire disregard of the rule—probably on the theory that, since the brief is short, this court could with little labor read it in its entirety. In cases of a direct violation of the rule, where are we to draw the line, if not by requiring a substantial compliance with the rule? If four pages can be filed without incurring the penalty of dismissal, why not twice or five or ten times that number, and so on until the rule becomes a dead letter? We think we must require compliance with the rule in all cases."

Appeal dismissed.

We concur: WORKS, P. J.; CRAIG, J.

FLEMING et al. v. DOLFIN et al. (two cases).†
Civ. 5829, 5831.

District Court of Appeal, Second District,
Division 2, California.
Dec. 3, 1930.

Rehearing Granted Dec. 30, 1930.

1. Appeal and error ⇨773(2).

Appeal of appellant filing no brief should be dismissed.

2. Appeal and error ⇨766.

Appeal of appellant filing brief not presenting points separately under appropriate headings was dismissed (Rules of Supreme Court and District Court of Appeal, Rule 8).

Appeals from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Actions by R. C. Fleming and another, doing business as Fleming & Davidson, against Jessie Dolfin and others. From a judgment of the Superior Court reversing a judgment of the municipal court, plaintiffs and named defendant appeal.

Appeals dismissed.

See, also, 292 P. 498, 499.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
*Rehearing granted 294 P. 416. †Hearing granted 4 P.2d 776.

D. A. Knapp, of Los Angeles, for appellants.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for respondent De Garmo and appellant Dolfin.

IRA F. THOMPSON, J.

[1, 2] An action was commenced in the municipal court by the plaintiffs to recover from the defendants a real estate commission. Judgment went for the defendants, whereupon the plaintiffs appealed to the Superior Court. There the judgment was reversed as to the defendant Dolfin, and she has appealed to this court from that part of the judgment, and has also appealed from an order of the Superior Court denying a motion to dismiss the appeal to that court from the municipal court. No brief has been filed on behalf of this appellant, and, of course, the appeal should be dismissed for that reason. However, the Superior Court affirmed the judgment as to the defendant De Garmo, and the plaintiffs have appealed from that part of the judgment. They are in little better position. In the brief filed by these appellants, no effort is made to comply with rule VIII of the Rules of the Supreme Court and District Courts of Appeal. The points are not presented separately under an appropriate heading indicating or showing the nature of the point to be discussed, and, on the authority of *Fletcher v. Original Pit Barbecue* (Cal. App.) 293 P. 874, this day decided, ought to be dismissed.

Appeals dismissed.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 229

HERNANDEZ v. SANTIAGO ORANGE GROWERS' ASS'N.
Civ. 171.

District Court of Appeal, Fourth District, California.

Dec. 4, 1930.

Rehearing Denied Jan. 2, 1931. Hearing Denied by Supreme Court Feb. 2, 1931.

1. Negligence ⇨23(1).

Liability of owner on theory of attractive nuisance bears relation to reasonableness and propriety of his own conduct, in view of surrounding circumstances and conditions.

2. Negligence ⇨23(1).

Contrivance to create liability on theory of attractive nuisance must be artificial and uncommon and capable of being rendered safe without destroying usefulness.

3. Negligence ⇨134(4).

Facts did not warrant recovery on theory of attractive nuisance for death of boy from injuries when struck by ice falling from loading platform.

The facts disclosed that ice used in icing refrigerators was moved along loading platform, and that frequently small pieces of ice would fall into space between car and platform, and that on two occasions a whole block of ice slipped and fell to ground, one of which caused injuries resulting in death. The evidence further established that children were accustomed to collect on right of way and attempted to secure chunks of ice, though they had been repeatedly warned and chased away from premises.

4. Negligence ⇨136(8).

Undisputed facts in respect to whether liability exists on theory of attractive nuisance present question of law.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Refugio Hernandez against the Santiago Orange Growers' Association. Judgment for defendant, and plaintiff appeals.

Affirmed.

William P. Webb, Jr., of Anaheim, for appellant.

Kidd, Schell & Delamer, of Los Angeles, for respondent.

BARNARD, J.

This is an action for damages for the death of the minor son of the plaintiff. At the close of plaintiff's evidence, a motion for a nonsuit was granted by the trial court, and, from the judgment which followed, this appeal is taken. The facts are not disputed, and the only question presented is whether or not the case falls within the scope of the attractive nuisance doctrine.

Briefly stated, the facts are as follows: For more than eleven years prior to August 29, 1929, defendant had operated a plant in the city of Orange, Cal., situated along the tracks of the Santa Fe Railroad. As a part of its business, defendant iced refrigerator cars as they stood upon the railroad track. This was done by means of an ice-loading platform about 8 feet in width and 80 feet in length, and a chute leading from the platform to the top of the cars. There was a space of about 3½ feet between the platform and the side of the car, and the platform was a few inches higher than the top of the car. The defendant had built a fence around the outer edge of the platform to keep the ice from falling off. In the process of icing cars, blocks of ice weigh-

ing about 300 pounds each were moved along this loading platform to a point opposite the opening in the top of a car, where a gate in the fence was raised, and the ice taken to the car over a chute or trough about 5 feet long and 2½ or 3 feet wide, with side rails upon it. The ice was moved along this chute by means of a large pair of tongs suspended from a block and tackle. At the opening into the top of the car, the blocks of ice were broken into thirds for the purpose of compact loading. As a result of breaking the blocks of ice into thirds, small pieces of ice broken off would frequently fall into the space between the car and the loading platform, or upon the further side of the car. Quite frequently such pieces of ice would weigh 25 pounds or more. On two occasions during the eleven years, a whole block of ice slipped from control and fell to the ground. It was the second time this occurred that gave rise to this action. On August 29, 1929, a cake of ice slipped and fell to the ground between the car and the platform, striking the minor son of plaintiff, and causing injuries from which he later died. At that time the boy was 9 years 9 months and 26 days old.

It was the custom of children of all ages from 7 to 20, a number of whom lived near the plant, to collect almost daily on the railroad right of way. As to what these children did there, the record shows the following: "They would gather on the railroad right of way and would keep their distance, and the first opportunity they had they would dart in and get those little chunks of ice." "They would be standing along the track away from the cars until ice would drop down and then they would jump for it and grab for it." One witness testified that the children were not playing; that they were sitting or standing around the railroad track, and would pick up ice. Another witness, in response to a question as to what these children usually did while there, testified: "They gather right near the freight cars and watch pieces of ice fall from the top of the cars, and then when they had a chance pick it up and put it in the little cart and took it home." This same witness testified that he had seen the boy who was killed load such ice in his wagon and take it home; that he had been doing this for some time. Later he testified that he saw the boy carry the ice away from the premises, but did not know whether he used it himself or where he took it.

The defendant's employees, who were loading the cars, knew of this custom of the children in the neighborhood, and were all instructed to keep the children away. The evidence shows that children were chased away by employees on innumerable occasions; that the defendant had a standing complaint with the chief of police asking that the children be kept away from there; and

that it was a usual practice for police officers to call and chase the youngsters away. One of the men who was helping to ice the car at the time the boy was hurt, testified as follows:

"Q. You had not seen the boy around there before the accident, had you? A. No, there hadn't been any children around that day.

"Q. And you had been keeping watch to see that they kept away from there? A. Well, we kind of kept watch on them all the time because we would have to if they would run up under the cars.

"Q. What? A. They would sneak under the cars and every other way to get ice.

"Q. What would you do when you would see them there? A. We would chase them away."

Another witness testified that during the summer of 1929 he saw the employees of defendant chasing the boys away on three or four occasions. There was evidence that the boy who was killed had been thus warned and driven away. The defendant's loading foreman testified that he did not see the deceased around the plant on the day he was killed, prior to the accident; that he had previously seen him around on from six to ten different occasions; that he had told him to get out of there because it was dangerous while they were working; and that some three days before the accident, he pulled the boy by the arm from between the car and the loading platform, and then went back and got his little cart and took it to him, telling him to keep out. The boy's father testified that he had not given his consent or permission to visit these premises; that every time he found he had been there he reprimanded him for it; that he scolded him because it was dangerous; that the boy would promise he would not return there; that he told him not to go to the plant because he knew there was danger of his being crushed; that he did this on at least two occasions, the last one a little more than a week before the boy was hurt; and that these warnings were in Spanish and the boy understood them. The boy's mother testified that she scolded him for going there, and that sometimes she went over and brought him back and whipped him for going.

[1] The only question involved in this appeal is whether this case comes within the attractive nuisance rule, an exception to the general rule that a defendant is not liable for injuries sustained by a trespasser upon his premises. *Peters v. Bowman*, 115 Cal. 345, 47 P. 113, 598, 599, 56 Am. St. Rep. 106. As was said by Chief Justice Beatty in the case just cited: "The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether

natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different.

* * *

[2] Originally, the attractive nuisance doctrine was applied only to machinery under certain circumstances, but in this state its application has been extended to various appliances and contrivances. Certain conditions, however, are uniformly held to be essential to bring a case within the doctrine.

"The contrivance must be artificial and uncommon, as well as dangerous, and capable of being rendered safe with ease without destroying its usefulness, and of such a nature as to virtually constitute a trap into which children would be led on account of their ignorance and inexperience. The principle of the rule having been recognized and firmly established in this state, it has been applied to a variety of machines, appliances, and contrivances coming within this definition." (Citing cases.) *Morse v. Douglas* (Cal. App.) 290 P. 465, 457.

In *Giannini v. Campodonico*, 176 Cal. 548, 169 P. 80, 82, the court said: "Moreover, it is an essential ingredient of a cause of action to which the 'turnstile cases' doctrine applies that the minor should have been attracted to the premises by a childish curiosity and desire to play thereon."

[3] In the instant case, it is not contended that the instrumentality itself, the loading equipment, was dangerous or attractive, or that boys in general or this boy in particular were attracted by it. The complaint and all of the evidence shows that the boys were not attracted by any contrivance, but by the ice itself. The only danger that appears is the danger of being hit by falling ice while the loading facilities were being used. The loading of all kinds of heavy objects is common. The falling of such objects is in the regular order of nature, and danger from the same is always present wherever this process is carried on any distance above the ground. So far as we know, the attractive nuisance doctrine has never been applied to the danger incident to ordinary loading operations. Every place where such operations are carried on has some danger in it; in fact, such work

cannot be carried on without some element of danger. Not only was the contrivance used here a common one, and one that did not arouse the childish curiosity and desire for play of these children, inexperienced or otherwise, but the danger involved, the danger from the falling of heavy objects, was a natural and common danger. Even young children very early realize such a danger. Not only may it be presumed that normal children of about 10 years of age would understand such a natural and common danger, but actual knowledge here appears. The evidence is uncontradicted that all of the boys who had been around these premises did not remain between the car and the loading platform, but stayed away, sitting or standing on the railroad tracks; that they watched the pieces of ice fall; and watched their chance to dart in and obtain the same, even at times sneaking under the cars for the purpose. The evidence also shows that the boys in general were frequently warned of the danger, and that this particular boy had not only been warned, even to the extent of being whipped, but had promised to stay away. As was said in *Faylor v. Great Eastern Q. Min. Co.*, 45 Cal. App. at page 202, 187 P. 101, 104, in speaking of the danger existing in an artificial pond of water: "The danger was not a concealed danger and that children from birth are taught, generally speaking, to avoid the danger of drowning, at least when the danger is open to their eyes." In the instant case, the children were not only so taught, but the danger was both open to their eyes and frequently seen. In such cases, where the danger is so open and obvious that the children must have seen it, our courts have refused to apply the doctrine of attractive nuisance. *Peters v. Bowman*, *supra*; *Loftus v. Dehail*, 133 Cal. 214, 65 P. 379.

Not only did these children, including the deceased, know the danger, having watched the ice fall, but they were not attracted by the childish curiosity and desire to play which gave rise to the doctrine relied on. They were attracted by the ice, a by-product of the work carried on. This is alleged in the complaint, and conclusively shown by the evidence. They were not playing, but were getting something. All of the evidence is to the effect they carried the ice away in little wagons. Whether they took it home or otherwise disposed of it, and even though it may be said that the ice having been discarded was not being purloined, there can be no doubt that they were appropriating it, and that there was a little more to their actions than the playful sport of children. While the attractive nuisance doctrine has been rather liberally extended in this state, it has never been extended from machinery or a contrivance to such an attraction as food or fruit or ice. If the attraction, which constitutes the fun-

damental part of the exception, were thus extended, an intolerable burden would be added to business.

Nor can it be said that these loading operations were capable of being rendered safe with ease without destroying their usefulness. As was said in *Peters v. Bowman*, supra: "A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means." These railroad tracks could not have been locked or fenced. The record shows that respondent had taken unusual precautions, far in excess of those usually taken in icing cars, to prevent ice from falling. This, with the rather unusual efforts shown to have been made by employees and police to drive the boys away, and the testimony to the effect that the boys would keep their distance along the railroad tracks and dart in suddenly, and even crawl under the cars, discloses not only a situation not easily rendered safe, but one involving a well-known tendency of young boys quite different from that mere display of childish curiosity which may, through ignorance and inexperience, lead them into a dangerous situation they do not understand. We think the evidence here fails to show that the de-

ceased was too young and inexperienced to appreciate the danger he was running into, and fails to show that he was incapable of contributory negligence. *Bradley v. Thompson*, 65 Cal. App. 226, at page 232, 223 P. 572. The appellant admits that he knew of the danger in having his child around the ice-loading plant here in question. If he took sufficient steps to warn his child of that danger, the child was aware of it and the doctrine of attractive nuisance did not apply. On the other hand, if he did not sufficiently warn the child, his own negligence bars his recovery.

[4] Appellant argues that the question whether respondent exercised ordinary care in taking precautions to keep the children away from the dangerous situation existing is a question of fact to be left to the jury. However, the burden first rests upon appellant to show that his case comes within an exception to the general rule. The facts being undisputed, it is a question of law whether or not the facts shown bring the case within the exception. *Nicolosi v. Clark*, 169 Cal. 746, 147 P. 971, L. R. A. 1915F, 638.

The judgment is affirmed.

We concur: CARY, P. J.; MARKS, J.

MITCHELL v. GREEN et al.

Civ. 180.

District Court of Appeal, Fourth District,
California.

Dec. 5, 1930.

Rehearing Denied Jan. 2, 1931. Hearing De-
nied by Supreme Court Feb. 2, 1931.1. Brokers $\S$ 64(2).

Broker *held* not entitled to commission on exchange of realty, where brokerage agreement made commission payable out of payments by defaulting purchaser.

2. Brokers $\S$ 82(1).

Broker agreeing to take commissions for procuring exchange of realty out of purchaser's payments *held* required to allege existence of fund or valid reason for its nonexistence.

3. Pleading $\S$ 59.

Performance of condition precedent on which recovery depends must be alleged.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by L. Reed Mitchell against A. M. Green and another. From an adverse judgment, plaintiff appeals.

Affirmed.

Coleman E. Stewart, of Santa Barbara, for appellant.

Griffith & Thornburgh, of Santa Barbara, and Sarau & Thompson, of Riverside, for respondents.

MARKS, J.

This is an appeal from a judgment entered in the court below, following an order sustaining respondents' general demurrers to appellant's third amended complaint without leave to amend.

The following facts are alleged in the third amended complaint. Appellant at all times material to this action was a real estate broker duly licensed under the laws of the state of California. Respondents were the owners of approximately ninety-eight acres of land in Riverside county, together with personal property, water rights, and water stock. Thomas De Vries was the owner of about eight acres of land in Santa Barbara county.

On November 16, 1921, respondent Green gave appellant the following instrument:

"Nov. 16th

"My dear Mrs. Mitchell—

"You are herewith authorized to sell my property situated in Riverside, consisting of approximately ninety-eight acres (55+acres oranges; 5+acres apricots and peaches, bal-

ance hay land but majority susceptible to planting to trees), including all water stock (Gage Canal), farm implements, tractor, tools, etc. for the sum of \$110,000; for which services in the event of sale I will pay you fifteen per cent commission on above amount.

"Yours truly,

"A. M. Green."

On October 21, Green had given to appellant another listing of the same property in which he guaranteed that there was an orange crop maturing upon it that would bring a minimum price of \$25,000.

Immediately after November 16, 1921, appellant procured and introduced Thomas De Vries to Green as a purchaser ready, willing, and able to purchase the Riverside properties of respondents. The negotiations culminated in a contract bearing date the 8th day of December, 1921, whereby respondents agreed to exchange their Riverside properties for the Santa Barbara property of De Vries. For the purpose of the exchange respondents' property was given a value of \$110,000, and De Vries' property of \$47,500. The difference in values was to be paid to respondents as follows: By the assumption by De Vries of a \$25,000 incumbrance upon the Riverside property and the payment of \$37,500 to be made by De Vries and wife to respondents evidenced by three promissory notes secured by deed of trust. The first note was in the principal sum of \$12,500 payable on or before July 1, 1923; the second for \$15,000 payable on or before July 1, 1924, and the third for \$10,000 payable on or before July 1, 1925. All the notes bore interest at the rate of 7 per cent. per annum and payable semiannually. The agreement recited that the Santa Barbara property was incumbered by a mortgage securing a promissory note in the sum of \$12,000 which De Vries agreed to pay on or before January 1, 1922. Title to the Santa Barbara property was to be free and clear of incumbrances, except the second installment of taxes for the fiscal year 1921-1922, and rights of way, easements, reservations, and building restrictions of record, and a lease of the residence on the property which was to be assigned to respondents. It appears from this contract that the exchange was to be completed by January 1, 1922.

It was further alleged that, in consideration of the execution of the exchange agreement, appellant agreed to accept payment of her commission in the sum of \$16,500 from the payments made by De Vries on his promissory notes, and that she should be paid in full when 40 per cent. of the sum of \$37,500 had been paid by De Vries to respondents.

It was further alleged that De Vries was unable to pay the \$12,000 incumbrance on the Santa Barbara property, and that on the 6th day of January, 1922, respondents and De

Vries entered into a further exchange agreement modifying the prior contract by relieving him from the payment of this obligation and by De Vries and his wife executing to respondents their promissory note in the principal sum of \$12,000 payable ninety days after its date and secured by a crop mortgage on the oranges growing upon the Riverside property. The exchange of properties was then consummated and the various conveyances, notes, mortgages, and deeds of trust executed.

It was further alleged that on November 25, 1922, De Vries commenced an action in the superior court against respondents whereby he sought "to rescind and set aside said agreement of exchange upon the ground of fraud, and to recover damages for such fraud." It was further alleged that on the 27th day of March, 1924, De Vries and respondents compromised and settled their differences. The terms of the compromise are set forth in a written contract from which it appears that De Vries conveyed all of the Riverside property to respondents and quitclaimed the Santa Barbara property to them. Respondents paid to an escrow holder the sum of \$2,500 for the purpose of relieving the Riverside property from certain liens and incumbrances which had been permitted to accrue during De Vries' ownership, any balance remaining to be paid to him. The fraud action was dismissed.

There is no allegation that De Vries ever paid respondents or either of them anything on any of the promissory notes. It is admitted by appellant that no part of the principal or interest on the three promissory notes in the total sum of \$37,500, out of which she had agreed to accept her commission, had ever been paid.

Appellant relies upon the case of *Carl v. Eade*, 81 Cal. App. 356, 253 P. 750, for a reversal of the judgment. This case announces the familiar doctrine that one who voluntarily prevents the performance of an act upon which an obligation on his part depends cannot set up nonperformance of this act as a defense in a suit against him. We believe, however, that the facts of the instant case bring it within the rule laid down in the cases of *Lindley v. Fay*, 119 Cal. 239, 51 P. 333, 334, and *Dunne v. Colomb*, 192 Cal. 740, 221 P. 912, 913. In the *Lindley* Case it was held as follows: "Ignoring the question as to the pleading, however, the evidence shows no right of action in the plaintiff. It tends to show an agreement to pay commissions out of the first money received, and no money has ever been received. Under such a contract, the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms. There must be a sale and a first payment to

entitle him to recover. It is so nominated in the bond."

In the *Dunne* Case it was said:

"To render such cancellation an act of prevention entailing the consequence claimed by respondent it must be without legal justification. Where the vendee is in default, there is no longer any legal obligation on the vendor to proceed with the performance of the contract. The law gives him the right to regard the contract as at an end. The law prescribes no penalty for the exercise of this right. The default of the vendee, with the consequent destruction of the right of the broker to his commission, was a contingency inherent in the contract, the risk of the occurrence of which was assumed by the broker. * * *

"In the case at bar, the duty of the vendors to carry out the terms of their contract in good faith was at an end upon the default of the vendee. They were under no obligation to sue upon the contract in an attempt to recover the purchase price, although such action, if successful, would have inured to the benefit of the broker. *Prince v. Selby, etc., Co.*, 35 Cal. App. 684, 687, 170 P. 1075; *Seymour v. St. Luke's Hospital*, 28 App. Div. 119, 50 N. Y. S. 989; *McPhail v. Buell*, 87 Cal. 115, 25 P. 266."

[1] In the instant case De Vries was in default in the execution of the terms of his contract almost from the moment of its execution. He was unable to pay the incumbrances upon his Santa Barbara property. Respondents waived this obligation and extended his time to pay the indebtedness ninety days. Whether it was ever paid does not appear. De Vries did not pay any portion of the \$37,500 on the purchase price of the Riverside property. On March 27, 1924, he was in default in his payments in the sum of \$27,500 and the law gave the right to respondents to regard the contract as ended with no penalty attaching to them for their exercise of this right. With the default of De Vries and his failure to pay, the right of the agent to receive her commission failed. The parties are bound by their contract. If the appellant expected to demand her commission from respondents without regard to any payments made by De Vries, she should not have made its payment conditioned and contingent upon De Vries fulfilling the obligations of his contract. *Cannon v. Selmser*, 85 Cal. App. 783, 260 P. 332.

[2] Appellant agreed that she was to be paid from a certain fund, and it was incumbent upon her to allege the existence of this fund or a valid reason for its nonexistence. *Edwards v. Baker*, 39 Cal. App. 755, 180 P. 33; *Lindley v. Fay*, *supra*. As was said in the case of *Vatcher v. Grier*, 50 Cal. App. 41, 195 P. 75, 76: "But, as we have seen,

payment was postponed by the terms of the agreement until the happening of some future event, i. e., the payment of installments of the purchase price, and therefore it must be made to appear affirmatively that such event has occurred as a condition precedent to plaintiff's right to recover. *Van Buskirk v. Kuhns*, 164 Cal. 472, Ann. Cas. 1914B, 932, 44 L. R. A. (N. S.) 710, 129 P. 587. There is here no averment that any of the installments of the trust deed note were ever paid, and it is not shown by the pleading that the fund from which plaintiff's claim should be satisfied at any time materialized; hence no sufficient cause of action is alleged in the complaint."

[3] The payment of 40 per cent. of \$37,500 by De Vries to respondents was made a condition precedent to appellant's right to demand and receive her commission. The performance of a condition precedent upon which a recovery depends must be alleged. *McNulty v. New Richmond Land Co.*, 44 Cal. App. 744, 187 P. 97. As appellant failed to allege the existence of the fund out of which she was to be paid, or any lawful reason for its nonexistence, her complaint failed to state a cause of action.

Judgment affirmed.

We concur: CARY, P. J.; BARNARD, J.

110 Cal. App. 145

DEPAOLI et al. v. CLAUS.
Civ. 7324.

District Court of Appeal, First District,
Division 1, California.
Dec. 2, 1930.

1. Appeal and error ⇨999(3).

Jury's finding that collision between automobile and truck was not due to truck driver's failure to yield right of way *held* conclusive on appeal (St. 1923, p. 517, § 131, as amended by St. 1925, p. 412; Code Civ. Proc. § 1847).

2. Appeal and error ⇨930(1).

Evidence must be viewed on appeal in light most favorable to support verdict.

3. Appeal and error ⇨996.

Jury's finding on evidence from which different inferences might be drawn is conclusive on appeal.

4. Witnesses ⇨245.

Sustaining objection to question previously asked and answered by witness *held* not error.

5. Appeal and error ⇨1033(3).

Permitting defendant to state distance within which he could stop his automobile, over objection that there was no evidence that he attempted to do so, *held* not prejudicial to him.

6. Appeal and error ⇨1056(1).

Exclusion of corroborative testimony as to spot on diagram of scene of collision between truck and automobile where broken glass was found *held* not prejudicial to defendant automobilist.

7. Trial ⇨260(8).

Refusal of instructions on proximate cause, as to which court fully instructed jury, *held* not error.

8. Trial ⇨260(8).

Refusal of instruction that truck driver was negligent if he drove on highway from private drive at time which was not reasonable or prudent *held* not error, in view of instructions given (St. 1923, p. 517, § 113(a)).

The court charged the jury that, at time of accident, Motor Vehicle Act (St. 1923, p. 517), § 113(a), provided that person should drive vehicle on public highway at careful and prudent speed, not greater than is reasonable and proper, and that no person shall drive vehicle on highway at such speed as to endanger life, limb, or property of any person.

9. Automobiles ⇨246(39).

Refusal of instruction that person driving at night is not required to see every object on his half of highway *held* not error, in view of defendant automobilist's testimony.

Defendant testified that he was traveling about 20 miles per hour when plaintiff's truck suddenly emerged from driveway at point within 5 feet therefrom.

10. Appeal and error ⇨1067.

Refusal of instruction that person driving at night is not required to see every object on his half of highway *held* not prejudicial error, in view of testimony that defendant's automobile was several hundred feet away when plaintiff's truck crossed highway.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by J. Depaoli and others, doing business under the fictitious name and style of J.

Depaoli & Co., against William J. Claus, who filed a cross-complaint. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Kirkbride, Wilson & Brooks, of San Mateo, for appellant.

Ross & Ross, of Redwood City, and Norman S. Meniffee, of San Francisco, for respondents.

PER CURIAM.

This action was brought to recover damages for injuries to and loss of use of an automobile truck. The defendant filed a cross-complaint for damages for personal injuries and for injuries to his automobile. The litigation grew out of a collision between the vehicles mentioned at a point on the main San Jose-San Francisco highway, which will be hereinafter referred to as the highway, near its intersection with Euclid avenue in San Bruno. It was stipulated that, if plaintiffs were entitled to recover, such recovery should be in the sum of \$522.02 for repairs to the truck with whatever amount they might prove they were damaged by loss of its use; further that, if the defendant was entitled to a verdict, he should recover \$400 as special damages with whatever general damages, including loss of time, he might prove. A jury found the verdict in favor of plaintiffs for \$600. A motion for a new trial was denied, and defendant has appealed from the judgment entered upon the verdict. He contends that the verdict is unsupported; that the court erred in denying his motion for a new trial, in certain of its rulings on the admissibility of evidence, and in its instructions to the jury.

The truck, which was 24 feet long, weighed with its load about 8 tons. It was equipped with acetylene headlights, which were attached to the dashboard between 5 and 6 feet from the ground. The hood, the radiator, the frame, and the bumper all protruded beyond the dashboard. The truck was also equipped with two oil lights in the rear. The automobile was a model T Ford sedan, and was being driven south along the highway. The collision happened at about 1:45 a. m. on December 4, 1928, and there were no eyewitnesses except the drivers of the respective vehicles. The driver of the truck testified that he drove the same with all the lights burning, from a private driveway on the east to the west side of the highway; his intention being to proceed north to San Francisco. The highway at that point is 40 feet wide, and is divided into four traffic lanes, marked on the pavement, each 10 feet in width; the two adjoining the edges of the pavement being the slow traffic lanes and the two in the middle of the highway being used for fast traffic. The truck driver further testified that he stopped before attempting to cross the highway and looked to the north and south. There were

no vehicles approaching from the south, but he saw defendant's automobile coming from the north about 600 feet away. He then crossed to the east side of the highway and proceeded north. When the automobile, which, according to this witness, was traveling between 40 and 50 miles per hour, reached a point about 100 feet north of the truck, it turned to its left across the highway and struck the front end of the truck, tearing off the bumper, bending the front portion of the frame, and injuring the motor. According to the defendant, the automobile was proceeding along the extreme westerly portion of the pavement at a speed of about 20 miles per hour, when the truck suddenly appeared, and the collision occurred before he had an opportunity to apply his brakes or change his course. According to the testimony of a traffic officer who arrived on the scene about 15 minutes after the collision, he found the truck facing north, about midway between the east line of the slow and the west line of the fast traffic lane on the east side of the highway, and the automobile off the pavement to the east and about 8 feet from the truck. The officer also testified that he found broken glass on both sides of the middle line of the pavement, and that skid marks were visible on the dividing line between the south-bound slow and fast traffic lanes immediately north of the broken glass. There was also the testimony of a witness to a conversation with the driver of the truck after the collision, from which the negligence of the latter might be inferred. The driver, however, denied the correctness of the witness' version of the conversation.

[1-3] While the driver of a vehicle entering a public highway from a private road or drive must yield the right of way to all vehicles approaching on the highway (Motor Vehicle Act, § 131, Stats. 1925, p. 412), here, according to the driver of the truck, the automobile was several hundred feet away when the truck crossed, and the collision was not due to any failure to observe the above provision. There was nothing inherently improbable in the testimony of this witness when considered in connection with the physical conditions disclosed by the evidence. The jury believed his account of the affair, and his credibility was a question for their determination exclusively. Code Civ. Proc. § 1847. The evidence must be viewed in the light most favorable to support the verdict, and, though different inferences might be drawn from the evidence, a finding by the jury either way thereon is conclusive on appeal. *Aronson & Co. v. Pearson*, 199 Cal. 295, 249 P. 191.

[4, 5] Objection to a question propounded on the cross-examination of the driver of the truck, but which had been previously asked and answered, was sustained, and the defendant on cross-examination was permitted to

state the distance within which he could stop his car; the objection to the last question being that there was no evidence that he attempted to do so. There was no error in the first ruling, and the second, if erroneous, was not prejudicial.

[6] A witness for the defendant was asked to mark on a diagram of the physical conditions at the scene of the collision the spot where broken glass was found. The court suggested that defendant had already shown this, and that the plaintiff would probably not offer evidence in this connection. The defendant did not press the question, and plaintiff offered no evidence on the point. The testimony, although corroborative, was not such that its exclusion can reasonably be said to have prejudiced the defendant.

[7, 8] The defendant offered two instructions with reference to proximate cause which were refused. The court nevertheless fully instructed the jury on this subject, and the refusal was not error. The court charged the jury that "at the time of the accident herein subdivision (a) of section 113 of the Motor Vehicle Act of this state provided that any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface, and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb, or property of any person." This was given at defendant's request, and was part of a proposed instruction which contained the following, which the court refused: "You are instructed that this provision of the section is just as much a portion of the law as that which allowed a speed of 40 miles per hour under certain specified conditions at the time of the accident herein. Therefore if you find on a preponderance of the evidence that under the particular circumstances of this case E. Bacigalupi drove on the highway at a time which was not reasonable and proper or careful or prudent or which endangered the life, limb, or property of any person, then as a matter of law he was guilty of negligence." While the rejected portion of the proposed instruction was not improper, it added nothing material to the instruction as given, and its refusal was not erroneous; and the same is true of another similar instruction offered by the defendant.

[9, 10] Defendant also offered the following instruction, which was refused: "You are instructed that the law does not require that a person driving on the highway at night must see every object on his half of the highway." While, as impliedly held in *Schurman v. Los Angeles Creamery Co.*, 81 Cal. App. 758, 254

P. 681, the offered instruction as an abstract statement of law was correct, here it appears that defendant could see objects in front for a distance of 40 to 50 feet, but, according to his testimony, he was traveling about 20 miles per hour when at a point within 5 feet from the driveway the truck suddenly emerged therefrom. Under these circumstances, that he was not bound to have observed the truck before is self-evident, and required no instruction, while, on the other hand, if the truck driver's account was true, the proposed instruction had no application and its refusal was not prejudicial.

The verdict was supported by the evidence, and, after an examination of the entire cause, we find no error which would justify a reversal of the judgment.

The judgment is affirmed.

110 Cal. App. 183

PEOPLE v. McDONALD et al.

Cr. 1958.

District Court of Appeal, Second District,
Division 1, California.

Dec. 4, 1930.

Rehearing Denied Dec. 17, 1930. Hearing Denied by Supreme Court Dec. 29, 1930.

1. Intoxicating liquors $\S$ 236 (4).

Evidence, independently of accomplice's testimony, *held* to show defendants' connection with possession of still (Pen. Code, $\S$ 1111).

The evidence, independently of accomplice's testimony, showed that still was located on accomplice's premises, that one of appealing defendants attempted to throw away note book containing entries tending to connect him with operation of still, accompanied codefendant when latter negotiated lease of building wherein still was located, was on premises in vicinity of such building with lessee about a month later, and sold to accomplice large quantities of sugar delivered to such premises; that book containing entries in his handwriting, tending to connect him with operation of still, was found on codefendant's person; and that second appealing defendant drove automobile onto and away from premises several times while still was in operation.

2. Witnesses $\S$ 67.

Ruling that attorney taking stand cannot argue case *held* not erroneous as depriving defendant of his attorney's rebuttal testimony.

A witness for the people testified that he was asked during telephone conversation with defendant's attorney to testify falsely that he never saw defendant. Defendant's attorney, at conclusion of people's case, asked whether court knew of any rule against attorney taking stand, to which court replied that attorney who takes stand cannot argue case, but record did not disclose that attorney advised judge that it was he who desired to testify in contradiction of such witness' testimony, and he did not take stand.

3. Criminal law ☞1043(3).

Objection, first made on appeal, that question to accomplice's wife as to when she learned of operation of still on husband's premises was proper to show that she was accomplice, came too late.

Counsel stated, when asked by trial court to state purpose of question, that it was purely impeachment and went generally to witness' credibility.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Harry McDonald, Victor Pipitone, Frank Cuscio, Mario Bono, and Gabriel De Maria were charged with, and the four last named defendants convicted of, possessing a still, and defendants Pipitone and Cuscio appeal. Affirmed.

W. T. Kendrick, of Los Angeles, for appellant Pipitone.

P. R. Hornbrook, of Los Angeles, for appellant Cuscio.

Moses C. Davis, of Los Angeles, for De Maria.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

HOLLZER, Justice pro tem.

Defendants Pipitone and Cuscio, together with three others named McDonald, Bono, and De Maria, were charged with the crime of possessing a still. The cause having been dismissed as to McDonald, the latter appeared as a witness on behalf of the prosecution. The remaining four defendants were convicted of the offense charged. At the trial defendant Bono admitted he had operated the still under the direction of McDonald, but exonerated all of the other defendants. This appeal is prosecuted by the defendants Pipitone and Cuscio from the judgment of conviction and the orders denying their motions for a new trial.

[1] It is conceded that McDonald was an accomplice. The principal question on this appeal is whether the evidence was sufficient

to meet the requirements of section 1111 of the Penal Code with respect to corroboration of his testimony. This section reads as follows:

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

"An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Independently of the testimony of the accomplice McDonald, the evidence showed that the still in question was located on certain premises belonging to McDonald. These premises consisted of two dwelling houses, one being in the rear of the other, together with a garage adjacent to the rear house. The still was in the rear building.

At the time of his arrest the defendant Pipitone attempted to throw away two notebooks which contained entries tending to connect him with the defendants in the operation of the still. It further appeared that the defendant De Maria was accompanied by Pipitone at the time the former negotiated for the lease of the rear building, the lease being taken in De Maria's name. It was also shown that about a month later Pipitone was on the premises in the vicinity of the rear building, and on said occasion he was again accompanied by De Maria. The defendant Pipitone further admitted that he had sold large quantities of sugar to McDonald, which were delivered to these same premises.

Testifying in his own behalf at the trial, Pipitone denied knowing the defendant Cuscio prior to his arrest, and, particularly, denied being present at one Sam Blum's Malt House, in company with Cuscio, De Maria, McDonald and certain other parties, a few weeks prior to said arrest. On the other hand, two witnesses, produced by the prosecution, testified that such meeting had taken place.

Likewise, at the time of De Maria's arrest, there was found on his person a book containing certain entries, shown to be in the handwriting of Pipitone, and which tended to connect him with De Maria's activities in the operation of the still.

With respect to the defendant Cuscio, who was a cousin of De Maria, the evidence given by the witnesses, in addition to the accomplice McDonald, disclosed that Cuscio, on a number of occasions during the period the still was in operation, had driven an automobile to the premises in question; that on each of these occasions he had walked to the

rear of the premises, then he departed leaving the automobile for varying lengths of time, and returned later the same day and drove away the automobile.

Defendant Cuscio also denied on the witness stand that he had been acquainted with Pipitone prior to his arrest.

Without undertaking to set forth all of the evidence adduced at the trial, we deem it sufficient to say that our examination of the record convinces us that such evidence, independently of the testimony given by the accomplice McDonald, clearly showed not only a guilty knowledge on the part of the defendants Pipitone and Cuscio as to the possession and operation of the still by McDonald and Bono, but also tended to connect the appellants with such possession.

[2] At the trial a witness named Levin was interrogated by the prosecution concerning a telephone conversation he claimed to have had with either Mr. Hornbrook, attorney for defendants Pipitone and Cuscio, or Mr. Shoop, attorney for the defendant Bono. On recross-examination, this witness testified that, during said telephone conversation, he had been asked to testify that he had never seen the defendants, and that he had answered that he would not lie for anybody.

At the conclusion of the people's case, the following colloquy took place between Mr. Hornbrook and the court:

"Mr. Hornbrook: If the Court please, I don't know whether or not there is any rule against an attorney taking the stand. Does your Honor have any knowledge of it?"

"The Court: The only rule in this department is that an attorney who takes the stand cannot argue the case. He may take the stand, if he wants to, but he is precluded from making any argument to the jury."

It is contended that this ruling deprived the appellants of the testimony of Mr. Hornbrook, their attorney, thereby leaving the testimony of the witness Levin stand uncontradicted. Such ruling is therefore claimed to have been prejudicially erroneous.

An examination of the record, however, fails to disclose that Mr. Hornbrook advised the trial judge that it was he who desired to testify in contradiction of the evidence given by the witness Levin. Furthermore, counsel did not take the witness stand, and hence it cannot be said that any such rebuttal was offered or that these appellants were deprived of any of their rights.

[3] Appellants also attack the ruling of the lower court sustaining an objection to the following question propounded upon cross-examination of the witness Beatrice McDonald: "When was the first time that you did have knowledge that still was in operation there?"

When asked by the court to state the purpose of the question, counsel responded that it was "purely impeachment"; "testing the credibility of the witness"; "just going generally to her credibility as a witness, not any particular point, only her knowledge of what was going on there."

It is contended for the first time on this appeal that this question should have been allowed, because, if the witness had admitted that she had known the still was in operation, such answer would have tended to prove that she was an accomplice, and hence her testimony would not be regarded as corroborating that of her husband.

It is a sufficient answer to this point to say that, counsel having failed to disclose to the trial court that the purpose of this question was the one now advanced before this court, the objection here presented comes too late, and hence the ruling of the lower court must be sustained.

The last contention advanced by appellants is to the effect that the court erred in failing to instruct the jury that the witness Beatrice McDonald, wife of the defendant McDonald, was an accomplice as a matter of law.

It is a sufficient answer to this contention to point out that there was ample evidence tending to show that Mrs. McDonald was not an accomplice.

For the foregoing reasons the judgment of conviction and the orders denying the motions for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

109 Cal. App. 619

EARLE v. DE BESA et al.

Civ. 5991.

District Court of Appeal, Second District,
Division 1, California.

Nov. 18, 1930.

1. Courts ☞30.

Jurisdiction of state court properly acquired cannot be divested by subsequent appointment of defendant to vice consular office (Jud. Code § 256 [28 USCA § 371]).

Under Jud. Code § 256 (28 USCA § 371), jurisdiction over actions against vice consul is vested in the courts of the United States, exclusive of the courts of the several states.

2. Principal and agent ☞99.

Principal is liable for acts of ostensible agent.

3. Principal and agent $\text{C}\text{--}160\frac{1}{2}$.

Principal was liable for value of property delivered to ostensible agent misapplying proceeds thereof.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Henry Edmond Earle against L. S. De Besa and others. Judgment for plaintiff against defendant named, and such defendant appeals.

Affirmed.

Sigmund S'Renco and Charles T. Lester, both of Los Angeles, for appellant.

J. Russell Morton, of Pasadena, for respondent.

CONREY, P. J.

During the months of May and June, 1925, the defendants were licensed brokers, and as such brokers were fiscal agents for sale of stock of the Pasadena Mercantile Finance Corporation, a California corporation. On or about June 2, 1925, one Edward Sloane, claiming to be a salesman of the defendants, solicited the plaintiff to purchase units of the capital stock of said Pasadena corporation. In the complaint it is alleged that said Sloane, as agent of the defendants, represented to plaintiff that he was a duly licensed and bonded salesman employed by the defendants; that, relying upon the fact of such employment, which had been acknowledged and ratified by defendants in a previous transaction involving the purchase of a unit of capital stock of said corporation, plaintiff delivered to said defendants, through said salesman as such agent of defendants, two corporate gold bonds having a market value of \$1,985; that, in consideration thereof, defendants by their said agent agreed to obtain for plaintiff five units of said stock, having a par value of \$5,100; that plaintiff was not familiar with the law, and did not know, as defendants did well know at said time, that any issuance of said stock not in accordance with the terms of the permit issued therefor by the commissioner of corporations would be void; that said purported subscription was in violation of said permit, in that no cash payment was made and the value of said bonds was not sufficient to conform with the terms of said permit, and no notes or bonds were given to cover the balance of the price of said stock. Other allegations follow in the complaint, showing false and fraudulent representations by said agent that said stock could be duly and regularly issued in consideration of delivery of said bonds, and that in reliance upon said representations the plaintiff delivered said bonds by delivering the same to said agent. Upon discovery of the falsity of said representa-

tions, plaintiff demanded rescission of said purported subscription and a return to plaintiff of said bonds or the value thereof, but defendants refused to consent thereto or to return said bonds or their value.

Judgment having been entered in favor of the plaintiff and against the defendant De Besa, said defendant appeals therefrom. The grounds of appeal are as hereinafter stated. Appellant contends that "the court erred for the following reasons." Here follow eight points, numbered 1 to 7, together with No. 9, all of which in some form of attack challenge the authority of Sloane to act as appellant's agent in the described transaction. Point numbered eight contains the assertion that plaintiff and Sloane, in collusion, attempted to commit a fraud upon appellant. Point ten is that the court erred in permitting the plaintiff to testify concerning an offer to compromise alleged to have been made by the defendants. Point eleven is that appellant was "a duly accredited Vice-Consul of the Republic of Peru, in Los Angeles, and that therefore the court was without jurisdiction over the person of appellant."

[1] Jurisdiction over actions against vice consuls is vested in the courts of the United States, "exclusive of the courts of the several States." Judicial Code, § 256; 28 USCA, approved June 30, 1926, § 371. It does not appear, however, that the defendant was a vice consul when the pleadings were filed, or at any time prior to the day when he testified at the trial. In the absence of any citation of any decision to the contrary, we are of the opinion that, the court having acquired jurisdiction over the defendant, such jurisdiction was not divested by the fact that, perhaps on the very day of trial of the action, the defendant was appointed to a vice consular office. If in the meantime the statute of limitations had run against the plaintiff's cause of action, the defendant, by means of this appointment, would be able to completely defeat the enforcement of the claim, without regard to its validity. We think that the principles of international comity, which are the basis of the statute, were not intended to produce any such result.

[2, 3] The evidence is sufficient to prove that the man Sloane was the ostensible agent of the defendant, and for the acts of such ostensible agent the defendant is responsible. The plaintiff delivered his property to Sloane, relying on such agency. Sloane having sold this property and misapplied the proceeds, the defendant was properly held as bound to repay to the plaintiff the value thus lost.

The evidence did not necessarily establish any participation by plaintiff in the fraudulent acts of Sloane. The error assigned in relation to the ruling upon objection to the testimony concerning an offer of compromise is

of slight importance, and has no serious bearing upon the result of the action.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

PEOPLE v. RANNEY.*
Cr. 1131.

District Court of Appeal, Third District,
California.

Nov. 24, 1930.

Rehearing Denied Dec. 9, 1930.

Hearing Granted by Supreme Court.
Dec. 22, 1930.

1. Jury ⇨131(6).

Refusing to permit accused to question jurors whether they would regard accused's prior convictions for felony as evidence in case creating presumption of guilt *held* error.

Such refusal was error because indictment, in addition to charging grand theft, charged that accused had twice previously been convicted of felony, and accused's defense was interwoven with fact of such prior convictions and that accused would probably be impeached as witness therefor, and he did not gratuitously introduce such facts to jury's attention.

2. Criminal law ⇨369(1).

Evidence of offenses other than charged, except in exceptional cases, is incompetent as proof of crime charged.

3. Jury ⇨97(1).

Accused is entitled to be tried by fair and impartial jury free from bias or prejudice.

4. Criminal law ⇨1035(6).

Accused's request for permission to examine jurors to determine whether they would indulge presumption of guilt because of previous felony convictions *held* sufficient to preserve question for appellate review.

After ruling refusing to permit accused's counsel to question jurors whether they would indulge in presumption of guilt by reason of two previous felony convictions against accused, accused's counsel stated that in order to protect record, if counsel decided to propound question in some variety or form, court would understand

counsel was not disrespectful but desired ruling on it, to which court replied that accused was fully protected by record.

5. Larceny ⇨70(2).

Instruction twenty-one times telling jury to convict of grand theft if they found defendant "unlawfully" took money *held* erroneous (Pen. Code, § 511).

Instruction was erroneous because it did not define "unlawful" as requiring finding that the taking was felonious or otherwise criminal and because accused claimed money admittedly taken had been taken as commissions with authority of four or five directors of corporation, while theory of prosecution was that directors never made such promise and that it would have been unlawful transaction had they done so, so that in effect jury were permitted to convict if accused merely had no legal right to take money, though acting in good faith and without criminal or felonious intent required by Pen. Code, § 511.

[Ed. Note.—For other definitions of "Unlawful," see Words and Phrases.]

6. Larceny ⇨70(2).

"Unlawful," as used in instruction on grand theft, is not synonymous with "criminal."

7. Criminal law ⇨823(4).

Error in instruction authorizing conviction for grand theft if accused "unlawfully" took property involved *held* not cured by qualifying instruction (Pen. Code, § 511).

The qualifying instruction was practically in language of Pen. Code, § 511, and told jury that conversion of property does not constitute grand theft if done under bona fide claim of title and to that extent was correct and directly applicable to facts, but such statement was nullified by further instructing that such provision would not excuse the unlawful retention of property to pay accused's demands against corporate owner, since latter statement was not appropriate to any theory of case and must have been misleading.

8. Criminal law ⇨783(2).

Refusal to instruct that jury cannot presume it more probable that person previously convicted of felony will commit subsequent crime *held* error.

Such refusal was error because during trial it had many times been brought to jury's attention that accused had been previously convicted on two charges of felony, and jury was instructed that de-

defendant as witness might be impeached by proof that he had been convicted of a felony.

On Petition for Rehearing.

9. Larceny $\S$ 40(2).

In prosecution for grand theft, people *held* required to establish beyond reasonable doubt that, in addition to being unlawfully taken, money was also feloniously taken (Pen. Code, $\S$ 511).

10. Criminal law $\S$ 1137(3).

Accused, whose requests to charge acquittal of grand theft if money was not unlawfully taken were refused, *held* not precluded from objecting to instructions to convict if he unlawfully took money on theory he requested such instructions.

This is true because instructions requested by defendant did not state law as favorably to defendant as might have been requested and trial court's statement of converse by eliminating words "do not" in beginning of defendant's requested instruction and changing words therein of "not guilty" to read "guilty" did not state factors specifying verdict of guilty of grand theft.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

W. S. J. Ranney was convicted of grand theft, and he appeals.

Reversed.

Gumpert & Mazzer and C. H. Hogan, all of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SHIELDS, Justice pro tem.

The defendant was charged by indictment of the grand jury of San Joaquin county with the crime of grand theft. The indictment contained twenty-one counts. In addition, the defendant was charged with having been twice previously convicted of felony. Upon his arraignment defendant pleaded guilty to the charges of conviction of felony, and not guilty in all other particulars.

He was thereafter tried and convicted upon seven of the charges, the jury disagreeing as to the remaining counts. He moved for a new trial, which motion was denied, whereupon he was sentenced to imprisonment for the term prescribed by law. Defendant then prosecuted this appeal from the judgment and from the order denying his motion for a new trial.

Many points were made by the defendant in support of his appeal, the first one being that

he was not permitted to examine the jurors, at the time the jury was being selected to conduct the trial, with reference to whether or not they would be influenced by the fact that he had been convicted of other felonies and would from that fact presume that he had been guilty of the crime for which they were about to try him, or whether or not, because of that fact, they would entertain any bias or prejudice against the defendant which might influence their verdict. The facts upon which this objection is made may be quite briefly stated.

[1] When counsel for defendant was examining one of the prospective jurors, among other questions asked was whether the juror knew that the defendant had served two prison terms, one in a reform school in New York and one in the state prison at San Quentin. The district attorney objected to this question and the court sustained his objection. Counsel for defendant thereupon outlined his purpose in asking this question. He stated that it was only preliminary; that the defendant would take the witness stand in his own behalf and that he presumed that the district attorney would ask this question of the defendant for purposes of impeachment. He declared that he reserved the right "to question this jury * * * as to whether or not they would regard an admission of those felonies as evidence in the case, and indulge in the presumption of guilt. We submit that this is one of the most vital questions that has been propounded to the jury. * * * It is only to show the extent of his bias and prejudice." After interruption, counsel for defendant continued that he assumed that the district attorney would ask as to previous conviction of a felony for the purpose of impeaching the defendant's credibility, and that what we "want to determine now (is) whether any juror will be biased or prejudiced in listening to the evidence by reason of the fact that the defendant had been twice previously convicted of felony."

After a question by the court, defendant's attorney continued: "We are seeking to ascertain whether or not the jury, by reason of an admission on the part of the defendant of serving these two prior terms, would indulge in the presumption of guilt by reason of that fact alone. We can readily understand that the outside layman might be influenced, might be induced even to the extent of arriving at a verdict in this case on the basis of a past, or past convictions, and we are entitled to go into that fact in order to determine whether or not they would." The court thereupon announced that the objection would be sustained. Counsel then asked if the court's ruling went "to the extent of prohibiting the defendant from questioning any or all of the jurors as to whether

or not they would be influenced in their deliberations at all, by a statement of admission of prior conviction of a felony"? To this the court answered: "That is correct." We think that this action of the court and this ruling was clearly erroneous. "Nothing is better settled or more rational than that an indictment for one crime cannot be supported by proof of another." *People v. Carpenter*, 136 Cal. 391, 68 P. 1027, 1028. It is not proper to show the defendant "to have been guilty of some other offense, for the purpose of raising a presumption, either of law or fact, of his guilt in the case under consideration." *People v. Sears*, 119 Cal. 267, 51 P. 325, 327. "When a person is accused of crime, and placed upon trial, he cannot be required to defend himself against anything but the specific charge, and he cannot be compelled, under the rules of law, to maintain the honesty and integrity of his entire life." *People v. Arlington*, 123 Cal. 356, 55 P. 1003; 8 Cal. Jur. 58.

[2] Evidence of other offenses than the one charged, except in exceptional cases not involved here, is incompetent as proof of the charge upon which an accused is on trial. If it gets before the jury by suggestion, or in connection with evidence otherwise competent, it must be disregarded by the jury, and the court, upon request, should definitely so instruct them. Whether or not a prospective juror will be influenced by knowledge of any such previous offense, whether he will be governed by the rule of law which rigidly excludes such a consideration, and whether or not if chosen as a juror, he will obey an instruction by the court to dismiss from his mind all consideration of any separate and different offense of which he may have obtained knowledge in any way, except for purposes of impeachment, is a question of vital importance to an accused person in the circumstances of the defendant here.

[3] He is entitled to be tried by a fair and impartial jury, wholly free from bias or prejudice. Defendant knew that the fact of his previous convictions would be brought to the attention of the jury if they did not already know of it. He intended to be, and later was, a witness in his own behalf. He had a right to expect that the prosecution would bring out the fact that he had been twice convicted of a felony for the purpose of impeaching him. The defense which he had planned, and later presented, was interwoven with this fact, and required its disclosure. He did not gratuitously introduce this fact to the jury's attention. There was no fact more fundamental to his defense than that he should select a jury which would not be biased by this fact, and regard it as evidence in the case from which they might find or presume his guilt of the charges upon which he was being tried. He had a right to inquire of the

panel fully as to the existence of any such bias to enable him to secure his constitutional right of trial before a legally qualified jury.

The denial of that right seems so clearly erroneous as to require no citation of authorities to establish it. But the question has been definitely adjudicated. In a recent California case the defendant was charged with the crime of murder. Upon his first trial the jury disagreed, standing ten to two for conviction. Upon a retrial the attorney for the defendant sought to question the jury relative to their knowledge of the failure of the former jury to agree upon a verdict, and what influence, if any, the action of the former jury would have upon their verdict. The court sustained an objection to such questions and forbade counsel from further mentioning the former jury to the present jury. The defendant was convicted of manslaughter and upon appeal the Supreme Court said: "It is not clear from the record upon just what theory the court sustained the objection of the prosecution. We think the questions were proper, as the answers thereto would tend to show the existence or nonexistence of actual bias on the part of the jurors with reference to the case then on trial. If any of the jurors had heard the result of the former trial, and that the jury therein had stood ten for conviction and two for acquittal, we do not think it unreasonable to conclude that such a juror might be influenced by such knowledge, and that he might well conclude that, if ten out of twelve of the former members of the jury believed the appellant guilty, there was a strong probability of his guilt. Persons entertaining such opinions, we think it must be conceded, are not, and cannot be, fair and impartial jurors such as one accused of crime is entitled to have pass upon the accusations against him." *People v. Carmichael*, 198 Cal. 534, 246 P. 62, 66. Other reasoning in this case is peculiarly appropriate to the question before us. In concluding its discussion, the court say: "No authority has been called to our attention which can be construed as holding that section 4½ of article 6 of the Constitution can be relied upon to sustain the judgment herein. As we have already said, in our opinion it was prejudicial error for the court to refuse the appellant the right to examine the jurors as to the effect on their minds of the standing of the former jury." Holding that the ruling of the court deprived the defendant of a fundamental right, the court conclude by saying that: "It was never intended by this provision of the Constitution to take from the defendant in a criminal action his fundamental right to a jury trial or in any substantial manner to abridge this right." The judgment was reversed. *People v. Carmichael*, supra.

In a New York case there was an almost complete identity with the case before us. In

that case the defendant was indicted upon a charge of grand larceny, the indictment also containing a charge of a prior conviction. At the trial counsel for defendant asked one of the prospective jurors if it should develop that the defendant had previously been convicted upon a charge of grand larceny "would that influence you in arriving at a verdict of guilt or innocence"? The district attorney objected to this question and, as in this case before us, his objection was sustained. It was stipulated that the record might show that the same question had been asked of each of the jurors, and that the objection to the same had been sustained.

After conviction an appeal was taken and the Supreme Court held this ruling of the trial court to have been erroneous, and for that reason reversed the judgment. In announcing its decision the court said:

"I cannot escape the conviction that this question was competent, and that the defendant should have been allowed to ask of each juror whether or not the fact that he had been convicted of a former crime would influence him in determining the question as to his guilt or innocence of the particular crime with which he was charged. It is quite true that the jurors were bound in determining the grade of crime to consider whether or not the defendant had been convicted of a felony; and it is also quite true that, if the defendant offered himself as a witness upon the trial, the jury was justified in considering his former conviction in determining the weight to be given to his testimony. It is, however, a fundamental principle of the English common law that a former conviction is not properly to be considered by a jury in determining whether or not a defendant is guilty of the crime charged. If a juror was so constituted that in determining the question of the guilt or innocence of a defendant of the crime charged he would not be able to eliminate the impression of guilt produced upon his mind by the fact of a former conviction so that it would influence his determination of the guilt of the defendant of the crime charged, he could not try that issue impartially and without prejudice to the substantial rights of the defendant; and that that is not an impossible mental condition is shown in this case by the fact that other of the jurors voluntarily stated upon their examination as to their competency as jurors that the prior conviction would probably affect them in making up their minds as to his guilt or innocence, and, when that appeared, the juror was excluded. The right of a defendant to a fair and impartial jury who will determine the question as to his guilt or innocence solely upon the testimony, and without prejudice or bias, is one that the courts are bound to uphold, and which the court below was bound to protect.

"The defendant had the right to have the question as to whether or not each particular

juror was an impartial juror determined by the court, and was entitled to a reasonable examination of each proposed juror so that that fact could be intelligently determined. It was an important element in determining the question as to the competency of a juror to ascertain whether the former conviction of the defendant would influence him when he came to determine the guilt or innocence of the defendant; and, if it appeared that a juror would not or could not weigh the evidence in regard to the commission of the crime charged without being influenced by the fact that the defendant had been convicted of a former crime, he was not an impartial juror, and the challenge should have been sustained, and that fact could only be ascertained by an examination of the juror as to the effect upon his mind of the former conviction."

People v. Hosier, 132 App. Div. 146, 116 N. Y. S. 911, 914, affirmed by the Court of Appeals, 196 N. Y. 506, 89 N. E. 1107.

We have quoted extensively from this case, as its reasoning renders further discussion of this question unnecessary. We might add the cases of *People v. Estorga*, 206 Cal. 81, 273 P. 575, and *People v. Barrett*, 207 Cal. 47, 276 P. 1003, 1004, as illustrating the emphasis which our courts put upon the right of an accused person to sift the minds of proposed jurors in an effort to develop possible grounds of challenge for cause.

[4] It was suggested in the case before us that defendant had not protected his rights in this matter, as the question asked did not necessarily involve a decision of the question now raised. But counsel repeatedly stated that the question was only preliminary, and continued: "We are seeking to ascertain whether or not the jury, by reason of an admission on the part of the defendant of serving these two prior terms, would indulge in the presumption of guilt by reason of that fact alone." This was an appeal to the court to be allowed to exercise a clear legal right. It was without question specific enough to inform the court, and to raise the question here involved. But if there was anything lacking in the scope of the question asked and the request made, it was completely supplied near the conclusion of the examination of the juror in whose case the question was first raised. Counsel for defendant then said: "In order to protect the record, if counsel decide to propound this other question in some variety or form, I hope the court will understand that counsel is not endeavoring to be disrespectful at all, but I desire a ruling on it." The court thereupon interrupted counsel and stated: "You are fully protected by the record in that matter." Counsel seemed not to have failed in any degree to present his point to the court, and to maintain his objection to the court's ruling. But if he had the court's attitude here would be as it was in *People v. Barrett*, supra, where they say: "We are not

prepared to say that the prejudicial character of the error was in any way lessened or destroyed by defense counsel's rather passive acceptance of, and virtual acquiescence in, the course dictated by the lower court." Here there is nothing to excuse in counsel. He definitely asked to be permitted to conduct an examination of prospective jurors to which he was entitled, and his request was definitely denied.

[5, 6] Other questions raised on this appeal relate to instructions given and refused. One instruction given by the court was erroneous, particularly so in the circumstances of this case. In it the jury was told: "If the jury find to a moral certainty and beyond a reasonable doubt that the defendant W. S. J. Ranney did, at and in the County of San Joaquin, State of California, and on or about the 20th day of July, 1926, unlawfully take the property of the Harris Manufacturing Company * * * it will be your duty to bring in a verdict of guilty of grand theft, a felony, as charged and set out in the first count of the indictment on file herein; otherwise you should acquit him on said first count." A like instruction was read in reference to each of the remaining twenty counts of the indictment. This instruction did not define unlawful; it did not instruct the jury that before they could convict the defendant they must also have found that the "taking" was felonious, or otherwise criminal. It made no reference to any distinction between what was criminally unlawful and civilly unlawful. Under the instruction they were to convict the defendant in either case.

The jury were told twenty-one times by this instruction that if they found that the defendant unlawfully took the property involved that they should find him guilty of the crime charged. But there are many acts of "taking" of property which are unlawful but are not criminal, and which would not justify a conviction of felony. Section 511 of the Penal Code illustrates this, wherein it provides that a certain appropriation of property is not criminal if made under a claim of title "even though such claim is untenable," in other words, "unlawful." The law is so stated in *People v. Lapique*, 120 Cal. 25, 52 P. 40. So in *People v. Ephraim*, 77 Cal. App. 29, 245 P. 769, 772, in a prosecution for embezzlement, the court say that "it was incumbent upon the appellant to prove that she had appropriated the money openly and avowedly and under a claim made in good faith, but it was not necessary for her to prove that her claim was a valid one upon which she might recover in law."

Countless decisions might be cited to show that an act may be unlawful and not be penal. Words and Phrases, First, Second, and Third Series, Unlawful; 39 Cyc. 829. The word unlawful in connection with a contract for the

use of a machine, does not mean a criminal use, but any use in violation of the contract. *Cortelyou v. Charles Eneu Johnson Co.* (C. C.) 138 F. 110. Unlawful in relation to the acts of a corporation may mean acts only ultra vires. *Dunbar v. Am. Tel. & Tel. Co.*, 238 Ill. 456, 87 N. E. 521. Unlawful is not synonymous with criminal, "To speak of an act as unlawful is not equivalent to saying it has been denounced as a crime. 'Every criminal act is illegal or unlawful, but illegal or unlawful acts may not be criminal.'" *State v. Tinkler*, 72 Kan. 262, 83 P. 830. So the use of the word "unlawfully" in an instruction relative to embezzlement will not supply the place of the word feloniously or fraudulently. "Many things are unlawfully done which are not crimes, because the criminal intent is wanting." *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282, 287. When the broad meaning of the word "unlawful" is thus understood, the error of an instruction which directs the jury to convict upon the mere finding that the defendant had committed an unlawful act, is very apparent.

The instruction complained of here was particularly inappropriate to the facts of this case, which in the briefest way and according to the testimony of the defendant were these. Defendant was acting as manager of the Harris Manufacturing Company. He sold some \$83,500 worth of preferred stock which at the time stood in the name of four of the directors of the company, the sale being made in the interest of and for the benefit of the company. These four directors individually promised and agreed to pay him for his services in selling the stock a commission of 15 per cent. which was to be paid out of the funds of the company, from time to time, as the finances of the company might permit. The four directors required, however, that the money was to be taken without the knowledge of the remaining director, a Mr. Henry. The sums taken as specified in each of the seven counts upon which he was convicted, as defendant testified, were part of this 15 per cent. commission which he had been so authorized to withdraw. Defendant relied upon this authority, as he claimed it to exist, to justify his admitted taking of the money. It was the theory of the prosecution that the four directors never made any such promise, and that it would have been an unlawful transaction had they done so. The real question before the jury in such a state of the evidence and in finding upon each of the counts in the indictment was as to whether or not the defendant fraudulently and with a felonious intent appropriated the money as charged in the respective counts. It will be readily seen that if the four directors promised the defendant the 15 per cent. commission and told him to take it as he did, even if they had no legal right to make such promise or to authorize such taking, if the defendant believed that

they had, and acting upon such claimed authority, he took the money in good faith, he would clearly be committing no crime. But his taking would have just as clearly been "unlawful"; and the jury were instructed to convict him if the taking were unlawful.

[7] So stated, the error in the instruction is obvious. It is contended, however, that other instructions given in connection with the one now in question, supplied the deficiencies, and together with it, completed a fair presentation of the law. It is doubtful if any separate or detached instruction could be held to have cured the error in this instruction, given at the end of the charge, and twenty-one times repeated. It contains a definite direction, upon the finding of a certain fact, to find the defendant guilty. It is the rule that in the case of instructions which so direct a conviction, the instruction must state all of the conditions necessary to a legal conviction, which this instruction admittedly did not. But waiving these considerations, the qualifying instruction relied upon by the respondent is insufficient for that purpose. The greater portion of this latter instruction (page 1652, vol. 5, Reporter's transcript) is practically in the terms of section 511, Penal Code. By it the jury was told that if a person in converting property to his own use does so under a bona fide claim of title thereto, he is not guilty of the crime of grand theft, although his claim of title was not good. Continuing, the court further instructed: "If you find * * * that the defendant appropriated property owned by the Harris Manufacturing Company and by said company entrusted to said defendant, and the defendant laid claim to the property so appropriated, such claim of title, if preferred in good faith, is a sufficient defense, even though the claim is untenable."

So far this instruction is a correct statement of the law, and directly applicable to the facts of this case. It so far differs from the instruction in which the jury were told that if they found that the defendant "unlawfully" took the sums mentioned in the various counts of the indictment, that they should convict him, as to tell them that even if his claim of title to the property "was not good" or "untenable," if made in good faith, that they should not convict him. Whether or not this instruction so far supplied the deficiencies of the first instruction, and limited the forces of the specific direction to convict the defendant, if the jury found that he had "unlawfully" taken the sums withheld, we do not have to decide, for reasons which we will briefly discuss. At the end of and concluding this instruction the court said: "But this provision would not excuse the unlawful retention of the property of the Harris Manufacturing Company to offset or pay demands held against it by defendant." This concluding part of the instruction should not have been given; there is no theory of the case to which

it is appropriate. The prosecution contended that the defendant took the sums mentioned in the different counts of the indictment without any right or authority whatever. Defendant contended, not that he retained the money appropriated by him to pay any debt or claim which he had against the company, but that he took it as provided in the first portion of the above instruction, and as provided in section 511 of the Penal Code, under a claim of title to it, and in pursuance of a definite direction of four of the directors of the company, instructing him to do so.

Ordinarily the giving of an irrelevant instruction is of no consequence in a case, and the giving of this portion of the instruction given here would not constitute error in itself. But in this case it could not fail to have misled the jury. There having been no theory of the case to which it was appropriate, the jury might quite properly have taken it as having been given as applicable to the facts of the case they were considering. So understood the jury were told, substantially, by the first portion of the instruction that if the defendant took the property under claim of right, and in good faith although unlawfully he should be excused, and in the second and concluding portion, that if he retained the property unlawfully, he should not be excused. Such an instruction so confused and apparently contradictory cannot be held to have explained and properly qualified the direct instruction first above mentioned, to convict the defendant if the jury found that he took the property in question unlawfully. Other instructions relied upon to supplement and qualify the instruction first above mentioned need not here be referred to. It is enough to say that in no portion of the charge was the jury told that the taking, or retention of the money mentioned in the indictment, must, in any aspect of the case, have been fraudulent or felonious before the defendant could have been convicted. *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282.

[8] Another assignment of error was based upon the refusal of the court to give the following instruction requested by the defendant: "You are instructed that the law indulges no presumption, nor is a jury permitted to indulge in any presumption that it is more probable that a person previously convicted of felony will commit a subsequent one. The fact that the defendant W. S. J. Ranney was previously convicted of a felony raises absolutely no presumption against him that he committed any offense as charged in the indictment." This instruction should have been given. During the course of the trial it had many times been brought to the attention of the jury that the defendant had been previously convicted upon two charges of felony. The jury was instructed that the defendant as a witness might "be impeached by proof that he had been convicted of a felony or fel-

onies." He was entitled to have the jury instructed that that was as far as they could go in considering such evidence, and that the fact of these convictions could not in any way be used by them as evidence of his guilt of the charges upon which he was on trial. This was a substantial right of the defendant which he was improperly denied. As the case will have to be retried for the reasons above stated, other contentions advanced by the defendant to that end need not be considered.

The order and judgment are reversed.

On Petition For Rehearing.

PER CURIAM.

[9, 10] By some oversight in examining the record in this cause the petition for rehearing with reference to the instruction given to the jury by the trial court, heretofore held prejudicially erroneous, contains the following language: "But in considering the propriety of the giving of that instruction, this court has unconsciously stepped into error and wholly overlooked the fact that the twenty-one instructions were given at the request of the defendant." An examination of the clerk's record discloses that this statement is not in accordance with what is there disclosed.

A comparison between the twenty-one instructions given by the court at the request of the prosecution, and the twenty-one instructions requested by the defendant and refused by the court, is all that is necessary to clearly exhibit the difference between the instructions given and the instructions asked by the defendant and refused by the court. The instructions requested by the defendant should have been given. They did not state the law as favorably to the defendant as might have been requested. On the other hand, the instructions given by the trial court did not state the factors justifying a verdict of guilty. The respondent's petition for rehearing demonstrates the vice of the instruction under consideration. The instruction referred to as requested by the defendant's counsel clearly stated an elementary principle of law, to-wit, that if the money was not unlawfully taken, the defendant was entitled to an acquittal. By the instruction requested by the people and given to the jury, the elim-

ination of the words "do not" in the beginning of the instruction as worded by the people, and the changing of the words "not guilty" to read "guilty," in the concluding portion of the instruction as requested by the people, the jury was incorrectly advised that if the money was simply unlawfully taken, defendant should be convicted. Such is not the law. If not unlawfully taken, the defendant was certainly entitled to a verdict of not guilty. But before finding the defendant guilty the jury must not only be satisfied that the money was unlawfully taken, but also that it was feloniously taken. By the formula instruction as requested by the people, the jury was advised that if the people established that the money was unlawfully taken, a verdict of guilty should be returned. The people were not entitled to any such instruction. It was necessary for the people to establish beyond a reasonable doubt that in addition to being unlawfully taken, the money must also have been feloniously taken. The petition for rehearing overlooks the fact that the instruction as requested by the people and given by the court, is neither a full nor a correct statement of the law. By placing the given instruction as requested by the people, in contrast with the refused instruction as requested by the defendant, the error in the instruction is luminously disclosed. The given instruction reads: "If the jury find, to a moral certainty and beyond a reasonable doubt, that defendant W. S. J. Ranney did, at and in the County of San Joaquin, etc., * * * unlawfully take the property of the Harris Manufacturing Company * * * then I charge you it will be your duty to bring in a verdict of guilty of grand theft." The refused instruction requested by the people is worded as follows: "If the jury *do not* find, to a moral certainty and beyond a reasonable doubt, that the defendant W. S. J. Ranney did, at the County of San Joaquin, etc., * * * unlawfully take the property of Harris Manufacturing Company * * * then I charge you it will be your duty to bring in a verdict of not guilty of grand theft." The elimination of the words "do not" thus stand out in bold relief, telling the jury that all the prosecution had to do was to prove that the money was unlawfully taken. As we have said, such is not the law.

The petition for rehearing is denied.

In re YALE'S ESTATE.*
YALE et al. v. BRIGGS et al.
 Civ. 7185.

District Court of Appeal, Second District,
 Division 1, California.
 Nov. 26, 1930.

Rehearing Denied Dec. 26, 1930. Hearing
 Granted by Supreme Court Jan. 22, 1931.

1. Wills ☞337.

Evidence held insufficient to sustain verdict finding testator was mentally incompetent; hence granting new trial was not error.

2. Judgment ☞199(3).

In absence of evidence overcoming presumption of testator's sanity, proponents' motion for judgment notwithstanding verdict for contestants should have been granted.

3. Wills ☞55(1).

Contestants must overcome presumption of testator's sanity at time of execution of will by affirmative showing and preponderance of evidence.

Appeals from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding by William E. Briggs as executor, and others, to probate the will of Charles Yale, deceased, opposed by Harold L. Yale and others. From a judgment and order in proceedings by contestants to revoke an order admitting the will to probate, contestants and proponents appeal.

Affirmed in part, and reversed in part, with directions.

Woodruff, Musick & Hartke, of Los Angeles, for contestants.

Harry A. Chamberlin, of Los Angeles, for proponents William E. Briggs, Claude F. Peters, and William E. Briggs.

Farrand & Slosson, of Los Angeles, for proponent Ralph B. Hardacre.

YORK, J.

The proceedings included in these appeals arose out of a petition for revocation of an order admitting to probate a certain instrument purporting to be the last will and testament of Charles Yale, deceased. The contest was tried before a jury.

The Supreme Court has heretofore dismissed the appeals from the several minute orders referred to in its opinion in the Matter of the Estate of Charles Yale, Deceased, etc., reported in 208 Cal. 102, 280 P. 358. It has, therefore, simplified the consideration by this court of the appeals to that extent.

The appeals now pending are: (1) By the contestants, from that part of the judgment granting certain motions for nonsuit and dismissing the contest with respect to the grounds of contest therein specified; and from that part of the judgment dismissing the contest as to two of the contestants because they were not parties interested therein; and from an order granting the motion of the proponents of the will for a new trial of the contest. (2) By the proponents, from an order denying their motion for judgment notwithstanding the verdict.

The verdict of the jury was in favor of the contestants on the issue of mental incompetency, the court on the trial having ordered nonsuits against the contestants on the issues of undue influence, fraud, conspiracy, and lack of proper execution of the will. After judgment was entered, a motion for a new trial of the contest was made by the proponents which motion was granted.

The very voluminous transcript discloses a vast amount of evidence as to the mental condition of the decedent, which the proponents contend fails to show any mental incompetency, or at least any incompetency to make a will, and which evidence, it is contended by the contestants, shows undue influence, fraud, conspiracy, and lack of proper execution of the will, and a total lack of testamentary capacity.

[1] A careful analysis of all of the evidence does not justify the statement of the contestants contained in their summary as to their proof of Mr. Yale's mental condition. A condensed statement, as the court views it, is that he was a man well along in years suffering from a great many ailments, and that he suffered "a slight stroke" prior to the making of the will. But the record does disclose that he knew the extent of his property; that he knew who were the objects of his bounty, and that he had decided ideas as to the persons to whom he desired to leave his property, apparently uninfluenced by any delusions or improper suggestion of any person. It is true, however, that the conclusion (from facts not stated) of one witness is in the record showing that, about the time the will and codicil were executed, the deceased (in the words of the witness Wellman) was not "in a condition mentally to really make a will in the first place, and in the second place I thought his physical condition was such that it would tax his physical condition to attempt to do so, assuming that it would take some time, which I believed it would take to get down what he would want to do."

The trial judge, however, who heard all of the evidence, granted the motion for a new trial of the contest and this, we think, was justified by reason of the condition of the case after due consideration of all of the evidence introduced before the jury. There were ap-

parently no material errors in the introduction of the evidence, nor in the giving of the instructions to the jury, and the motion evidently was granted solely because the trial judge concluded that the verdict was not satisfactorily sustained by the evidence.

[2. 3] The motion for a judgment in favor of the proponents and appellants William E. Briggs, Ralph B. Hardacre, Claude F. Peters, and William E. Briggs, as executor, notwithstanding the verdict of the jury, on the evidence as disclosed by the cold record before us, should have been granted by the trial court, as there was no evidence other than the conclusion given in evidence, as above stated, to overcome the presumption of the sanity of the decedent at the time the will was executed, which presumption the contestants must overcome by a showing affirmatively and by a preponderance of the evidence. *Estate of Smith*, 200 Cal. 152 at page 158, 252 P. 325, 328; *Estate of Fleming*, 199 Cal. 750, 251 P. 637, 638.

In *Estate of Smith*, supra, a quotation from the *Estate of Perkins*, 195 Cal. 699, 235 P. 45, is pertinent here as to both motions made: "Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion." And, as stated by our Supreme Court in the *Estate of Smith*, supra, following this quotation: "* * * And, even in this latter class of cases, the evidence 'must establish that the will itself was the creature or product of such hallucination or delusion.'" However, the court, who heard all the evidence, concluded that it was best in the interest of justice to order a retrial of the contest.

The Supreme Court in the *Estate of Sexton*, 199 Cal. 759 at page 762, 251 P. 778, 779, says: "A motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court, and its action in granting the motion will not be disturbed on appeal unless it appear that there was a clear abuse of such discretion. [Citing cases.] The precise test whereby to determine when a trial court abuses its discretion in granting a new trial after the verdict of a jury upholding a will appears not to have been determined by any previous decision of this court. This much, however, seems certain. If the entire evidence upon the issue of mental competency is of such a character that it would not have supported a verdict for the contestant had the jury brought in such a verdict, then it should be held that the trial court abused its discretion in granting the new trial. Indeed, this seems to be

the view taken by counsel on both sides of this appeal. The question then is this: If the jury had found for contestant, would its verdict have totally lacked the support of substantial evidence? If it would, then the order granting the new trial must be reversed."

Quoting from the same case on page 763 of 199 Cal., 251 P. 778, 780: "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. [Citing cases.] The actual mental condition of the testator at the time of the execution of the will is the question to be determined. *Estate of Perkins*, 195 Cal. 699, 235 P. 45."

Quoting again from the *Estate of Sexton*, supra, at page 766 of 199 Cal., 251 P. 778, 781: "Testamentary capacity is always presumed to exist until the contrary is established. That is to say, the presumption is always that a person is sane, and the burden is always upon the contestant to show affirmatively and by a preponderance of evidence that the testator, at the time of executing the will, was of unsound mind." Therefore, the court did not err in granting the motion for a new trial.

On the authority of the cases hereinbefore cited, and after a scrutiny of the entire evidence introduced in the trial of the contest in the lower court, the order of the trial court denying the motion for judgment in favor of the respondents, notwithstanding the verdict rendered by the jury, should be reversed. See, also, *Estate of Redfield*, 116 Cal. 637, 48 P. 794; *Estate of Casarotti*, 184 Cal. 73, 192 P. 1085. As was held in the *Estate of Fleming*, supra: "When a motion for a directed verdict, which should have been granted, has been denied, and a verdict rendered against the moving party, it is the duty of the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, to render judgment in favor of the party aggrieved, notwithstanding the verdict. Code Civ. Proc. § 629. Appellant is here contending that the power of the trial court in these matters is limited, by the provision of the section, supra, to granting a motion for judgment notwithstanding a verdict in those cases in which the antecedent motion for a directed verdict 'should have been granted,' and that, therefore, if for any reason the motion for a direction by the court was properly denied, the court is without power to grant the motion for judgment notwithstanding the verdict. * * * Assuming, but not deciding, that the motion for a directed

verdict was properly denied for the reasons stated, it does not follow that such denial was a bar to the granting of the motion for judgment notwithstanding the verdict. Appellant was not injured. * * * The motion was denied, and the case was submitted to the jury, carrying with it the benefit of the court's ruling in the contestant's favor. We are of the view that section 629 of the Code of Civil Procedure relates to the granting of a motion for judgment notwithstanding the verdict in a case in which the motion for a directed verdict 'should have been granted' on the evidence, and does not lend itself to the narrow construction appellant attempts to put upon it. * * * The trial court had power to direct the jury to render a verdict in favor of the respondents, unless there was substantial evidence tending to prove all the controverted facts necessary to establish the contestant's case. It was not necessary that there should have been an utter absence of conflict in the evidence. To deprive the court of the right to exercise its power, if there was a conflict, it must have been a substantial one. Estate of Sharon, *supra* [179 Cal.] p. 459, 177 P. 283; Estate of Baldwin, 162 Cal. 471, 123 P. 267."

There is no evidence in the record which shows or tends to show any undue influence, conspiracy, fraud, or lack of proper execution of the will and codicil in question, and there is no proof in the record to sustain the contention of Jennie Ethelyn Miller Grisier or Richard Miller that they are parties entitled to contest said will or codicil. They are the children of Mr. Yale's sister, who was living at the time of the contest.

Therefore, that portion of the trial court's judgment is affirmed wherein it finds that said children of the sister of the decedent are not interested in said contest and are not proper parties to said contest. That part of the judgment is also affirmed which granted certain motions of nonsuit and dismissed the contest with respect to the grounds of contest therein specified. The order of the trial court granting the motion for a new trial is affirmed. The order denying the motion of appellants William E. Briggs, Ralph B. Hardacre, Claude F. Peters, and William E. Briggs, as executor, for a judgment in their favor notwithstanding the verdict of the jury in favor of respondents, is reversed.

We concur: CONREY, P. J., and HOLLZER, Justice pro tem.

On Rehearing.

PER CURIAM.

The petition of contestants for a rehearing of this cause is denied.

By reason of inadvertence, in rendering the judgment of this court, we omitted to

give direction for entry of judgment notwithstanding the verdict. In view of the conclusions stated in the opinion, such direction should be given. For this reason alone, the petition of proponents for a rehearing is granted and the cause is resubmitted. Upon such resubmission, and for the reasons set forth in the opinion now on file, that portion of the trial court's judgment is affirmed wherein it finds that said children of the sister of the decedent are not interested in said contest and are not proper parties to said contest. That part of the judgment is also affirmed which granted certain motions of nonsuit and dismissed the contest with respect to the grounds of contest therein specified. The order of the trial court granting the motion for a new trial is affirmed. The order denying the motion of appellants William E. Briggs, Ralph B. Hardacre, Claude F. Peters, and William E. Briggs, as executor, for a judgment in their favor, notwithstanding the verdict of the jury in favor of respondents, is reversed; and the superior court is directed to grant said motion of said appellants Briggs, Hardacre, Peters, and Briggs, as executor, and enter judgment in their favor. C. C. P., § 629.

110 Cal. App. 65

LEVY v. BERNER et al. (two cases).

Civ. 7349.

District Court of Appeal, First District,
Division 1, California.

Nov. 25, 1930.

1. Automobiles ⇨245(13).

In personal injury action, weight of testimony tending to impeach plaintiff's version of automobile accident *held* for jury.

2. Automobiles ⇨244(36).

In personal injury action, evidence *held* to establish that automobile accident was due to defendant's driving on wrong side of street.

3. Automobiles ⇨246(47).

Evidence in personal injury action warranted instruction that automobile might be driven on left side of highway when overtaking other vehicle, if highway was clear and unobstructed for at least 100 yards ahead.

The evidence disclosed that when defendant attempted to pass the automobile in front of him, the plaintiff's automobile was about two hundred feet away.

4. Automobiles ⇨246(8).

Instruction *held* not to inform jury that occurrence of automobile accident at defendant's left-hand side of street was conclusive evidence of defendant's negligence.

The instruction was to the effect that the law required vehicles to be driven on the right-hand side of the highway, except when overtaking and passing other vehicles, in which case they might be driven on the left side if the same was clear and unobstructed for at least one hundred yards ahead.

5. Trial ⇨296(3).

Error, if any, in instruction regarding defendant motorist's negligence in passing automobile in face of approaching automobile *held* corrected by further instructions.

Instruction was to the effect that, if defendant was attempting to pass automobile when there was another automobile approaching in opposite direction within three hundred feet of defendant, there was negligence under statute. The court further instructed the jury that the violation of a statute or ordinance constituted negligence as a matter of law, but that, unless such negligence was the proximate cause of injury, it becomes immaterial, and that there must appear to be a causal connection between the violation of the law and the injury before defendant could be held to have violated it.

6. Trial ⇨127.

Cross-examination disclosing defendant's witness was employed by insurance company to examine injured plaintiff *held* proper.

The cross-examination question to which witness replied that he was requested to act by a person associated with a certain insurance company was proper, as the jury had the right to consider the witness' interest in case as tending to impeach his credibility.

7. Appeal and error ⇨1060(1).

Testimony disclosing insurance company was involved in automobile accident case, if improper, *held* not prejudicial under circumstances.

The circumstances disclosed that the defendant had testified that after the accident he stated to plaintiff he was insured in certain company and directed plaintiffs to explain occurrence to company.

8. Appeal and error ⇨1046(5).

In personal injury action, defendant suffered no prejudice because court questioned

police officer testifying plaintiff presented cigars to him and offered to make it worth while to change report of automobile accident.

9. Damages ⇨130(3).

\$3,000 for sprained joints between vertebra and pelvis and sprains of joints of femur and contused chest *held* not excessive.

10. Damages ⇨130(2).

\$1,000 for lacerations of both legs and strained ligaments of knee joints *held* not excessive.

11. Appeal and error ⇨1004(3).

In personal injury action, damages is committed first to discretion of jury and then to trial court.

12. Appeal and error ⇨1004(1).

Personal injury judgment cannot be set aside unless verdict is so excessive as to suggest passion or prejudice of jury.

Appeals from Superior Court, City and County of San Francisco; Walter E. Herzinger, Judge.

Separate actions by Joseph Levy and Albert Levy against L. Rothenberg. The causes were tried together and presented on appeal on the same transcript and brief. Since the appeals were taken, the defendant has died, and Saul Berner and another, executors of the last will and testament of the defendant, have been substituted as the appellants.

Affirmed.

J. Hampton Hoge, of San Francisco, for appellants.

Franklyn M. O'Brien and Horace A. Diibert, both of San Francisco, for respondents.

PER CURIAM.

The above actions were brought to recover damages for personal injuries growing out of the same automobile accident. The causes were tried together and are presented here upon the same transcript and briefs.

The accident occurred on March 27, 1929, at 9:55 o'clock a. m. The plaintiffs, who were riding in a Chevrolet automobile, were proceeding northerly along Nineteenth avenue between Judah and Kirkham streets in San Francisco, and the defendant was operating a Buick automobile in the opposite direction along the same street. Plaintiff Albert Levy owned and was driving the Chevrolet car, and plaintiff Joseph Levy was a passenger therein. There was a collision between the two automobiles, as the result of which each plaintiff suffered physical injuries and the Chevrolet automobile was damaged.

The complaint in each action averred negli-

gence on the part of the defendant, which he denied; and contributory negligence was pleaded as a defense in both cases. Verdicts were returned as follows: For Joseph Levy, \$1,000, and for Albert Levy, \$3,000. New trials were denied, and defendant has appealed from each judgment.

Since the appeals were taken defendant has died, and his executors have been substituted as the appellants herein.

As grounds for the appeals it is claimed that the court erred in its instructions to the jury and in admitting certain facts in evidence; that the conduct of the court in the examination of a certain witness was prejudicially erroneous, and that the damages awarded were excessive and the result of passion or prejudice.

[1, 2] According to the plaintiffs the course of their automobile was north along Nineteenth avenue, east of the center line of the avenue and about four feet from the easterly curb. They testified that the defendant swerved from his course, which was south along the same avenue, and a collision occurred. The defendant testified that he turned to his left in an attempt to overtake and pass a car traveling ahead of him, but that the collision occurred west of the center line of the avenue. Other testimony, however, tended to show that defendant's car immediately before the collision was moving in a southeasterly direction on the east side of the avenue, and that the collision occurred at a point five or six feet from the easterly curb. While testimony tending to impeach plaintiffs' version of the affair was produced, the weight to be given thereto was a question for the jury, and we are satisfied that they were justified in concluding from all the evidence that the accident happened as described by the plaintiffs and was due to the fact that the defendant was driving on the wrong side of the avenue.

[3] The jury was instructed, in substance, that at the time of the accident the law required vehicles to be driven on the right-hand side of the highway except when overtaking and passing other vehicles, in which case they might be driven on the left side if the same was clear and unobstructed for at least one hundred yards ahead. Defendant claims that there was no evidence that the highway on his left was not clear and unobstructed for one hundred yards ahead, and that the instruction was therefore improper. It appears, however, from defendant's testimony that when he attempted to pass the car in front plaintiffs were about two hundred feet away. This was sufficient to warrant the giving of the instruction.

[4] Nor did the instruction inform the jury, as claimed, that the occurrence of the accident at defendant's left-hand side of the street was conclusive evidence of negligence on his part. The instruction was a correct state-

ment of the law in the abstract which, in view of the evidence, was proper.

[5] The jury was further instructed as follows: "If you find from the evidence that defendant was attempting to pass an automobile at the time when there was another automobile approaching in the opposite direction within three hundred feet of the defendant I instruct you that this constitutes a violation of section 122 of the Motor Vehicle Act, and is therefore negligence." While, as claimed by the defendant, a violation of the statute, if such violation was the proximate cause of the damage alleged, would constitute negligence (19 Cal. Jur., Neg., § 67, p. 636), and this element should properly be included in such an instruction, nevertheless the jury was also instructed that "the violation of a statute or ordinance constitutes negligence as a matter of law. Unless, however, such negligence is the proximate cause of injury to another it becomes immaterial. There must appear to be a causal connection between the violation of the law and the injury before the defendant can be held to have violated it." This, with other instructions, wherein the court carefully defined negligence and proximate cause, was sufficient to correct any error in the instruction complained of.

[6] The testimony of a physician called by defendant, and who had examined plaintiffs after the accident, tended to show that their injuries were less serious than they claimed. On cross-examination the witness was asked who employed him to make the examinations, and he replied that he was requested to act by a person associated with a certain insurance company. The question was objected to by defendant, and the jury was instructed by the court to disregard the answer. The question was, we think, proper cross-examination, as the jury had the right to consider the witness' interest in the case as tending to impeach his credibility. 27 Cal. Jur., Witnesses, § 96, p. 122.

[7] The defendant also testified that after the accident he stated to plaintiff Albert Levy that he was insured by a certain company, and directed plaintiffs to explain the occurrence to them.

Plaintiff Albert Levy, in response to the question whether he consulted a physician after the accident, said: "I went to the—to Mr. Rothenberg's insurance company and asked them whether it was their duty to send a doctor out to attend to patients that were injured in an accident." The court, on motion, struck out this answer.

Defendant complains that both answers were prejudicial to him, as they improperly called the jury's attention to the fact that he was insured. In view of defendant's testimony the last answer, if improper, cannot reasonably be said to have been prejudicial; and, as stated, the first question and answer were competent on cross-examination.

[8] A police officer who made an investigation of the accident testified that the plaintiff Albert Levy made him a present of cigars and also offered to make it worth his while if he would change his report. In this connection the trial court asked certain questions of the officer, and defendant claims that these questions showed partiality on the court's part. We have carefully reviewed them, and fail to understand how they could have been injurious to the defendant. On the contrary, it appears to us that plaintiff, rather than the defendant, had grounds for complaint. It is certain that the latter suffered no prejudice therefrom.

[9-12] The testimony shows that the plaintiff Albert Levy received a sprain of the joint between the lower lumbar vertebra and the top of the pelvis. There were also sprains of the joints of the femur with the pelvis on each side, and his chest was contused. He continued to receive treatment from a physician up to the time of the trial. He also suffered pain from the injuries, which he testified had continued; and a physician who examined him shortly before the trial was unable to state whether his injuries, particularly that to the junction of the lower lumbar and sacrum, would be permanent. It was also testified that injuries of this character are frequently chronic. This plaintiff had also incurred an indebtedness for medical services amounting to about \$150, and in addition lost considerable time from his business as a dealer in motion picture films.

Plaintiff Joseph Levy, according to a physician, suffered contusions and lacerations of both legs, and the ligaments of his knee joints were strained. He was confined to his bed for some days, and incurred an expense for medical treatment and X-ray examinations amounting to \$125. In addition he suffered considerable pain, and lost seven weeks from his business as a salesman from which he had previously derived an income of about \$50 a week.

The amount of damages in actions of this character is committed first to the sound discretion of the jury and then to the trial court, which, in ruling upon a motion for a new trial, may consider the evidence and set aside the verdict, if unjust. Upon appeal the judgment cannot be set aside unless the amount of the verdict is so plainly excessive as to suggest at first blush passion or prejudice on the part of the jury. *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100; *Johnson v. Pearson*, 100 Cal. App. 503, 280 P. 394. In view of the evidence, we cannot say that the verdicts are excessive, and no error is shown which would warrant the conclusion that the same resulted in a miscarriage of justice.

The judgments are, accordingly, affirmed.

BANDINI PETROLEUM CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7292.

District Court of Appeal, Second District,
Division 2, California.

Nov. 29, 1930.

Rehearing Denied Dec. 27, 1930. Hearing Denied by Supreme Court Jan. 26, 1931.

1. Mines and minerals ⇨47.

Owner of surface has absolute title to oil and gas only when they are reduced to possession.

2. Constitutional law ⇨50.

Legislative power of state may be exercised for purpose of adjusting coexisting rights.

3. Constitutional law ⇨278(1).

Eminent domain ⇨2(7).

Mines and minerals ⇨91.

Statute relating to protection of natural resources of petroleum and gas from waste does not deprive oil well owners of property without just compensation or due process of law (St. 1929, p. 923, §§ 8b, 14b; Const. Cal. art. 1, §§ 13, 14; Const. U. S. Amend. 14).

4. Constitutional law ⇨70(3).

Courts cannot be concerned with wisdom of legislation.

5. Statutes ⇨47.

Statute prohibiting "unreasonable" waste of natural gas held not void for uncertainty for failure to define standard of conduct (St. 1929, p. 923, §§ 8b, 14b).

The word "unreasonable" was used in St. 1929, p. 923, §§ 8b, 14b, for purpose of providing that operators of well might utilize reasonable proportion of gas for purpose of lifting oil to surface, and when viewed in this light the word "unreasonable" is not so uncertain as to render enactment void and inoperative.

[Ed. Note.—For other definitions of "Unreasonable," see Words and Phrases.]

6. Prohibition ⇨5(3).

Trial court having jurisdiction to determine whether there is unreasonable waste of natural gas, Court of Appeal cannot interfere by writ of prohibition to deprive its judgment of effect (St. 1929, p. 923, §§ 8b, 14b).

Petitioners sought to prevent trial court from enforcing preliminary injunction and order modifying same, and also to check any further order or proceeding in an action pending against them for the purpose of enjoining them from unreasonably wasting natural gas from their wells in certain oil fields.

7. Mines and minerals 91.

Statute prohibiting unreasonable waste of natural gas confines authority within limits of enjoining production of gas when in excess of reasonable proportion to oil for particular field involved when not conveniently necessary for other than lifting purposes (St. 1929, p. 923, §§ 8b, 14b).

Application for a writ of prohibition by the Bandini Petroleum Company and others against the Superior Court of the State of California in and for the County of Los Angeles and Honorable William Hazlett, one of the judges thereof.

Writ denied.

Call & Murphey, Robert B. Murphey, and Wm. L. Murphey, all of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., and James S. Bennett, of Los Angeles, for respondents.

Charles A. Son, Arthur R. Smiley, Roland Rich Woolley, Rush M. Blodget, George W. Nilsson, Robt. M. Pease, and Roy P. Dolley, all of Los Angeles, amici curiæ.

IRA F. THOMPSON, J.

This is an original prohibition proceeding. The petitioners seek to prevent the respondent court from enforcing a preliminary injunction and order modifying the same and also to check any further order or proceeding against them in an action pending in the respondent court entitled *People of the State of California on Relation of Fred G. Stevenot, Director of Natural Resources of the State of California v. Associated Oil Company et al.*, which action was brought for the purpose of enjoining all of the defendants therein named from unreasonably wasting natural gas from their wells in the Santa Fé Springs oil field. On March 19, 1930, after hearing the parties to the action, the court granted a temporary injunction limiting and defining the amount of gas which the defendants would be allowed to permit to escape into the air from their wells in the field mentioned. On March 28, 1930, the court made another order somewhat relaxing the terms of the injunction pendente lite. It is asserted by petitioners that they have been irreparably injured and damaged by attempting to curtail the production of natural gas; that there is no market for a large part thereof and that if they are to be allowed as they claim it is their right, to employ the gas as a lifting power to raise the oil from below the surface they must of necessity permit a portion thereof to escape into the air; that prior to the temporary injunction they were producing 19,534 barrels of oil per day but that operating most efficiently under the amount of gas allowed to be used

by the modified order they cannot possibly produce more than 10,211 barrels per day.

The action was instituted in the respondent court pursuant to the provisions of "An act to protect the natural resources of petroleum and gas from waste and destruction, etc." (Stats. 1929, p. 923), the sections of which pertinent at this point in our discussion read as follows:

"Sec. 8b. The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste."

"Sec. 14b. Whenever it appears to the director of the department of natural resources that the owners, lessors, lessees or operators of any well or wells producing oil and gas or oil or gas are causing or permitting an unreasonable waste of gas, he may institute, or have proceedings instituted, in the name of the people of the State of California, to enjoin such unreasonable waste of gas regardless of whether proceedings have or have not been instituted under section 8 [a section authorizing the oil and gas supervisor to issue certain orders] hereof, and regardless of whether an order has or has not been made therein. Such proceedings shall be instituted in the superior court for the county in which the well or wells from which the unreasonable waste of gas is occurring or any thereof are situated. The owners, lessors, lessees or operators causing or permitting an unreasonable waste of gas in the same oil or gas field, although their properties and interests may be separately owned and their unreasonable waste separate and distinct, may be made parties to said action. In such suits no restraining order shall be issued ex parte, but otherwise the procedure shall be governed by the provisions of chapter three, title seven, part two of the Code of Civil Procedure of the State of California [a chapter relating to injunctions] and no temporary or permanent injunction issued in such proceedings shall be refused or dissolved or stayed pending appeal upon the giving of any bond or undertaking, or otherwise."

The arguments of the petitioners may be grouped into the following propositions: First, the act deprives petitioners of property without just compensation and without due process of law. Second, the statute is void for uncertainty and for failure of the legislature to define a standard of conduct. Third, the enactment permits the use of gas for lifting purposes in a reasonable proportion to the

amount of oil produced and that the uncontroverted evidence shows no other or greater use and for that reason the court was without jurisdiction to grant the temporary injunction.

[1] Turning then to the first contention, it is asserted that the act is violative of the Fourteenth Amendment to the federal Constitution and sections 13 and 14 of article 1 of the state Constitution. To put the argument most favorably for the petitioners, it is asserted that they have the same vested right to make use of the gas under their property for the purpose of lifting the oil thereunder that a riparian owner has to make use of the underflow of a stream passing through his property to lift the waters to levels of entry upon his land. It is therefore insisted by counsel that it is of prime importance to examine the nature of petitioners' rights. While this is true in a degree, yet we do not attach the same weight as do petitioners to the pure legal question whether the owner of the surface is the owner of the gas in place under his soil subject to the right of an adjoining owner to appropriate to himself the title thereto by capture and possession, or whether the owner of the surface is vested only with the right to bore for gas and reduce it to possession. In either event he is the owner of a valuable right. Every owner of the surface has a like interest and right of property, whatever it may be. We think, however, that the better reasoning, on account of the self-propelling or migratory character of natural gas, as well as oil, dictates the conclusion that while in general we may speak of the owner of the surface as being the owner of the gas and oil in place, what we really mean is that he and he alone has the right through his own property to endeavor to reduce the substances to possession; that when they are reduced to possession and then only does he have an absolute and unqualified title thereto. It is argued by petitioners and by some of those who have appeared as amici curiæ that the law of California is settled to the effect that the owner of the surface is the owner of the gas and oil in situ. There are some general expressions in the authorities to this effect, particularly in tax cases where assessments have been levied upon a lease giving and granting to the lessee the right to bore for and extract the hydrocarbon substances. But they are not controlling or helpful here. On the other hand, in distinguishing between oil and other minerals in the case of *Acme Oil Co. v. Williams*, 140 Cal. 681, 74 P. 296, 297, the Supreme Court said: "Oil, on the contrary, is of a fluctuating, uncertain, fugitive nature, lies at unknown depths, and the quantity, extent, and trend of its flow are uncertain. It requires but a small surface area, in what is known as an oil district, upon which to commence operations for its discovery. But when a well is developed the oil may be tributary to it for a

long distance through the strata which holds it. This flow is not inexhaustible, no certain control over it can be exercised, and its actual possession can only be obtained, *as against others in the same field*, engaged in the same enterprise, by diligent and continuous pumping. *It is anybody's property who can acquire the surface right to bore for it*, and when the flow is penetrated, he who operates his well most diligently obtains the greatest benefit, and this advantage is increased in proportion as his neighbor similarly situated neglects his opportunity." (Italics ours.) It is the co-existence of these rights which authorizes the state to make use of its legislative power. When the rights of one impinge upon the rights of others the state may interpose for the purpose of adjusting and regulating the enjoyment of those rights. This is, in a large part at least, the foundation of all the authorities which support the power of the state to regulate the production of oil and gas. In *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 S. Ct. 576, 581, 44 L. Ed. 729, it is said: "No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners" and " * * * the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. *But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate.* It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, *or by waste by one or more to the annihilation of the rights of the remainder.* Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste." (Italics ours.) In *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 339, 55 L. Ed. 369, Ann. Cas. 1912C, 160, where the court was considering a statute designed to prevent the waste of natural mineral water by pumping for the purpose of extract-

ing the gas therefrom; after reference to and a discussion of the Ohio Oil Company case just mentioned, it is said: "The mineral waters and carbonic acid gas exist in a commingled state in the underlying rock, and neither can be drawn out without the other. They are of value in their commingled form and also when separated, but the greater demand is for the gas alone. Influenced by this demand, some surface owners, having wells bored or drilled into the rock, engage in extensive pumping operations for the purpose of collecting the gas and vending it as a separate commodity. Usually where this is done an undue proportion of the commingled waters and gas is taken from the common supply, and a large, if not the larger, portion of the waters from which the gas is collected is permitted to run to waste. Thus these pumping operations generally result in an unreasonable and wasteful depletion of the common supply and in a corresponding injury to others equally entitled to resort to it. It is to correct this evil that the statute was adopted, and the remedy which it applies is an enforced discontinuance of the excessive and wasteful features of the pumping. It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, consistently with the continued existence of that right, so regulates its exercise as reasonably to conserve the interests of all who possess it. That the state, consistently with due process of law, may do this, is a necessary conclusion from the decision in the case cited. But were the question an open one, we still should solve it in the same way." We ought to pause long enough to direct attention to this last sentence on account of its bearing upon the argument presented here that the rule established by *Ohio Oil Co. v. Indiana*, supra, has become obsolete.

In *Commonwealth v. Trent*, 117 Ky. 34, 77 S. W. 390, 392, 4 Ann. Cas. 209, the court places the source of the regulatory power upon both grounds in the following language: "It is well known that the supply of gas is limited, and may be exhausted. The act is intended to protect the supply from waste. Under the act, it is conceded, a person, to exhaust the supply of his neighbor, cannot put down wells on his own land, and allow the gas to escape at the well. * * * The Legislature may protect from waste the natural resources of the state, which are the common heritage of all. The right of the owner of property to do with it as he pleases is subject to the limitation that he must have due regard for the rights of others. To allow the storehouse of nature to be exhausted by the waste of the gas would be to deprive the state and its citizens of the many advantages incident to its use. That the Legislature may prevent this is well settled." (Citing cases.) In *Oklahoma* the statute not only prevented the escape of gas into the air, "the intention-

al drowning with water of a gas stratum," the "underground waste" of gas, but also the "wasteful utilization of such gas." The Supreme Court of that state in the case of *Quinton Relief Oil & Gas Co. v. Corporation Commission*, 101 Okl. 164, 224 P. 156, 157, after referring to *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276, where a somewhat similar statute of Wyoming was under scrutiny, said: "A careful examination of the authorities show that there is almost unanimity in holding that the burning of natural gas for carbon purposes in high pressure fields, having sufficient rock pressure to force gas through a pipe line to domestic consumers, and where the same may be used for such purpose, constitutes a wasteful utilization thereof. Natural gas has twice the heating units as [sic] artificial gas, and, taking into consideration the convenience of natural gas, it is intrinsically worth more than artificial gas; its market value being from \$2.00 to \$3.00 per thousand cubic feet. The amount of carbon black produced from 1,000 cubic feet of natural gas has a market value of about 10 cents. It therefore is obvious that the state, in the proper exercise of its police power and in conservation of so valuable a natural resource as natural gas, may prohibit the wasteful utilization of the same in the interest of the public welfare." In *State v. Carson Carbon Co.*, 162 La. 781, 111 So. 162, the Supreme Court of Louisiana sustained an enactment by which the owners of gas wells were prohibited from taking and using for the manufacture of carbon black more than 20 per cent. of the potential capacity of a gas well. In *Oxford Oil Co. v. Atlantic Oil Producing Co.* (C. C. A.) 22 F. (2d) 597, 598, the court says: "The right of a state to so regulate the drilling of wells for oil and gas as to conserve the rights of adjoining owners is too well settled to admit of serious controversy. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160. It was within the power of the Legislature to lay down a general rule for the protection of the mineral rights of the owners of adjoining lands, and to leave the details of enforcing that rule to an administrative agency or board. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 S. Ct. 359, 58 L. Ed. 713." By a divided court in the case of *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276, a statute of Wyoming declaring the use of natural gas from a well within 10 miles of an incorporated city "without the heat therein contained being fully and actually applied and utilized for other manufacturing * * * or domestic purposes" to be a "wasteful and extravagant use" and unlawful, was held valid and constitutional. The court reasserted the doctrine that "a state

may consider the relation of rights and accommodate their coexistence, and, in the interest of the community, limit one that others may be enjoyed." It also says: "The determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights, and in which the state has an interest to adjust and preserve; natural gas being one of the resources of the state. And in this consideration it is more important to consider, not for what a particular owner uses the gas, but the proportion of his use to that of others, or, it may be, the prevention of use by others. * * *

[2] It is apparent from the quotations that the legislative power of the state may be exercised for the purpose of adjusting co-existing rights. They also tend to indicate that the state may restrict or regulate the production of oil or gas on the theory of the public's interest in their natural resources. Whether this latter may be done we think it unnecessary to a decision of the present application. But as indicating that there is grave doubt concerning this power we here make reference to the case of *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564, 570, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193. The state of Oklahoma attempted to prohibit the construction of pipe lines for natural gas or the transportation of the same except by domestic corporations, the charters of which were to provide that it should only be transported between points in the state and not outside. The court in declaring the statute void said with reference to the power of the state to "preserve the common property" as distinguished from the right of the state to prevent waste: "The extent of power which the second question implies a state possesses challenges serious inquiry. The natural resources of a state may be other than natural gas; for example, may be timber and coal and iron and other metals; but it is contended that the right of conservation extends to these, and the broad statement of the first question [the right of the state to preserve its resources] is qualified in the argument by the properties of natural gas and the limitation of its supply. This, it is contended, gives a range to the police power of the state which otherwise it would not possess. And such power, as we understand the further contention to be, may determine not only the conservation of the resources of the state, but as to what class of persons may use them, as dependent upon their transportation in state, rather than in interstate, commerce. * * *

The statute of Indiana [considered in *Ohio Oil Co. v. Indiana*, supra] was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose

was to secure to the common owners of the gas a proportionate acquisition of it—a reduction to possession and property—not to take away any right of use or disposition after it had thus become property. It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, *could not be deprived of the right to reduce it to possession without the taking of private property*. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it when in possession. The Oklahoma statute far transcends the Indiana statute. It does what this court took pains to show that the Indiana statute did not do. It does not protect the rights of all surface owners against the abuses of any. *It does not alone regulate the right of the reduction to possession of the gas, but, when the right is exercised, when the gas becomes property, takes from it the attributes of property—the right to dispose of it; indeed, selects its market, to reserve it for future purchasers and use within the state, on the ground that the welfare of the state will thereby be subserved. The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce.* The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare—a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made

the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court." (Italics ours.)

It is argued, however, that the statute involved herein does not proceed upon the theory of correlative rights, but only upon the policy of conserving or preserving the common supply. We cannot assent to this statement or construction of the enactment. It is true that section 8b of the act declares the "unreasonable waste of natural gas * * * to be opposed to the public interest" and "to be unlawful," but it is also apparent from a reading of the entire act that unreasonable waste of gas is considered to be the production of an undue proportion of gas to the amount of oil, in the particular field involved, by one surface owner as against others, in those instances where the gas is not conveniently necessary for the "generation of light, heat, power or other industrial purpose." That this is the intent and purpose of the law is made manifest from the following quotation from section 8d: "If it shall appear that gas is being produced from any oil well or wells in quantities exceeding *a reasonable proportion to the amount of oil produced* from the same well or wells, even though it is shown that such excess gas is being used in the generation of light, heat, power or other industrial purpose and that there is sufficient other gas available for such uses from other wells in the same or other fields in which the gas produced is not in excess of the amount which bears *a reasonable proportion to the amount of oil produced* from such other wells and that there are adequate gas-pipe-line connections between such other wells and the place of utilization of such gas the state oil and gas supervisor shall hold that such excess production of gas is unreasonable waste thereof if such holding will not cause an unreasonable waste of gas in any other field." (Italics ours.) The legislation was evidently adopted upon the theory that in every oil field there is what we may term (at least for illustrative purposes) a normal proportion of gas to oil; that when an unreasonable disproportion of gas to oil exists in a given well there is a corresponding loss of recoverable oil by other owners who would otherwise employ the lifting power of the excessive gas to good purpose; and that this disproportionate production of gas should not be permitted unless the gas as a separate thing be conveniently necessary for domestic or industrial purposes. We have not overlooked the fact that the act makes the blowing or release of gas into the air prima facie proof of unreasonable

waste. It is to be observed, however, that such waste is not absolutely prohibited as it was in *Ohio Oil Co. v. Indiana*, supra, but is only made a rule of evidence. But even if such were the results of the act the authorities from which we have quoted would dispose of the arguments of the petitioners.

[3, 4] We are therefore irresistibly led to conclude that the statute here involved is not as stringent in its restrictions as those in other jurisdictions, and further that it does not deprive the petitioners of property without just compensation or due process of law but rather falls within the legislative authority of the state with the wisdom of which we cannot be concerned.

We also find authority of a persuasive character in our own state. In *Ex parte Elam*, 6 Cal. App. 233, 91 P. 811, 812, the court was considering a statute to prevent the waste and flow of artesian wells and making it a misdemeanor to waste the flow thereof. On account of the pertinency of the discussion relative to a similar argument we deem it expedient to set forth in full the first question raised therein and the response of the court thereto. We quote as follows:

"The first point made by petitioner—which is that the act is violative of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall 'deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law,' and of article 1, § 1, of the Constitution of this state, which provides that 'all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property,' and of section 13, article 1, which provides that no person shall be 'deprived of life, liberty, or property without due process of law'—seems to have been met and demonstrated to be untenable by the Supreme Court of the United States in the case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729. By that case it is established that water, oil, gas, and all fugitive substances held in their natural subterranean reservoirs are exceptions to the general rule establishing absolute ownership in the proprietor of the surface of all that lies underneath; that these minerals, being migratory in their nature, having no fixed situs, are a part of the soil only so long as they are on or in it, but after they escape and go to other lands the title of the former owner is gone; that it follows therefore that no one owner of the surface of the earth within the area beneath which these minerals move can exercise his right to extract from the common reservoir in which the supply is held without diminishing the source of supply as to which all oth-

er owners of the surface must exercise their rights; that, in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all, and of the public at large, the state could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein they were deposited, as well as the public, had an interest. 'No divesting of private property under such a condition can be conceived, because the public are the owners, and the enactment by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character.' This water, the ownership of which until actual possession is acquired being in the public, or at least that portion of the public who may own the surface of the soil within the artesian belt, is subject to a reasonable use only by those interested therein. This reasonable use is determined in *Katz v. Walkinshaw*, 141 Cal. 134, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, to be the use of such amount of the subterranean water as may be necessary for some useful purpose in connection with the land from which it is taken.' The conditions existing in this state with reference to the necessity for the conservation of irrigating waters are most clearly set out in the case last cited, and the reasons for the rule restricting the use clearly shown. Whenever a land owner exceeds this reasonable use, he is appropriating to himself that which belongs to others who are entitled to a like use, and to that extent is obstructing the free use of property so as to interfere with its comfortable enjoyment, and which, by sections 3479 and 3480, Civil Code, is declared to be a public nuisance. Whatever right one has, even in his own, is subject to that established principle that his use shall not be injurious to the rights of others, or of the general public. This act therefore relates to waters, the right to the use of which is common to a large portion of the community, and affects the general public right. Legislation in relation thereto affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the state, which is declared in *Ex parte Whitwell*, 98 Cal. 78, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, to be 'the power to make laws to secure the comfort, convenience, peace and health of the community.' 'The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals.' *Ex parte Drexel*, 147 Cal. 766, 82 P. 429, 2 L. R. A. (N. S.) 588 [3 Ann. Cas. 878]. It is settled law that all property is held sub-

ject to the exercise of police power, and that provisions of the Constitution declaring that property shall not be taken without due process of law have no application in such cases. *Odd Fellows' Cem. Ass'n v. San Francisco*, 140 Cal. 230, 73 P. 987." (Italics ours.)

It is to be observed that the case of *Ohio Oil Co. v. Indiana*, supra, is approved and legislation of a character very much akin to the enactment now under scrutiny has been found not to invade the constitutional provisions against deprivation of property without compensation and without due process of law.

In the discussion of the problem to this point we think the essential difference from the question involved in *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 252 P. 607, is made apparent. It is to be noted that the contest in that case was between a riparian owner, whose rights have long been established in our jurisdiction, and an appropriator of water who cannot divest a private existing right by his act of appropriation. This is quite a different thing from the adjustment and regulation of the coexisting rights of several persons. The rights here involved are more nearly analogous to those discussed in *Ex parte Elam*, supra, and in *Eckel v. Springfield Tunnel, etc.*, 87 Cal. App. 617, 262 P. 425, in the latter of which cases the rule was reannounced that as between riparian owners one can only take his reasonable share thereof. It is there determined that he cannot take all that is reasonably required to develop his land, but only that amount that will not unreasonably deprive the owners of coequal rights of a proper proportion.

[5] We therefore turn to the second angle of our problem: Is the statute void for uncertainty and the failure of the Legislature to define a standard of conduct? The objection thus urged against the enactment arises from the use of the word "unreasonable." Were it not for the argument that it is not waste to permit the use of the gas to lift the oil to the surface, it would be obvious that without the qualifying word the enactment could not be subjected to attack on the ground of uncertainty. As we have heretofore observed, the Indiana statutes prohibited all waste, and the United States Supreme Court concluded it to be a proper exercise of the legislative authority despite the argument that the owners of the surface were entitled to make use of its force to raise the oil from beneath the ground. Undoubtedly the Legislature had in mind the Indiana statute and its construction, as well as others from other oil producing states. It would seem to logically follow that they made use of the word unreasonable for the very purpose of providing that the operators of a well might utilize a reasonable proportion of gas for the purpose

of lifting the oil to the surface. This thought coincides with that indicated by the language we have already quoted to the effect that it shall be held to be an unreasonable waste of gas for one to produce gas in excess of "a reasonable proportion to the amount of oil produced," when such gas is not conveniently necessary for other than lifting purposes. When viewed in this light we think the word unreasonable is not so uncertain as to render the enactment void and inoperative. In fact, our courts have frequently applied the rule of reasonable use between riparian owners where similar correlative rights are involved. We have already cited the case of *Eckel v. Springfield Tunnel, etc., Co.*, and *Ex parte Elam*, and to these we may add the following: *Fall River Valley Irrigation Dist. v. Mt. Shasta P. Corp.*, 202 Cal. 56, 259 P. 444, 56 A. L. R. 264; *Turner v. James Canal Co.*, 155 Cal. 82, 99 P. 520, 522, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823. In the latter of these two cases the words are so pertinent that they should be quoted. They are: "Out of regard to the equal rights of others whose lands may abut upon the same water, the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the right of others similarly situated, *must be reasonable*, and must be confined to a reasonable share thereof; but, with this common limitation, the right to use water upon adjoining land applies as well to the water of a lake, pond, slough or any natural body of water, by whatever name it may be called, as to a running stream." (Italics ours.) In a slightly different situation, but still for the purpose of adjusting coequal rights, the Supreme Court applied the same doctrine in *Katz v. Walkinshaw*, 141 Cal. 128, 70 P. 663, 74 P. 766, 771, 64 L. R. A. 236, 99 Am. St. Rep. 35, and *San Bernardino v. Riverside*, 186 Cal. 25, 198 P. 784, 788. In the former it said: "The doctrine of *reasonable use*, on the other hand, affords some measure of protection to property now existing, and greater justification for the attempt to make new developments. It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken. * * * The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural." In the latter we find these words: "With regard to such land owners, these cases hold that each owner of land overlying the same general underground supply of water may take such water on his own land for any beneficial use thereon, so long as such taking works no *unreasonable injury to other land overlying such waters*; that, if the natural supply is not sufficient for all such owners, each is en-

titled only to his *reasonable* proportion of the whole, and that each may apply to the courts to restrain an injurious and unreasonable taking by another, and to have the respective rights adjudicated and the use regulated so as to prevent unnecessary injury and restrict each to his reasonable share." (Italics ours.)

These authorities set at rest the contention that the enactment is uncertain as well as the incidental assertion that the Legislature has by the language of the act and its failure to define a standard of conduct with greater rigidity, attempted to confer upon the court a legislative function. From them, as well as those cases such as *Standard Oil Co. v. U. S.*, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, wherein the court announced and adopted the "rule of reason" holding that it was only those unreasonable restraints of trade which were intended to be curbed by the Sherman Anti-Trust Act (15 USCA § 1 et seq.), we find that the courts have for a considerable period of time been accustomed in *circumstances such as are concerned in the present enactment to apply the standard and guide of reason for the adjustment of those rights the unrestricted exercise of which would injuriously affect the rights of others*. In fact, it is not a new rule in the domain of jurisprudence but a new adaptation of the old maxim: "*Sic utere tuo ut alienum non laedas*." (Italics ours.)

[6, 7] Sufficient has been said to effectually dispose of the remaining argument of the petitioners and demonstrate that it is founded on a misconception of the legislative intent. Their argument is in effect that they are not producing an undue proportion of gas when the gas production is measured by the oil from one specific well. But this is obviously not the purpose of the law, as may clearly be indicated by a single illustration. Suppose a well is drilled and comes in, as what is commonly termed "a gasser"; that is, a well which produces an insignificant quantity of oil. Conceivably such a well might drain the field of its supply of gas, leaving the oil therein unrecoverable, to the great and irreparable injury of the other surface owners. We have instanced an extreme possibility, but our interpretation of the act is that it was intended to remedy a lesser, but nevertheless unreasonable, degree of waste of the same character.

Another answer to this argument of petitioners is that having determined that the court has the jurisdiction to determine what is an unreasonable waste, we cannot interfere by the writ of prohibition to deprive its judgment of effect. And we here direct attention to the determination of the respondent court that "there appears to be an unreasonable waste of natural gas in the Santa Fe Oil Field," and "that the evidence available * * * shows that the unreasonable waste

of natural gas in said field may be substantially reduced and that the equities of all parties may be fairly conserved by a preliminary injunction which will limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground, etc." It does not appear from the facts presented to us that in so far as the particular case before us is concerned the court exceeded its jurisdiction in finding as we have already quoted.

It is suggested in the briefs that the Legislature is without authority to restrict the production of oil, and lest we be misunderstood we deem it expedient to add that the record does not indicate that the temporary injunction was founded upon such a theory. Nor are we determining that the act attempts to confer upon the court any such power. Rather we are convinced that a proper construction of the enactment confines the authority within the limits of enjoining the production of gas when in excess of the reasonable proportion to the oil for the particular field involved, when not conveniently necessary for other than lifting purposes.

Writ of prohibition denied.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 156

PEOPLE v. STINE et al.
Cr. 2013.

District Court of Appeal, Second District,
Division 1, California.
Dec. 2, 1930.

Rehearing Denied Dec. 16, 1930.

1. Criminal law $\S$ 1159(2).

To sustain judgment on appeal by one of three defendants accused conjunctively, verdict need rest only on facts indicating appellant's guilt.

2. Intoxicating liquors $\S$ 224.

To warrant presumption of ownership or personal operation of still, defendant's possession thereof must be proved (Code Civ. Proc. $\S$ 1963, subd. 11; St. 1927, p. 497, $\S$ 1).

Code Civ. Proc. $\S$ 1963, subd. 11, declares that disputable presumption of ownership of thing follows from possession thereof, and "Still Act" (St. 1927, p. 497) $\S$ 1, provides that "any person * * * who shall be the owner of or have any interest in or who shall operate * * * or knowingly have in his posses-

sion or control, any still * * * shall be guilty of a felony."

3. Criminal law $\S$ 323.

Possession, from which presumption of ownership arises, must be such that claimant may honestly exercise exclusive power over thing (Code Civ. Proc. $\S$ 1963, subd. 11).

4. Criminal law $\S$ 736(1).

Whether acts of person in possession of thing amount to exercise of such dominion over it as to entitle him thereto exclusively, so as to warrant presumption of ownership, is ordinarily for jury (Code Civ. Proc. $\S$ 1963, subd. 11).

5. Criminal law $\S$ 1159(2).

To bind appellate tribunal, verdict must rest on such substantial evidence as to stand test of applicable legal principles.

6. Criminal law $\S$ 561(2).

Prosecution in trial for possessing still was bound to prove defendant's possession thereof beyond reasonable doubt (St. 1927, p. 497, $\S$ 1).

7. Criminal law $\S$ 552(3).

Where defendant's conduct was equally consistent with innocence, verdict of guilty should not be returned.

8. Criminal law $\S$ 1159(2).

Appellate court cannot disturb jury's verdict for insufficiency of evidence, unless there is no evidence supporting it, state's evidence is incredible, or evidence so clearly preponderates against verdict as to show passion or prejudice.

9. Criminal law $\S$ 561(1).

To acquit, law demands only that reasonable doubt of guilt be established by competent evidence.

10. Intoxicating liquors $\S$ 236(19).

Evidence held to preponderate so clearly in favor of innocence as to show that verdict of guilty of possessing still was result of great excitement, passion, or prejudice (St. 1927, p. 497, $\S$ 1).

There was evidence that defendant owned and operated extensive legitimate business and constructed pit under shed near his office for parties leasing it to refine oil; that lessee moved tank and drums on premises; that defendant was never inside shed until after codefendants' arrest; that he had steam disconnected and ordered codefendant to investigate on day of arrest; that such codefendant, with another employee of defendant, went to see what was going on in shed; and that they were arrested while so engaged.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Walter L. Stine, David R. Duke, and Karl Sworfford were convicted of possessing a still, and defendant Stine appeals.

Reversed.

Willard J. Laney and Arthur C. Webb, both of Los Angeles (James MacIntosh, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Alberta Bedford, of Los Angeles, for the People.

HOUSER, J.

Appellant Stine and three others, named respectively Anderson, Duke, and Sworfford, were charged with the crime of "possession of a still," a felony. Several days after the trial of the defendants had commenced and in the course thereof, defendant Anderson "disappeared." Thereupon, by order of the trial court, a mistrial was directed as to defendant Anderson only. The trial proceeded as to the remaining defendants, with the result that a verdict of "guilty" was returned against each of them. Other than defendant Stine, each of the convicted defendants was admitted to probation. It is from the judgment and the order by which his motion for a new trial was denied that defendant Stine has appealed to this court.

As disclosed by the evidence adduced on the trial of the action, the pertinent facts which related to the guilt of defendant Stine appear to be as follows:

Stine was the owner of a 20-acre tract of land on which he was producing sand and gravel for commercial purposes. Among other things, the equipment used by Stine in the prosecution of his business were an office building, a bunkhouse, sand bunkers, galvanized iron sheds, scales, two steam shovels, a toolhouse, and a blacksmith shop. In one corner of an inclosure of the size approximately 70 by 75 feet was located a shed which, in part, covered a pit of about 16 by 18 feet. The distance between the office occupied by defendant Stine and the shed was 396 feet. The larger inclosure was used by defendant Stine and his employees for the purpose of parking their automobiles during the daytime when the sand and gravel plant was being operated; also by truck drivers, numbering between 50 and 70 per day, who called at the plant for the purpose of procuring and hauling away sand and gravel, which in the aggregate averaged between ten and fifteen thousand tons per month. Connected at one end with a pipe which led from one of the steam shovels used by defendant Stine in loading sand and gravel into trucks was a steam hose which at its other end connected with another pipe which led to a still which was located in the shed. A raid on the still occurred at night, at about 7:30 p. m. At the

time the raid was made all the defendants other than Stine were in the pit where, in addition to the still, were found several gallons of alcohol which had been redistilled from other alcohol unfit for beverage purposes, of which five barrels were also found in the shed. The still was slightly warm and, according to the testimony of the arresting officers, the steam gauge on the still showed from 10 to 15 pounds pressure; which latter fact, however, was accounted for by the production in court of the gauge and testimony to the effect that it was defective and always registered 10 or 15 pounds pressure even when not in use. No fire was found under the boiler of the steam shovel; nor was the steam hose connected either with the steam shovel or with the still, but was stored in the blacksmith shop.

In explanation of the circumstances hereinbefore set forth, defendant Stine testified that for a period of more than six months next preceding his arrest he had not for any purpose used the shed where the pit was located; that approximately two weeks next preceding his arrest he had leased the shed to the Bay Cities Oil Company and a man named Walter Wilson, who said that "he wanted a place to blend oil; * * * he went around and picked up the crankcase drainage and refined it, and took the dirt out and added a Western oil and he sold it." The lease between the parties was identified by defendant Stine and filed as an exhibit in the case. Also, a letter, of which the following is a copy, was introduced in evidence:

"Burbank, Cal., Feb. 10, 1930.

"Bay Cities Oil Company,

"Mr. Walter Wilson,

"San Pedro, Calif.

"Dear Sir:

"Confirming our conversation of a few days ago, it is my understanding in connection with your lease of a part of my garage that I am to dig a pit 12x16x16 feet for use for your oil vats, etc.; this pit to be lined with concrete. For this work I am to receive five hundred dollars cash; this in addition to your rent of one hundred dollars per month.

"It is also my understanding that I am to furnish you a certain amount of steam for heating, etc., during my working hours. In event you would require me to furnish steam other than my regular working hours, you will pay me at the rate of \$1.50 per hour. You are to keep your building clean and free from fire hazard at all times and open to inspection by myself when I feel it is necessary.

"Yours truly,

Walter L. Stine,

"By (Signed) 'Stine.'"

Defendant Stine also testified that within a week following the execution of the lease he bought a new steam shovel and that, in accordance with the understanding between

him and the Bay Cities Oil Company, he constructed the pit mentioned in his communication to that company; that immediately thereafter the lessee paid him the \$500 agreed upon, together with \$100 for the first month's rent, and went into possession of the leased premises; that thereafter Stine saw Wilson deliver at the shed a tank "about four feet in diameter by about eight feet high"; also that he saw Wilson move into the shed, "I would say two days before the arrest I seen a flat rack truck load of oil drums, supposedly oil drums, black drums * * * about 45 or 50-gallon oil drums * * * I would say about 12."

Stine gave further testimony that, after the pit was constructed, he never was inside either the pit or the shed; that on the day of the arrest of the defendants other than himself, on driving his automobile in the street on which the shed faced, he had noticed the odor of alcohol and had become somewhat suspicious of the business which was being conducted in the shed or pit; but that it was not until later in the day, that is, between 3:30 and 4 o'clock p. m., at which time his suspicions were again aroused, that he ordered his foreman, Sworfford, to extinguish the fire under the boiler of the steam shovel and to detach the steam hose; and it was at that time that the steam hose was disconnected and placed in the blacksmithshop. At the same time defendant Stine directed his employee Sworfford "to go in there and see what was going on."

Defendant Sworfford testified that in the capacity of foreman of the sand and gravel business he had been in the employ of defendant Stine for several years next preceding the date of his arrest; that at about 3:30 o'clock p. m. on the day of his arrest defendant Stine said to him: "There is something wrong over there. Go over there and cut that fire out of that shovel and take that hose off of there and take it over to the blacksmith shop, and then, when you are through at 6 o'clock, go in there and see what is going on. He said, 'Get in there if you have to tear in there.'"

At about 7 o'clock p. m. Sworfford and defendant Duke—the latter of whom for several years next preceding the date in question had been a truck driver in the employ of defendant Stine—went into the shed in which the still was located. It was dark; the shed and pit were unlighted, but Duke used a flashlight. A few minutes after Sworfford and Duke entered the shed, defendant Anderson, who was a stranger to them, came into the shed. He said he was looking for Wilson who had employed Anderson to work for him. It was at about that time that the officers arrived and placed Sworfford, Duke, and Anderson under arrest. Defendant Stine was not arrested until the following day. De-

fendant Duke corroborated the testimony of defendant Sworfford.

Defendant Anderson testified that in the morning of the day on which he was arrested he was introduced to Wilson, who employed him "to watch steam gauges and pressure gauges"; that on arriving at the place where he was supposed to work, which was at about 7 o'clock p. m., after some delay, he heard voices in the shed or pit, and on entering the shed he saw defendants Sworfford and Duke, who were strangers to him, of whom he inquired for Wilson. After he had been there "probably fifteen minutes * * * just looking around * * * heard some one say, 'police officers, open the doors.'" He was then placed under arrest.

A truck driver named Norstrom testified that he was employed by the Tec-Art Studio; that he was acquainted with Wilson, who told him about his having leased the shed and pit for the purpose of blending oil therein.

The first point made by appellant is that the evidence adduced on the trial of the action was insufficient to support the verdict.

As far as concerns the guilt of defendant Stine, the effect of the evidence is that, in the nighttime, a still was found by police officers on a part of certain premises owned by said defendant, at which time two persons, each of whom was then and for several years theretofore had been, during regular daytime working hours, in the employ of said defendant in his business of producing sand and gravel, were in the room where the still was located; also that the still had been operated by means of steam which was generated in a boiler used by defendant Stine in his sand and gravel business.

Section 1 of the "Still Act" (Stats. 1927, p. 497) provides that "any person * * * who shall be the owner of or have any interest in or who shall operate or cause to be operated or knowingly have in his possession or control, any still * * * shall be guilty of a felony. * * *"

By the information herein, in substance the defendants were accused of the crime of "possession of a still," in that they "did wilfully, unlawfully and feloniously have an interest in, own, operate and caused to be operated, and knowingly have in their possession and under their control a certain complete still. * * *"

The question, then, presented to this court is whether the bare facts that, in the nighttime, in the presence of one's daytime employees, a still is found on one's property which is capable of being operated by power furnished by the owner of the property, supply sufficient evidence to legally prove that such an owner "did wilfully, unlawfully, and feloniously have an interest in, own, operate

and cause to be operated, and knowingly have in his possession and under his control" such still.

[1] It will be noted that the accusation is conjunctive in form, in that it charges the defendants with the ownership, the operation, and the possession and control of a still. But in order that the judgment herein be sustained, a verdict by the jury need rest only upon facts from which it may follow that the defendant Stine owned, or operated, or was in possession and control of the inhibited property. *People v. Thompson*, 111 Cal. 242, 43 P. 748; and authorities cited in 14 Cal. Jur. 61 et seq.

[2] Subdivision 11 of section 1963 of the Code of Civil Procedure is to the effect that a disputable presumption of ownership of a thing follows from the possession of it; and (without so deciding) it may be that where the question at issue is as to who is the operator of a still, the person in possession of it may be subject to a like presumption. But it will at once appear that, in order that the presumption of ownership, or that of the personal operation of a still, may become effective, the pre-existing element of possession must be present; and it is obvious that in establishing the charge that a defendant "knowingly had in his possession" a still, the question of whether the condition of physical possession by the defendant was present constitutes a vital issue to be determined by the jury. So in the instant case, in any aspect in which the evidence assumed to be in support of the verdict be viewed, in the first instance, its validity must depend upon its sufficiency in the proof of possession.

At once, it is plain that the inquiry affects not only the liberty of the appellant in this proceeding, but as well may affect the possible interest of many individuals. As an illustration: Take the situation of the owner of an apartment house who has let to a stranger a suite of rooms at a certain price, which includes the cost of water, light, and gas to be furnished by the owner. If, unknown to the owner of the property, the tenant should install a still in his apartment and use the gas furnished by the owner of the property as the means of distilling intoxicating liquor therein, and on a raid being made by the police of the premises, the still should be discovered in the presence of the janitor of the apartment house—a state of facts analogous to the condition obtaining in the instant case would be presented.

[3-5] Relating to that kind of possession from which the presumption of ownership may be inferred, it is manifest that to become effective the "possession" must be something more than a mere fleeting, physical, retention of the thing in question. The condition must be such that the claimant may honestly exercise his power over the thing to the exclu-

sion of all others; and is denoted by acts of dominion over it. *Rice v. Frayser* (C. C.) 24 F. 460; *Gilkerson-Sloss Commission Co. v. London*, 53 Ark. 88, 13 S. W. 513, 7 L. R. A. 403; *Staton v. Mullis*, 92 N. C. 623. It may be said that the precise acts which will or may indicate a dominion over a thing to the exclusion of all others are incapable of being either accurately specified or described. The determination of whether the acts or conduct of a person in whose physical possession a thing may be held or retained amount to such right of dominion over it as to legally entitle him to it to the exclusion of all others, ordinarily would rest with a conclusion thereon by the jury to which the question might be submitted. In order to be binding upon an appellate tribunal, the verdict of the jury must rest upon such substantial evidence that it will stand the test of legal principles applicable to the situation. In the instant case it is apparent that the liberty and the good name of the defendant may depend upon the disputable presumption that "possession" of a thing by the defendant indicates its ownership by him; and that a determination of the question of whether the defendant was "possessed" of the thing may depend upon such slight, ambiguous, incriminatory conduct that, established as a judicial precedent, will or may threaten the liberty and the good reputation of many innocent and law-abiding citizens.

[6, 7] It was incumbent upon the prosecution to prove "possession" beyond a reasonable doubt. As far as indicating the guilt of defendant Stine was concerned, his acts or conduct, whether actual, or only imputed to him, were altogether ambiguous. Without other incriminatory evidence, such acts and conduct were as consistent with the innocence of defendant Stine as they were with his guilt; and in such circumstances the rule of law is that a verdict of "guilty" should not be returned. Nevertheless, as a matter of law, this court cannot declare that, in concluding that the evidence to which reference has been had was sufficient to show beyond a reasonable doubt that the defendant was the owner, the operator, or in possession and control of the still in question, the jury was transcending its legal powers. However, there remains a question as to whether the verdict was the result of passion and prejudice.

[8] Where the appeal involves the question of the sufficiency of the evidence to support the verdict of the jury, the power of the court in the premises is succinctly stated in the case of *People v. Willard*, 150 Cal. 543, 553, 89 P. 124, 128, and repeated in *People v. Niino*, 183 Cal. 126, 128, 190 P. 626, as follows: "This court cannot disturb a verdict unless there is no evidence to support it, or where the evidence relied on by the prosecution is apparently so improbable or false as to be in-

credible, or where it so clearly and unquestionably preponderates against the verdict as to convince this court that its return was the result of passion or prejudice on the part of the jury."

The case of *People v. Wong Chong Sney*, 110 Cal. 117, 121, 42 P. 420, 421, contains a statement to the effect that the finding of the jury will not be disturbed "unless the evidence preponderates so greatly against the verdict as to make it manifest that the verdict is the result of passion or prejudice."

And in the case of *People v. Acosta*, 10 Cal. 195, the syllabus is that: "Where it is manifest, from the testimony stated in the record, that the verdict of the jury must have been given under a state of great excitement, preventing a fair and just trial, * * * this Court will reverse the judgment. * * *"

See, also, *People v. Sullivan*, 129 Cal. 557, 560, 62 P. 101; *People v. Manning*, 48 Cal. 335; *People v. Hamilton*, 46 Cal. 540; *People v. Vance*, 21 Cal. 400; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Harden*, 24 Cal. App. 522, 141 P. 1075; also authorities cited in 8 Cal. Jur. 591.

[9, 10] Remembering the substance of the evidence which tended to establish the guilt of defendant Stine, for the purpose of considering the probable "state of mind" of the jury at and preceding the time when the verdict was returned, it becomes necessary to again briefly review the evidence offered by defendant Stine in his defense.

Stine was the owner of and engaged in operating an extensive business. At the solicitation of Bay Cities Oil Company and Wilson, for the consideration of \$500 paid to Stine, he constructed a pit under an unused shed located approximately 400 feet from his business office, and thereupon leased the shed and pit to Bay Cities Oil Company and Wilson for the purpose of refining and blending oil therein, at a rental of \$100 per month, including steam to be furnished during daytime working hours—extra time at \$1.50 per hour. The first month's rent of the premises was also paid. The lessee (Wilson), who was identified by a disinterested person, took possession of the premises and moved thereon a large tank and several iron drums. The lease, also a letter written by Stine to the Bay Cities Oil Company and Wilson, which letter amplified the terms of the lease, were introduced in evidence. After the pit was constructed, Stine never was inside the shed or pit until after the night when his codefendants were arrested. Steam had been connected with the still but two days when the arrest occurred. On that day, owing to the fact that the suspicions of defendant Stine had been aroused regarding the legitimacy of the business conducted in the shed, he had the steam disconnected and ordered defendant Sworfford to "investigate." Unknown to

Stine, after his usual daytime labors had been finished, Sworfford took Duke with him to "see what was going on" in the shed, which at that time was dark and unlighted. While so engaged, defendant Anderson, who was a total stranger to all the other defendants, and who on that day had been employed by Wilson to "watch steam gauges," came into the shed, and the arrest of the three defendants occurred within ten or fifteen minutes thereafter.

Other than by cross-examination of the several witnesses who testified to the foregoing facts, no attempt was made by the prosecution to rebut such facts or to challenge their correctness in any way. As far as the record discloses, the testimony given by each of the witnesses for the defense was entitled to full credit. Stine was a reputable business man engaged in conducting a legitimate business. In his employ were defendants Sworfford, as foreman, and Duke, as a truck driver, each of whom had been regularly so employed for several years next preceding the date of the arrest. Anderson was a total stranger to either of his codefendants. The good reputation of none of the witnesses was in any way questioned.

Considering such evidence, it is difficult, if possible, to appreciate either the attitude or the reasoning of the jury in the premises. The evidence adduced by the prosecution was barely sufficient to establish even a prima facie case of guilt of the defendants. To a very considerable extent it depended upon a disputable presumption of ownership, which presumption was based upon ambiguous facts which were just as consistent with the innocence of the defendant as they were with his guilt. In any criminal case, in order to acquit the defendant, all that the law demands is that a reasonable doubt of his guilt be established by competent evidence. In the instant case, not only was trustworthy evidence introduced which was sufficient to raise such a doubt, but it clearly preponderated in favor of the innocence of the defendant. To assume that through some untoward influence the jury was prejudiced against the defendant would appear to be the only way by which to account for its verdict. It would seem certain either that the verdict of the jury was given "under a state of great excitement" (*People v. Acosta*, 10 Cal. 195), or that "its return was the result of passion or prejudice on the part of the jury" (*People v. Willard*, 150 Cal. 543, 553, 89 P. 124; *People v. Niino*, 183 Cal. 126, 128, 190 P. 626).

It becomes unnecessary to consider other points urged by appellant for reversal.

It is ordered that the judgment and the order by which defendant's motion for a new trial was denied be, and they are, reversed.

We concur: CONREY, P. J.; YORK, J.

109 Cal. App. 673

DONEGAN v. CITY OF LOS ANGELES.**DORSEY v. SAME.**

Civ. 4211, 4212.

District Court of Appeal, Third District,
California.

Nov. 19, 1930.

Rehearing Denied Dec. 19, 1930. Hearing Denied by Supreme Court Jan. 12, 1931.

1. Eminent domain ☞38.

In 1910, city of Los Angeles could not acquire land for warehouses by eminent domain proceedings (Code Civ. Proc. § 1238 [St. 1909, p. 1032]).

Prior to the amendment of Code Civ. Proc. § 1238 by St. 1913, p. 544, the word "warehouses" did not appear in subdivision 4 thereof, and city of Los Angeles had no power to condemn land for warehouses.

2. Eminent domain ☞172.

Superior court, having jurisdiction in eminent domain proceedings generally, had jurisdiction of such proceedings by city of Los Angeles for warehouse purposes, though judgment of condemnation in such case was unauthorized (Code Civ. Proc. § 1238 [St. 1909, p. 1032]; Const. art. 6, § 5).

At time of entry of judgment in 1912, city of Los Angeles was without power to condemn land for warehouse purposes, but, by virtue of Const. art. 6, § 5, superior court had jurisdiction over the class of cases to which particular case involved belonged, and hence, though law did not authorize judgment of condemnation, superior court was not without "jurisdiction," for "jurisdiction" of court to hear and determine is not absent simply because law does not authorize entry of particular judgment which court in particular case may enter.

[Ed. Note.—For other definitions of "Jurisdiction," see Words and Phrases.]

3. Eminent domain ☞268.

Landowners, who, knowing condemnation was unauthorized, acquiesced therein by retaining award for thirteen years, waived right to reclaim land.

Plaintiffs, in quiet title action, were some of defendants in condemnation proceeding by city of Los Angeles for warehouse purposes, which, at that time, were unauthorized by statute, though superior court had general jurisdiction over condemnation proceedings. Record disclosed that, at time of accepting award for many thousands of dollars, they had knowledge of all grounds now advanced against validity of judgment entered in that proceed-

ing, but, notwithstanding, they prosecuted no appeal, acquiesced in judgment, and accepted award.

4. Eminent domain ☞268.

In quiet title action, plaintiffs could not reclaim illegally condemned property without first returning to city amounts accepted, with interest, less profits to city from occupancy or rental value of premises.

5. Equity ☞66.

To obtain benefit of alleged equities by appealing to equity court, parties must do equity.

Appeals from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Actions by William P. Donegan, as administrator of the estate of D. F. Donegan, deceased, and by Rebecca Lee Dorsey, against the City of Los Angeles. From judgments in favor of plaintiffs, defendant appeals.

Reversed.

Jess E. Stephens, Clyde M. Leach, Lucius P. Green, Joseph T. Watson, and Jerrell Babb, all of Los Angeles, for appellant.

Robert Young, of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The above cases were, by stipulation, consolidated for trial, and are, upon this appeal, presented to us upon one set of briefs, and, for convenience, will be hereafter referred to as the Dorsey case and the Donegan case, respectively.

In the respective cases the plaintiffs had judgment quieting title to the lots hereafter mentioned, and the defendant appeals from the judgment in each case.

On the 27th day of April, 1925, the plaintiff Dorsey began an action in the superior court of Los Angeles county to quiet title to lots 6, 12, and 13, in block 93, of the town of San Pedro, Los Angeles county. The first cause of action is in the common form of an action to quiet title. The second and third causes of action set out in the complaint do not require mention. In the fourth cause of action it is alleged that on the 26th day of November, 1912, the said Rebecca Lee Dorsey owned the title to the premises herein mentioned; that on or about said date there was entered in the superior court of Los Angeles county, in a certain action wherein the city of Los Angeles was plaintiff and Arthur S. Koyer et al. were defendants, a judgment and decree condemning said land and appropriating the same to the city of Los Angeles for the purpose of constructing thereupon

public warehouses. The complaint then alleges that the city of Los Angeles had no right or power under the law to condemn said land for such purposes. It is then set forth that in the judgment just referred to there was awarded to the said Rebecca Lee Dorsey, as compensation for the lands so condemned, the sum of \$53,338.10, which was paid to her. It is further set forth in the complaint in this action that, although twelve years and upwards have elapsed since the judgment of condemnation, the city of Los Angeles has not used said land, or any part thereof, for the construction of a public warehouse, and that the same is still vacant and unoccupied. The complaint then alleges that the city has abandoned said land, and the title thereto has reverted to the said Rebecca Lee Dorsey; that on or about the 27th day of March, 1925, plaintiff tendered and offered, in writing, to repay the city of Los Angeles the sum of \$53,338.10, and in connection with said tender demanded that the city release and quitclaim to the plaintiff all interest in said land; that the defendant has not accepted said tender, and has refused the same, and neglected and refused to release and quitclaim said property to the plaintiff.

The answer of the defendant denies the allegations of the complaint, and then sets forth, among other defenses, the following: That in the action of *The City of Los Angeles v. Arthur S. Koyer et al.*, 48 Cal. App. 720, 192 P. 301, mentioned in the plaintiff's complaint, an interlocutory judgment and decree was entered on the 4th of September, 1912, awarding to Rebecca Lee Dorsey the sum of \$53,338.10, as the full amount payable to her as compensation for the lots set forth in plaintiff's complaint, and specifically described as lots 6, 12, and 13, in block 93, town of San Pedro, as per map recorded in book 84, pages 81 to 84, Miscellaneous Records of Los Angeles county; that the amount so awarded was paid to the said Rebecca Lee Dorsey on October 10, 1912, and accepted by her pursuant to said judgment and decree; that thereafter a final order and judgment of condemnation was filed and entered, and the title to said property thereupon became vested in the defendant, and the defendant took possession thereof, and has continuously held possession of the same.

It is further set forth in the answer that the plaintiff received said amount awarded to her as compensation, without objection, and satisfied the said decree; that no appeal was taken by her therefrom, and that by reason of the acts herein stated said Rebecca Lee Dorsey waived any right or claim that she had, or might have had, to assert that the said condemnation proceedings were irregular or invalid, and that the said Rebecca Lee Dorsey was and is estopped to assert the irregularity or invalidity of said proceedings, or that the title to said property was not there-

by vested in the city of Los Angeles, or that the same is not now vested in the city of Los Angeles, or that the city of Los Angeles is not possessed of the title in fee simple, and entitled to the right of possession of the said premises. The answer further sets forth that the cause of action is barred by the provisions of sections 335 to 340, inclusive, of the Code of Civil Procedure.

The complaint in the Donegan case sets forth the death of D. F. Donegan and the appointment of William P. Donegan as the administrator of the estate of said deceased. The complaint then alleges that at the time of the death of D. F. Donegan, which took place on the 30th day of May, 1918, the said Donegan was the owner of lot 10 in block 93 of the town of San Pedro, as per map recorded in book 84, pages 81 to 84, Miscellaneous Records of the county of Los Angeles. The complaint further sets forth an allegation similar to that found in the Dorsey case; the entry of judgment in the action wherein the city of Los Angeles was plaintiff, and Arthur S. Koyer et al., defendants, being a condemnation proceeding. A judgment and decree was entered condemning the premises herein described and awarding the same to the city of Los Angeles; that in said award compensation was allowed D. F. Donegan in the sum of \$18,892.60, which was paid to the said Donegan. The complaint further alleges that, although more than twelve years have elapsed since the entry of said judgment in said condemnation proceeding, the city of Los Angeles has not constructed any warehouse thereon, and that the premises have remained vacant and unoccupied, and that the title thereto has reverted to the heirs of the said D. F. Donegan. The complaint further alleges that on or about the 27th day of March, 1925, the plaintiff tendered and offered, in writing, to repay to the city of Los Angeles the sum of \$18,892.60, and that, in connection with said tender, demanded that the city release and quitclaim said property to the plaintiff.

The answer of the defendant denies the allegations of the complaint, and, among other things, set forth the entry of the judgment and decree of condemnation heretofore referred to, and then alleges that the amount of the decree, to wit, the sum of \$18,892.60, was paid to the said D. F. Donegan October 7, 1912, and accepted by him pursuant to said judgment and decree, as compensation for said property; that thereafter, a final order and judgment of condemnation was filed and entered in said cause, and that the defendant took possession of the property mentioned, and has ever since held possession thereof.

It is further alleged that no appeal was taken from said judgment by the said D. F. Donegan, and that the said D. F. Donegan, by the acceptance and retention of the award just mentioned, waived all right to assert

that said condemnation proceedings were irregular or invalid, and likewise is estopped to assert the irregularity or invalidity of said proceedings. It is further set forth that the plaintiff, by reason of said Donegan having accepted said award and acquiesced in the judgment without appealing therefrom, is now estopped, and that the heirs of said Donegan are estopped from questioning the title of the city to said premises, and that the city is entitled to hold said premises in fee simple, free from any claim of the plaintiff as the administrator of the estate of D. F. Donegan, deceased, etc.

It is further set forth in the answer that this action is barred by the provisions of sections 335 to 340, inclusive, of the Code of Civil Procedure. The findings of the court in the Dorsey case were and are to the effect that on the 6th day of September, 1910, the said Dorsey was, and continuously has been, and now is, the owner of the lots described in the plaintiff's complaint, to wit, lots 6, 12, and 13, in block 93 in the town of San Pedro, as per map recorded in book 84, pages 81 to 84, Miscellaneous Records of the county of Los Angeles; that on the said 6th day of September, 1910, the defendant in this action, as plaintiff, began a suit against Arthur S. Koyer et al. in Los Angeles county, in which action the plaintiff was made a defendant; that said complaint was filed by the city of Los Angeles for the purpose of condemning certain lands located in blocks 92 and 93 of the town of San Pedro, for the purpose of erecting warehouses thereon; that when said cause came on for trial, the plaintiff Dorsey objected to the introduction of testimony therein, on the ground that the city had no right to maintain an action to condemn property for warehouse purposes; that thereafter, judgment was entered in said action awarding to said Dorsey, as a defendant in the condemnation proceedings, damages in the sum of \$53,338.10, which sum was accepted by the said Dorsey. The court further found that on or about the 27th day of March, 1925, the plaintiff tendered and offered, in writing, to repay to the city of Los Angeles the sum of \$53,338.10, and, in connection with said tender, demanded that the city release and quitclaim to the plaintiff all interest in said lots. The court further found that the city of Los Angeles has never used said lots, or any part thereof, for the construction of any warehouse thereon, and has not made any plans or preparation for the construction of any such warehouse, and that the lots have remained vacant and unoccupied since the entry of said judgment.

The judgment entered in pursuance of the findings and the conclusions of law based thereon quieted the title of the plaintiff thereto, subject to a lien declared in favor of the city for the amount herein referred to as

having been paid to, and accepted by the plaintiff as the value of said premises ascertained in said condemnation proceedings, and further provided for the payment of said sum by the plaintiff to the city within sixty days after the judgment in this action becomes final, and, if not so paid, the defendant should be entitled to the issuance of an execution directing the sheriff to sell the lots in question for the repayment to the city of the sum of \$53,338.10.

The findings in the Donegan case are similar in form and effect to the findings in the Dorsey case, save and except the property described is set forth as lot No. 10 in block 93 in the town of San Pedro, as heretofore stated, and that the amount offered in writing to be repaid to the city by the plaintiff in the Donegan case is the sum of \$18,892.60.

While the record and the findings of the court show that no warehouses had been erected upon any of the lots involved in this action, it does appear that the city has removed a building from lot 10, claimed in the Donegan case, and also constructed a viaduct across a part of lots 12 and 13, claimed by the plaintiff Dorsey.

The right of the plaintiffs to maintain these actions is based upon the contention that, at the time of the institution thereof, the city of Los Angeles had no right to maintain eminent domain proceedings for the purpose of securing lands upon which to erect warehouses, as prior to the amendment of section 1238 of the Code of Civil Procedure in 1913 (Stats. 1913, p. 544) the word "warehouses" did not appear in subdivision 4 of said section, nor did said section, in any other of its provisions, authorize condemnation proceedings for such purposes.

While neither of the plaintiffs in the actions before us upon these appeals—who were defendants in the action entitled "City of Los Angeles v. Koyer et als."—took appeals from the judgments entered in said action, the defendant Koyer did appeal. *City of Los Angeles v. Koyer*, 48 Cal. App. 720, 192 P. 301. Upon this appeal it was held that a city has no inherent right to maintain eminent domain proceedings, and that such right can only be exercised when expressly authorized by the Legislature, and that at the time of the beginning of the action, to wit, in 1910, municipalities were not authorized to maintain eminent domain proceedings to obtain land on which to erect warehouses. It was further held that, while section 262 of the Charter of the City of Los Angeles authorized the city to incur indebtedness and issue bonds for the purpose of constructing docks, wharves, and warehouses, and acquiring the necessary land therefor by purchase or condemnation, such charter was ineffective to authorize the city to condemn land for warehouse purposes, unless such power was granted by the general

laws of the state, the power of eminent domain not being classed as a municipal affair.

[1] Upon the coming down of the remittitur involving the lots belonging to Koyer, only a portion of whose lots were involved in the appeal, dismissal was entered as to the condemnation proceedings, concerning which Koyer had not withdrawn his appeal. It would thus appear that, at the time of the institution of the action to condemn the lots involved in the appeals now before us, the city of Los Angeles had the right to acquire land for the purpose of erecting warehouses thereon, and had a right, as shown by the cases cited involving the question, to issue bonds for the purpose of obtaining money to build such warehouses, but it possessed no power to acquire sites for such purpose by eminent domain proceedings, and that an action prosecuted for such purpose stated objects and purposes not within the provisions of section 1238 of the Code of Civil Procedure, and, therefore, that the invalidity of the proceedings appeared upon the face thereof. Under these circumstances it is strongly contended on the part of the respondents that the following excerpt taken from Freeman on Judgments (5th Ed.) volume 1, page 643, is determinative of this appeal. It is there said: "A judgment, upon its face requiring only an inspection of the record to demonstrate its invalidity, is a mere nullity, in legal effect, no judgment, conferring no right and affording no justification; nothing can be acquired or lost by it; it neither bestows nor extinguishes any right, and may be successfully assailed whenever it is offered as the foundation for the assertion of any claim or title; it neither binds nor bars anyone; all acts performed under it, and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at any sale by virtue of its authority finds himself without title and without redress. No actions upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislature or other department of the government, can invest it with any of the elements of power or of vitality. * * * Such a judgment has been characterized as 'a dead limb upon the judicial tree which may be chopped off at any time capable of bearing no fruit to plaintiff, but constituting a constant menace to defendants.'"

[2] Section 1917 of the Code of Civil Procedure reads: "The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment." It is so well settled that, when jurisdiction over the subject-matter or over the parties is lacking, any judgment rendered in such an action is void, as to require no

citation of authorities. In fact, this statement of the law as urged upon our attention by the respondent is unquestioned by the appellant. The appellant, however, insists that the trial court had jurisdiction to pronounce judgment in the case of *The City of Los Angeles v. Koyer et al.*, although it was not authorized by law to enter the judgment which it did enter, to wit, the condemnation of the lands involved for the purpose of building warehouses thereon. It is insisted on the part of the appellant that jurisdiction to hear and determine the cause, vested in the trial court by reason of the provisions of section 5 of article 6 of the Constitution, and that authority to enter judgment of condemnation in particular cases or instances, or for particular purposes, is controlled by section 1238 of the Code of Civil Procedure, and, of course, controlled the action of the trial court as the section read in 1910 (St. 1909, p. 1032) when the action was begun, and that as the court had jurisdiction to try and enter judgment in the cause, if it entered judgment not authorized by the section of the Code, and the defendants in that action acquiesced in the entry of said judgment and accepted the fruits thereof, to wit, the damages awarded for the taking of the property, and prosecuted no appeal from the judgment, and retained the fruits of the judgment for the intervening years shown to have elapsed between the entry of the judgment and the date of the beginning of these actions, then and in that case all irregularities and errors of the trial court in the entry of the judgment, conceding that the trial court had no authority to enter judgment of condemnation for the specific purpose for which it did, have been waived by the plaintiffs in these actions, and the right to question the judgment no longer exists.

In 15 C. J., page 844, § 164, the rule as to waiver is thus stated: "An absolute want of jurisdiction of the subject matter or cause of action cannot be waived; nor can the doctrine of equitable estoppel be invoked to confer a jurisdiction on a tribunal which has no jurisdiction of the subject matter. But where the court has general jurisdiction of the subject matter, a lack of jurisdiction of the particular case may be waived by failure to take timely and specific objections, or an indication of, or submission to the jurisdiction may raise an estoppel to deny such jurisdiction. So, also, the parties may, either expressly or by their conduct, waive objections to remedies pursued in courts having jurisdiction of the subject matter." Thus it is argued that the trial court had general jurisdiction of the subject-matter, and, even though it lacked jurisdiction of the particular case, the plaintiffs, by accepting the fruits of the judgment, have waived all rights to question the same.

In 7 California Jurisprudence, page 584, the text on the subject of jurisdiction, reads:

"Jurisdiction is the power to hear and determine; and jurisdiction of a particular case is the power to hear and determine that case." That the trial court had jurisdiction to hear and determine the cause before it in the action against Koyer et al., being an eminent domain proceeding, can scarcely be questioned. That it had no authority to enter the judgment, which it did, clearly appears from an inspection of section 1238, Code of Civil Procedure, as it then read.

In Ruling Case Law, volume 7, page 1029, we find the following text peculiarly applicable to this case: "Jurisdiction of the subject matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs. As applied to the subject-matter of the suit, jurisdiction is likewise conferred by law, and it is incorrect to suppose that the power to decide in any case rests solely on the averments of a pleading, but on the contrary the jurisdiction of a court in no way depends on the sufficiency or insufficiency of the pleadings, and if the pleadings state a cause of action belonging to a general class, and over which the authority of the court extends, then jurisdiction attaches and the court has jurisdiction to hear and determine the issues involved."

As we have seen, the Constitution gives the superior court jurisdiction over the class of cases to which the particular case involved belongs, and the jurisdiction of the court to hear and determine is not absent simply because the law does not authorize the entry of the particular judgment which the court in a particular case may enter.

No contention is made that the court, in the case of *The City of Los Angeles v. Koyer et al.*, did not have jurisdiction over the persons of Rebecca Lee Dorsey and D. F. Donegan.

If what we have said is correct, then the argument of respondent, based upon the text set forth in 15 California Jurisprudence, page 57, has no application. It is there said: "Neither the doctrine of laches nor the statute of limitations has any application to an attack upon a judgment void for lack of jurisdiction, the rule in this respect being different from that governing relief from a judgment which is merely voidable for fraud or similar grounds. The court's power to vacate a judgment or order void on its face is not extinguished by lapse of time, but may be exercised whenever the matter is brought to its attention." Nor do we need to question the rule set forth in the same volume of California Jurisprudence, page 49, reading: "Generally speaking, if a judgment is void it is subject to collateral attack. It has been said that 'A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties

or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever,' " etc.

It may be further noted that, while it was held in the case of *The City of Los Angeles v. Koyer*, 48 Cal. App. 720, 192 P. 301, that the court was without authority to enter the judgment which it did enter, the case does not hold, and there is nothing in the opinion indicating, that it was intended to hold that the trial court did not have jurisdiction over the general class of cases to which the specific case belonged. The ruling of the court is simply to the effect that the law, at the time the action was begun, did not authorize condemnation for the specific purpose involved in that action, and, for that reason, the judgment of the trial court was reversed. The appellate court did not direct the dismissal of the action for want of general jurisdiction over eminent domain proceedings.

[3] Are the respondents in this action estopped by reason of the fact that as defendants in the action of *The City of Los Angeles v. Koyer, Rebecca Lee Dorsey and D. F. Donegan* acquiesced in the judgment and accepted the fruits thereof?

In 15 California Jurisprudence, page 55, the right to attack a judgment is thus stated: "Ordinarily, no question is raised as to the right of a party to a judgment to attack it upon any proper grounds. Such a person may, however, be estopped to do so where he has enjoyed the fruits of the judgment." We do not need to consider how far this doctrine has been extended to divorce proceedings, but will confine ourselves simply to actions involving eminent domain proceedings and money judgments, as the question of public policy enters into judgments in divorce proceedings.

In 2 Ruling Case Law, page 61, the right of a party to attack a judgment after having received the fruits thereof, is thus spoken of by the text-writer: "It is quite generally conceded that one cannot ordinarily accept or secure a benefit under a judgment or decree, and then appeal from it or sue out a writ of error, when the effect of his appeal or writ of error may be to annul the judgment."

In 10 Ruling Case Law, page 209, we find the rule as to accepting awards in eminent domain proceedings worded as follows: "Where, however, a land owner accepts a sum awarded to him as damages in condemnation proceedings, he is estopped from taking and prosecuting an appeal from the award." This rule is a little more fully stated in 20 C. J., page 1054: "An owner who accepts a compensation awarded, cannot object to the amount of the award, or claim that the taking was unauthorized or that the condemnation proceedings were irregular, in the absence of fraud, collusion or prejudice, nor can he claim the land condemned, even by a return of the compensation paid."

The foregoing statements of the rule are supported by a long list of citations found in the volume referred to, and especially the rule that acceptance of the award and acquiescence in the judgment, as appears to characterize the circumstances in the instant cases, estops the parties from further questioning the proceedings, even though the taking is unauthorized by the statutes.

In the notes appended to the case of *McKain v. Mullen*, 29 L. R. A. (N. S.) 1, beginning on page 21, may be found a number of cases showing when a landowner is estopped. We quote from a few of them: "A landowner who accepts payment of damages awarded him for the taking of a portion of his land for a public highway cannot be heard afterwards to declare the proceedings for opening such way void. *Town v. Blackberry*, 29 Ill. 137; *Kile v. Yellowhead*, 80 Ill. 208; *Hartshorn v. Potroff*, 89 Ill. 509." Likewise: "A landowner who accepts the damages awarded him for land taken in the laying out of a public highway virtually dedicates his land as a public highway, and is estopped from testing the validity of the proceedings to take it, however defective they may be. *Karber v. Nellis*, 22 Wis. 215; *State v. Langer*, 29 Wis. 68; *Schatz v. Pfeil*, 56 Wis. 429, 14 N. W. 628; *Moore v. Roberts*, 64 Wis. 538, 25 N. W. 564." Again: "The acceptance by a landowner of a sum awarded to him as damages for opening a highway across his land estops him from prosecuting an appeal to reverse the judgment establishing the highway. *Glassburn v. Deer*, 143 Ind. 174, 41 N. E. 376." To the same effect are the cases of *Mississippi & M. R. Co. v. Byington*, 14 Iowa, 572; *Baltimore, O. & C. R. Co. v. Johnson*, 84 Ind. 420; *Parks v. Dallas Terminal R. & Union Depot Co.*, 34 Tex. Civ. App. 341, 78 S. W. 533. A parallel case is that of *Sherman v. McKeon*, 38 N. Y. 266, where it is held: "A land owner whose land has been condemned by right of eminent domain waives his right to appeal from the judgment in the condemnation proceedings, by accepting and retaining the damages awarded to him for his property; and this, notwithstanding the law under which the condemnation was had may be unconstitutional because it authorizes the taking of private property for other than public purposes."

In *Hensley v. Rich*, 191 Ind. 294, 132 N. E. 632, 636, 18 A. L. R. 1118, the rule relative to a waiver of the right to further proceeding after accepting the fruits of a judgment reads as follows: "By electing to follow the specific funds paid into court by Rich & Rich in satisfaction of the judgment and decree, and obtaining an order of court which necessarily operated to prevent Rich & Rich from receiving their money back, and prevented the money from earning interest for their benefit in the hands of Ryan, appellant has estopped

himself to challenge the judgment as against the appellees Rich & Rich. A party cannot seize upon and hold for his own benefit the amount of a judgment paid in by the party against whom the judgment was recovered, and at the same time successfully maintain an appeal on the ground that there was no valid judgment. *Williams v. Richards*, 152 Ind. 528, 53 N. E. 765; *Western Constr. Co. v. Carroll County*, 178 Ind. 684, 688, 98 N. E. 347." In the instant case, the money paid in by the city has been retained for a period now exceeding eighteen years, and at the time of the beginning of these actions had been retained for a period of about thirteen years, during all of which time the city has been deprived of the use of said moneys and the landowners have had the use and benefit thereof, and the opportunity to earn interest thereon.

That the doctrine of waiver and estoppel, by reason of accepting the fruits of the award in condemnation proceedings is applicable, even though there may be a want of jurisdiction, is further supported by the case of *Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 434, 21 P. 565, 566, 13 Am. St. Rep. 234, a case decided by the Supreme Court of Colorado. It is there said: "It is a familiar principle of the law that a party accepting and retaining the fruits of a void judgment is estopped from assailing the judgment itself. [Citing some of the cases heretofore referred to.] In none of the cases, however, did it become necessary to determine the effect of receiving the benefits of a judgment void for the want of jurisdiction in the court over the subject-matter of the suit, although the language used in some of the opinions is broad enough to cover such cases. In the case at bar the court below, in some of the instructions given to the jury, seems to have drawn a distinction between the case of a party accepting the fruits of a judgment rendered by a court without jurisdiction of the subject-matter and a case in which the party has received the fruits of a judgment voidable for the want of jurisdiction over the person, or on account of some informality occurring in the proceedings, antecedent to judgment, but this theory is expressly waived by counsel for appellee in their argument filed in this court, and, after diligent search, I have been unable to find any authority in support of the theory of the trial court. * * * And as appellee, after the notice of the invalidity of such proceeding, continued to retain the money so paid, I am of the opinion that he is estopped from denying the validity of such judgment, and that he should be held bound by that adjudication the same as he would have been had the court had complete jurisdiction, and that for the purposes of this action the same should be treated in all respects as a valid judgment."

In the instant case the record shows that the respondents had knowledge, in 1910 and 1912, at the time of accepting the awards, of all the grounds now advanced against the validity of the judgments entered in the case of the City of Los Angeles v. Koyer et al., notwithstanding they prosecuted no appeals, acquiesced in the judgments, and accepted the awards. The Colorado case from which we have just quoted is reaffirmed in *Handy Ditch Co. v. South Side Ditch Co.*, 26 Colo. 333, 58 P. 30. To the same effect is the case of *Field v. Kincaid*, 67 Colo. 20, 184 P. 832.

In *Tyler v. Shea*, 4 N. D. 377, 61 N. W. 468, 469, 50 Am. St. Rep. 660, a number of cases are cited supporting the text on the subject which we are considering, reading as follows: "The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment." In the Koyer Case, in which Dorsey and Donegan were defendants, a reversal of the judgment on the grounds presented upon these appeals would have absolutely barred their right to any portion of the awards. Thus, it is shown that the plaintiff's right to the benefits is not absolute, but does not and did not exist, save and except upon their acquiescence in the validity of the judgment and their tacit agreement that the judgment entered was sufficient to transfer title to the property to the city of Los Angeles, whose money they received and appropriated to their own uses and benefit.

In the case of *Brooks v. Yell County*, 76 Ark. 67, 88 S. W. 590, it was held: "That a land owner, after condemnation proceedings had been had, who received the amount of the award, was estopped from claiming the land appropriated and could not, without the consent of the county, restore his rights by a return of the money."

That the acceptance of the award is an affirmation of the proceedings and cannot afterwards be questioned is affirmed in the case of *Cape Girardeau & T. B. T. R. Co. v. Southern Ill. & Mo. Bridge Co.*, 215 Mo. 286, 114 S. W. 1084, where a number of authorities are cited.

Though the facts involved on these appeals are distinguishable in some particulars from the circumstances involved in the cases of *Young v. City of Los Angeles* (City of Los Angeles v. Morris) 86 Cal. App. 13, 260 P. 798, 802, the principles of law enunciated in the elaborate and well-considered opinion prepared by Presiding Justice Works are applicable here, and, we think, controlling. The authorities there cited are directly in point. The opinion is too lengthy to be quoted in full, but a few excerpts taken therefrom will illustrate its applicability: "The receipt of the money operates as an estoppel, and the

damages paid have the same effect as a conveyance, and vest the title in the corporation. The consent of the plaintiff is apparent from his conduct in the matter. He evidently appeared and interposed objections to the first report made by the commissioners, and probably induced them to make the award of \$1,500. He had a right to object to the confirmation of the report, upon the ground that the land was taken without his consent, and, had he done so, the report would have been set aside. * * * This he failed to do, and consented to receive the money without objection. The corporation was not bound to pay the money, except upon a waiver of all objections as to the title conferred, and his receipt of the money was a waiver of the objection, and a sufficient consideration for his affirmation of the title in the corporation"—citing *Matter of John & Cherry Streets*, 19 Wend. (N. Y.) 659; *Sherman v. McKeon*, 38 N. Y. 266. "The voluntary acceptance by the defendant of the damages assessed and awarded to him by the judgment, with a knowledge of all the facts precludes him from afterwards controverting the rights of the plaintiff as establishing by the judgment. Nor is it material in such case that the judgment may have been erroneous, or even void"—citing *Kile v. Town of Yellowhead*, 80 Ill. 208. Again, a number of cases are cited to the point that the acceptance of the award estops the parties from claiming that the proceedings are void. Hearing in the Supreme Court was denied in both the Young and the Morris Cases. It must be further borne in mind that the respondents in the cases now before us delayed some five years after the decision in the Koyer Case before beginning these actions, the Koyer Case being the principal one relied upon by the respondents as establishing their rights to reclaim the lands.

In view of what the record discloses, as set forth in the foregoing, and the authorities cited, the conclusion seems to us unavoidable that Rebecca Lee Dorsey and D. F. Donegan, in 1912, by the acceptance of the award, under the conditions attendant upon this case, waived all rights to reclaim the property involved, and especially is this true where said parties remained silent for some thirteen years without questioning the title of the city, and, likewise, have retained possession of many thousands of dollars, and had the use thereof for a period now exceeding eighteen years.

[4, 5] It is further contended on the part of the appellant that, even though this court should hold that respondents are not estopped to question the title of the city of Los Angeles to the property involved, the judgment as rendered is erroneous; that the tenders made by the respondents were insufficient. While the judgments must be reversed for the reasons set forth in this opinion, we think the

contention of the appellant, in relation to the form of the judgment, well taken. Under any view of the case we cannot very well see how the plaintiffs would be entitled to reclaim the property without first returning to the city the amount of the awards accepted by them, together with interest thereon at the legal rate from the date of acceptance until the date of payment, less any profits accruing to the city by reason of any possession or occupancy, or rental value of the premises involved. The plaintiffs have appealed to a court of equity, and it is a well-settled rule of law that, in order to obtain the benefit of any alleged equities, the parties so claiming must do equity.

The judgment and decree in the case of Rebecca Lee Dorsey against the city of Los Angeles is reversed.

The judgment and decree in the case of William P. Donegan, as administrator of the estate of D. F. Donegan, deceased, against the city of Los Angeles, is reversed.



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111 Cal. App. (Supp.) 779

PEOPLE v. RADICH.

Cr. A. 513.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 8, 1930.

1. Statutes ☞158.

Repeals by implication are not favored.

2. Statutes ☞162.

Later general statute does not repeal earlier special statute dealing with same subject, unless statutes are irreconcilably inconsistent.

3. Criminal law ☞116.

Later general statute relating to change of venue for bias or prejudice *held* not inconsistent with, hence did not impliedly repeal, earlier penal statute relating to same procedure in justice's court (Code Civ. Proc. § 170, as amended by St. 1929, p. 958; Pen. Code, § 1431).

Code Civ. Proc. § 170, as amended by St. 1929, p. 958, provides that no justice, judge, or justice of peace shall act as such when it is made to appear probable that, by reason of his bias or prejudice, a fair and impartial trial cannot be had. Pen. Code, § 1431, provides that if proceeding is in justice's court, change of place of trial may be had before commencement of trial, when it appears from defendant's affidavit he has reason to and does believe he cannot have fair and impartial trial before justice because of prejudice or bias of such justice.

4. Criminal law ☞115.

Mere filing petition for change of venue and supporting affidavit on ground of justice's bias and prejudice *held* not to oust court of jurisdiction or require transfer of case (Pen. Code, § 1431).

5. Criminal law ☞134(2).

Affidavit supporting accused's petition for change of venue because justice was prejudiced *held* insufficient for not stating supporting facts (Pen. Code, § 1431).

6. Criminal law ☞134(4).

Accused's verified petition for change of venue stating facts showing bias and prejudice of justice was sufficient, and, in absence of opposing affidavit, denial of petition was error (Pen. Code, § 1431).

The verified petition alleged that justice called accused, who was charged with theft, a thief, and thereby alleged sufficient facts showing bias and prejudice.

7. False pretenses ☞20.

In prosecution for theft, instruction that passing or writing checks without sufficient funds in bank was theft *held* error (Pen. Code, §§ 476a, 484).

Instruction was that "passing or writing checks without sufficient funds in the bank to cover said checks, unless an agreement is proved with the bank to honor overdraft checks, is theft." This was error because crime of theft defined by Pen. Code, § 484, does not include the offense which court attempted to define, and which is a separate offense defined by section 476a.

8. False pretenses ☞6.

To constitute drawing check with intent to defraud, there must be intent to defraud and knowledge drawer has not sufficient funds or credit to meet check (Pen. Code, § 476a).

Appeal from Justice's Court, Belevedere Township; John Zaring, Justice.

R. P. Radich was convicted of theft, and he appeals.

Reversed, and new trial ordered.

D. Joseph Coyne, of Los Angeles, for appellant.

Buron Fitts, Dist. Atty., and Thomas F. O'Brien, Deputy Dist. Atty., both of Los Angeles, for the People.

SHAW, J.

Defendant was convicted in a justice's court on a charge of theft. Before the trial began he filed and presented to the court a petition for change of venue and an affidavit in support thereof. One of the grounds for change of venue, as stated in the petition, was that the justice was so biased and prejudiced against defendant that he could not have a fair and impartial trial before said justice. Without the filing of any counter affidavits the petition was denied.

One of the questions presented by this appeal is whether the case made by the petition is governed by section 170 of the Code of Civil Procedure or by section 1431 of the Penal Code, respondent contending that Code of Civil Procedure, section 170, which is the later enactment, has effected a repeal of Penal Code, section 1431, by implication. Code of Civil Procedure, section 170, as amended in 1929 (St. 1929, p. 958), provides that:

"No justice, judge or justice of the peace shall sit or act as such in any action or proceeding: * * *

"5. When it is made to appear probable that, by reason of bias or prejudice of such justice, judge, or justice of the peace a fair and impartial trial cannot be had before him."

Penal Code, section 1431, which has not been amended since it was originally enacted in 1872, is directed by its context to criminal cases, and provides that: "If the action or proceeding is in a justice's court, a change of the place of trial may be had at any time before the trial commences: 1. When it appears from the affidavit of the defendant that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before the justice about to try the case, by reason of the prejudice or bias of such justice, the cause must be transferred to another justice of the same or an adjoining township."

[1-3] The rule is well settled that repeals by implication are not favored. Also applicable here, since Code of Civil Procedure, section 170, as amended, is the more general provision, is the rule that: "Where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter, so far as coming within its particular provisions." *Riley v. Forbes*, 193 Cal. 740, 745, 227 P. 768, 770. So far as concerns the right of appel-

lant to a change of judges on the ground stated, the two Code sections cited are entirely consistent. Moreover, Code of Civil Procedure, § 170, makes no provision for any procedure for claiming, in a criminal case in a justice's court, the right conferred by it, its procedural provisions being limited to courts of record, whereas Penal Code, § 1431, does provide a mode of proceeding. There being no inconsistency between the two sections, it is clear that Code of Civil Procedure, § 170, has not repealed Penal Code, § 1431, and the latter section is the one to be followed in all cases coming within its terms, of which this is one.

[4-6] The mere filing of the papers above mentioned did not oust the court of jurisdiction or require the case to be transferred to another court. *Miles v. Justice's Court*, 13 Cal. App. 454, 110 P. 349; *Lowrey v. Hogue*, 85 Cal. 600, 24 P. 995; *Ex parte Wright*, 119 Cal. 401, 51 P. 639. The affidavit alone was insufficient, for while it stated defendant's belief that he could not have a fair and impartial trial, yet as a reason for this belief it merely stated the conclusion that the justice was prejudiced—a conclusion which the court must be able to draw from facts stated in support of it. *Lowrey v. Hogue*, *supra*. The petition itself, however, was verified, and is therefore to be regarded as an affidavit. 1 Cal. Jur. 653. It does state certain facts which show bias and prejudice of the trial judge against defendant; e. g., that he called defendant a thief—the charge being theft. Since there was no affidavit disputing these statements, it was error to deny the petition for change of venue.

[7, 8] At the trial it appeared that defendant had obtained money from the complaining witness by stating that a certain bill was paid and producing a receipt for such payment. It was also shown that he obtained the receipt by giving a check which was not honored because of insufficient funds in the bank on which it was drawn. Defendant testified that he thought he had sufficient funds in bank to pay the check. The court instructed the jury that "passing or writing checks without sufficient funds in the bank to cover said checks, unless an agreement is proved with the bank to honor overdraft checks, is theft." This was error. The crime of theft does not include the offense which the court attempted to state in this instruction. Pen. Code, §§ 476a, 484. They are distinct and separate offenses and a defendant charged with one cannot be convicted of the other. Moreover, it is necessary to a violation of Penal Code, § 476a, that there be an intent to defraud and a knowledge at the time of drawing or uttering the check that the drawer has not sufficient funds or credit to meet it, both of which factors were omitted from the instruction given. The jury may very well

have convicted defendant because of this instruction.

The judgment is reversed, and a new trial of the case in the superior court is ordered.

We concur: McLUCAS, P. J.; BISHOP, J.

211 Cal. 121

PEOPLE v. GLOBE GRAIN & MILLING CO.
S. F. 13907.

Supreme Court of California.

Dec. 15, 1930.

1. Constitutional law ⇨62.

Fish ⇨9.

Statute allowing reduction of food fish by others than packers *held* not unconstitutional as granting fish commission uncontrolled discretion (St. 1929, p. 903, amending St. 1919, p. 1203, § 5).

St. 1929, p. 903, amending Fish Reduction Act (St. 1919, p. 1203) § 5, authorizes fish and game commission to grant revocable permits in such amounts and subject to such restrictions and regulations as commission may prescribe to take and use fish by reduction or extraction process for manufacture of edible products, provided, among other things, it be shown to commission's satisfaction that such use of fish will not tend to deplete species, or result in waste or deterioration of such fish.

2. Constitutional law ⇨62.

Statute granting discretion to administrative body is not unconstitutional, where statute contains guide to and limitation on administrative body's actions.

3. Constitutional law ⇨318.

If statute requires administrative body to determine existence of necessary facts before making discretionary decision, essential requirement of "due process" is complied with, and statute does not give uncontrolled discretion.

[Ed. Note.—For other definitions of "Due Process of Law," see Words and Phrases.]

4. Constitutional law ⇨236.

Statute allowing reduction of food fish by others than packers *held* not invalid as discriminatory (St. 1919, p. 1203, § 5, as amended by St. 1929, p. 903).

Fish Reduction Act (St. 1919, p. 1203) § 5, as amended by St. 1929, p. 903, is not

discriminatory merely because it does not expressly prohibit discrimination between applicants for permits on theory that thereby fish commission may favor one over others and perhaps create monopoly by granting permit to one person to take all available fish, since statute will be construed with constitutional provisions against discrimination.

5. Constitutional law ⇨48.

Statute is presumed constitutional.

6. Constitutional law ⇨48.

Statute will be given construction consistent with validity if possible.

7. Constitutional law ⇨42.

Charge of unconstitutional discrimination can only be raised where issue is involved, and only by person discriminated against.

8. Evidence ⇨83(1).

Presumption is that fish commission will exercise its powers in conformity with statute and Constitution (St. 1919, p. 1203, § 5, as amended by St. 1929, p. 903).

9. Fish ⇨10(1).

If applications for permit for reduction of food fish exceed in quantity amount of fish which fish commission finds may safely be taken, it would be commission's duty to make equitable apportionment of permits (St. 1919, p. 1203, § 5, as amended by St. 1929, p. 903).

In Bank.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by the People of the State of California, brought by the City Attorney of Monterey, against the Globe Grain & Milling Company. From an order granting a preliminary injunction restraining the taking of sardines for reduction purposes, defendant appeals.

Reversed with directions.

William B. Hornblower and Fabian D. Brown, both of San Francisco, and C. C. Baker, of Salinas, for appellant.

Argyll Campbell, of Monterey, and B. D. Marx Greene and Carl Westerfeld, both of San Francisco, for the People.

PER CURIAM.

This is an appeal from an order of the superior court granting a preliminary injunction. The action was brought by the city attorney of Monterey to restrain the taking of sardines by defendant for reduction purposes.

es, on the ground that such use of the fish caused irreparable injury to the people of the state and thereby constituted a public nuisance. The defense was that the taking was authorized by the terms of a permit granted by the Fish and Game Commission pursuant to a statute enacted in 1929. This would, of course, normally be a sufficient defense. Cal. Civ. Code, § 3482. Plaintiff contended, and the lower court held, that the statute was unconstitutional and hence did not justify acts which would otherwise have amounted to a nuisance. Some suggestion is also made by plaintiff that the statute does not confer upon the commission itself the power to grant the type of permit involved herein, but we deem this to be without merit. The sole basis upon which the injunction was granted was the alleged invalidity of the statute.

The law in question is the "Fish Reduction Act" (St. 1919, p. 1203) as amended in 1929. St. of 1929, p. 901, Deering's General Laws, Supp. 1929, Act 2895, p. 3224. The original statute, as enacted in 1919 and amended in subsequent years, had for its object the conservation of food fish for purposes of human consumption. However, in recognition of the problem facing canners in the use of an excess catch and the disposal of fish which are broken or otherwise unsuited for canning, the statute permitted sardine canners actually engaged in operating their plants to use not more than 32½ per cent. of their catch in a reduction plant, and also allowed the reduction of all fish unfit for ordinary methods of preserving, where they had not been deliberately taken into the plant in such condition. These provisions were construed and upheld in *People v. Monterey Fish Products Co.*, 195 Cal. 548, 234 P. 398, 38 A. L. R. 1186.

In 1929 the statute was again amended to allow the reduction of fish by others than packers of sardines. The amendment reads, in part, as follows: " * * * the fish and game commission may grant a revocable permit or permits in such amount and subject to such restrictions, rules or regulations as the fish and game commission may adopt or prescribe to take and use fish by a reduction or extraction process for the manufacture of edible products fit for, intended to be used and in fact used for human consumption providing it shall be shown and appear to the satisfaction of the fish and game commission that such use of such fish will not tend to deplete the species, or result in waste or deterioration of such fish; and provided, further, that no such permit shall be granted unless at least fifty per cent (50%) of the wet weight of the whole round fish or all of the oil extracted from such fish is manufactured into such products within the State of California." It will be observed that while this provision allows the taking of fish for reduction purposes, it is nevertheless required that

the product be intended for and suited to human consumption. Section 5.

Defendant has a reduction plant at Monterey. On June 22, 1929, it made application to the fish and game commission for a permit under the foregoing statute. On November 12, 1929, the commission held a hearing on the application, and on December 9, 1929, granted a permit to take and use not more than 7,500 tons for the period of the sardine season ending February 15, 1930. It is this permit which is relied upon as a defense to the suit for an injunction.

[1, 2] Plaintiff's contention is that the amendment to the statute is unconstitutional in that it grants to the commission an uncontrolled discretion, and permits discrimination between applicants. We are of the opinion that the amendment, properly construed, does not exhibit either of these defects.

The commission is given a broad but not an uncontrolled discretion. It may grant a permit only upon a showing that the use of the fish "will not tend to deplete the species or result in waste or deterioration," and the permit is always revocable. Here we have a condition limiting the exercise of the delegated power and, indeed, the only practicable one under the circumstances. Certainly the Legislature cannot intelligently prescribe any maximum quantity for all applicants or for any one applicant; nor would it be practicable for the Legislature to fix any period of time for the duration of the permit. These are important matters, but an administrative body in close touch with the conditions of the industry is far more competent to determine them than the Legislature. Aside from this practical consideration there is nothing unconstitutional in the grant to an administrative body of such authority, where the statute contains a guide to and a limitation upon its actions. *Tarpey v. McClure*, 190 Cal. 593, 213 P. 983; *Bank of Italy v. Johnson*, 200 Cal. 1, 251 P. 784; see, also, 15 Cal. L. Rev. 408. Here the statute contains the necessary limitation in the requirement that each applicant must make a showing, and the commission must find, that the granting of the permit will not conflict with the fundamental object of the statute—the conservation of food fish. In short, the question presented by the vesting of discretionary power in the commission by this amendment is very much the same as that presented by the original statute; and as to that this court said in *People v. Monterey Fish Products Co.*, *supra*, at page 558 of 195 Cal., 234 P. 398, 402: "There is no merit in the contention that the act is invalid for the reason that it purports to vest in the commission arbitrary authority and unguided discretion in that it may allow one canner to take 25 per cent. and another 5 per cent. and

another 1 per cent. of excess fish. The act confers discretion upon the commission, it is true, but such discretion is neither unguided nor uncontrolled. Its exercise is made dependent upon the findings of fact after a hearing 'that there is no market for the fish referred to in said application and that the taking or using of said fish in a reduction plant will not tend to impair or deplete said species of fish.' It is apparent that there may be varying circumstances of time, place, method of catching fish, location where they are to be found with relation to the location of the cannery, etc., which may legitimately justify the allowance of a larger leeway in one case than in another. The Legislature may, without violating any rule or principle of the Constitution, confer upon an administrative board or officer a large measure of discretion, provided the exercise thereof is guided and controlled by rules prescribed therefor. *Tarpey v. McClure*, 190 Cal. 593, 213 P. 983, and cases cited."

[3] The two statutes are similar in the one important respect that in each the discretionary power vested in the commission is controlled by a standard or guide set forth in the law itself. It is true that one contains more specific restrictions than the other. This is purely a matter of legislative policy, and does not affect the constitutional problem. The only substantial difference between them, so far as concerns the question of administrative discretion, is that the original statute expressly provides for a hearing. The difference is not material. The essential requirement of due process is merely that the administrative officer or body be required to determine the existence or nonexistence of the necessary facts before any decision is made. If the statute requires this, it does not vest an uncontrolled discretion, and the officer or body may not act arbitrarily. *Riley v. Chambers*, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418; *Doble Steam Motors Corp. v. Daugherty*, 195 Cal. 158, 232 P. 140; *Ex parte McManus*, 151 Cal. 331, 90 P. 702.

[4-6] The contention that the statute is discriminatory is purely speculative. On its face it treats all persons in the same manner, authorizing the commission to extend its benefits to anyone so long as the interests of the people in the preservation of food fish are safeguarded. The theory of the attack appears to be that inasmuch as the Legislature has not expressly prohibited discrimination between applicants, the commission may therefore favor one over others, and might perhaps create a monopoly by granting a permit to one person to take all the available fish. The courts have given scant consideration to such reasoning. The Supreme Court of the United States disposed of a similar contention in the following language: "Learned counsel for the defendant suggests

some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under an act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise." *Monongahela Bridge v. United States*, 216 U. S. 177, 195, 30 S. Ct. 356, 361, 54 L. Ed. 435. A statute cannot be declared unconstitutional upon such implications. The rule is just the contrary. It is of no consequence that the statute makes no reference to an equitable apportionment of the benefits to be granted. The important thing is that it contains no express grant of authority to the commission to indulge in favoritism or to make or enforce discriminatory rules. A presumption of constitutionality protects every legislative act. Being silent on the matter of apportionment of the benefits, the statute will be construed together with the constitutional provisions against discrimination, and, as so construed, must be upheld. *County of San Luis Obispo v. Murphy*, 162 Cal. 588, 123 P. 808, Ann. Cas. 1913D, 712; *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 96 P. 288; *Wheeler v. Herbert*, 152 Cal. 224, 92 P. 353; *In re Spencer*, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; *Lent v. Tillson*, 72 Cal. 404, 14 P. 71; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 S. Ct. 359, 58 L. Ed. 713; *Estate of Johnson*, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161; *Quong Ham Wah Co. v. Industrial Accident Commission*, 184 Cal. 26, 192 P. 1021, 12 A. L. R. 1190; 12 C. J. 787, § 220; 5 Cal. Jur. 615, § 46; 628, §§ 56, 57; 6 R. C. L. 78, § 77.

[7] The two principles just considered, namely, that a statute is presumed to be constitutional, and that it will be given a construction consistent with validity if at all possible, dispose of the attack leveled at the statute itself. We do not mean to hold that the decision of the commission in granting a permit to the defendant must necessarily be affirmed as a proper exercise of its discretion. That question is not before us. No contention is made that there was discrimination in the granting of this particular permit. Hence, plaintiff is in no position to raise this constitutional question. It is well established that a charge of unconstitutional discrimination can only be raised in a case where this issue is involved in the determination of the action, and then only by the person or a member of the class of persons discriminated against. *Estabrook Co. v. Industrial Accident Commission*, 177 Cal. 767, 177 P. 848; 5 Cal. Jur. 622, §§ 52, 53; 6 R. C. L. 89, §§ 87, 88, 89; 12 C. J. 768, § 189. Although this rule is subject to certain exceptions (see *Quong Ham Wah Co. v. Industrial Accident Commission*, *supra*), none of them are applicable to the situation presented by this case.

[8, 9] It may be observed in conclusion that the Legislature, in its desire to further the program of fish conservation without unduly restricting the development of this industry, has had occasion to change the scope and method of operation of this statute a number of times. Presumably the present amendment represents its well-considered judgment on the most reasonable and practicable method of achieving both of these ends. We should be slow to disturb the result of this judgment, and in no case should we anticipate capricious acts which are not intended by the Legislature and which may never take place. See *In re Holmes*, 187 Cal. 640, 203 P. 398; *In re Culver*, 84 Cal. App. 295, 257 P. 876; *Rode v. Siebe*, 119 Cal. 518, 51 P. 869, 39 L. R. A. 342. It is to be presumed that the commission will exercise its powers in conformity with the statute and Constitution of the state. It is to be expected that it will formulate reasonable rules of policy and practice. *Ex parte McManus*, 151 Cal. 331, 90 P. 702. In the event that the applications for permits should exceed in quantity requested the amount of fish which the commission finds may safely be taken, it would be the duty of the commission to make an equitable apportionment of its permits. Unless and until the commission is guilty of dereliction in these matters, and a charge of arbitrary action or discrimination is raised by a party affected by its decision, there is no basis for the intervention of this court. Should the question be presented at some future time in the proper manner, we would review the order of the commission in the same manner that we review the orders of other administrative bodies and officers.

The judgment is reversed, with directions to the trial court to dissolve the injunction.

110 Cal. App. 168

PARRA v. CLEAVER.

Chv. 250.

District Court of Appeal, Fourth District,
California.

Dec. 2, 1930.

Rehearing Denied Dec. 22, 1930. Hearing Denied by Supreme Court Jan. 29, 1931.

1. Appeal and error ⇨1061(3).

Denial of nonsuit is not prejudicial error, where facts sufficient to support judgment are in evidence before or after denial.

2. Negligence ⇨85(3).

Sixteen months old child, not having sufficient understanding to be contributorily neg-

ligent, nor otherwise shown negligent, could not be charged with contributory negligence.

3. Automobiles ⇨162(8).

Greater care is required of truck driver where he knows there are small children at play, than where only mature people are involved.

4. Automobiles ⇨244(36).

Reasonable inference if raised by evidence showing negligence of truck driver causing injury to child will sustain judgment awarding recovery.

5. Automobiles ⇨245(8).

Whether due care required truck driver to look for children on all sides of truck in places of danger before backing truck, *held* for jury.

6. Appeal and error ⇨996.

Evidence raises inference of negligence of truck driver causing injury to child when backing truck, precluding appellate court from disturbing verdict as unsupported by evidence.

Evidence showed that truck driver, after driving into yard to deliver laundry, knew that children were playing around truck, that driver walked around rear of truck to see that no children were there and then went to right side, where he stepped on running board and waited a few minutes, but that view of left-hand side of truck was obscured by truck body, and that injured child may have approached on left-hand side of truck and was in position of danger when truck was backed up.

7. Appeal and error ⇨1064(1), 1067.

Judgment will not be reversed because of giving or refusing of instructions not harming appellant.

8. Damages ⇨132(1).

\$1,950 damages to sixteen months old child suffering severe injuries about face and head, some of which were permanent, *held* not excessive.

9. Appeal and error ⇨1170(9).

Where verdict was only moderately compensatory, appellant suffered no injury by failure to instruct on punitive damages, and verdict could not be disturbed therefor (Const. art. 6, § 4½).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Jose Parra, an infant, by Manuel Parra, his guardian ad litem, against A. W. Cleaver, individually and as doing business under the firm name and style of Sanitary Laundry. Judgment for plaintiff, and defendant appeals.

Affirmed.

Guss Hagenstein, of Fullerton, for appellant.

D. G. Wettlin and Head, Rutan & Scovel, all of Santa Ana, for respondent.

MARKS, J.

This action grew out of an automobile accident occurring on the 18th day of September, 1926, in the town of Buena Park in Orange county. Jose Parra was then an infant of the age of sixteen months. Appellant was the proprietor of the Sanitary Laundry. At the time of the accident L. A. Baumstark was operating a laundry truck as the agent and servant of appellant and was acting within the scope of his employment. On the evening of September 18, 1926, at some time between 6:15 and 7 o'clock p. m., Baumstark drove into the yard of a house occupied by the family of Manuel Parra, the father of the infant, and delivered some wet wash to the Parra home, leaving the truck standing in the yard about fifty feet from the house. Returning to the truck he saw several children, all under the age of eight years, playing around or near the vehicle. Approaching its left side and throwing the empty laundry bag over the seat into the car, he walked around the rear end to see that no children were in his way before backing preparatory to driving from the premises. Coming around to the right-hand side opposite the cab and stepping up on the running board, he told the children to get away from the truck as he was going to back it. He testified that after he mounted the running board he "stood there and looked around a few minutes to see if everything was clear." He then took his seat behind the steering wheel, started his engine, cramped his front wheels to the left, and backed the truck. After proceeding about three feet he felt the left front wheel jar as though it had run over some object. As he moved further to the rear he noticed the body of Jose Parra lying on the ground in front of his truck. He stopped his vehicle, picked the baby up, and seeing that it was badly hurt, called its mother and then took it to a hospital, where the wounds were dressed and it was given treatment. The child was confined to this hospital for about three weeks, when it was moved to the County Hospital, where it remained for several months before being discharged. Baumstark was the only witness testifying to the manner in which the accident happened and there is no conflict in the evidence upon this point. However, he did testify that it was

dark and the lights of the truck were burning at the time of the accident. This was denied by two witnesses for respondent, who testified that the accident happened about ten minutes after the sun had set and while it was still daylight and that the lights on the laundry truck were not illuminated.

The case was tried before a jury, which returned a verdict in favor of respondent in the sum of \$1,950.

Appellant urges four grounds for a reversal of the judgment: First, that the trial court erred in denying his motion for nonsuit; second, that the evidence was insufficient to sustain the judgment; third, that the trial court erred in refusing to give an instruction proposed by him; and fourth, that the trial court erred in denying his motion for a new trial.

[1] The denial of a motion for a nonsuit is not prejudicial error where facts sufficient to support the judgment are in evidence either before or after the denial of the motion. *Cosby v. Cline*, 186 Cal. 698, 200 P. 801. Whether or not denial of this motion was prejudicial error must depend upon our conclusions as to whether there was sufficient evidence to sustain the judgment. Appellant's last specification of error depends upon a decision of his second and third specifications, which are the only ones requiring our consideration.

In support of his contention that the evidence was not sufficient to sustain the judgment, appellant argues, first, that it shows respondent guilty of contributory negligence as a matter of law, and second, that it shows no negligence on the part of the driver of the laundry truck.

[2] In the case of *Todd v. Orcutt*, 42 Cal. App. 687, 183 P. 963, 964, it was said: "An infant may be so very young that, like an idiot or a lunatic, no negligence may legally be imputed to him." As Jose Parra was only sixteen months of age at the time of his injury and as there was no evidence indicating that he had sufficient mind or understanding to enable him to be guilty of contributory negligence, and as the record is barren of any evidence pointing to contributory negligence on his part, we cannot charge him with it.

[3] In considering whether or not there was any evidence showing negligence on the part of Baumstark, we must bear in mind that a greater degree of care is required of the driver of a vehicle where he knows there are small children at play than in the case where only people of mature discretion are involved. As was said in the case of *Lampton v. Davis Standard Bread Co.*, 48 Cal. App. 116, 191 P. 710, 711: "The proximity of the place where Graham was driving to the adjacent school grounds, and the hour, at which children might, with certainty, be expected to be using the street, imposed upon him a greater degree of caution than he might be required to use

under ordinary circumstances. That which would be but ordinary negligence in reference to a grown person may be gross negligence as respects a child."

[4] While the evidence as to the manner in which the injury to Jose Parra occurred is undisputed, still if a reasonable inference pointing to the negligence of Baumstark may be drawn from it, such inference will be sufficient to sustain the judgment. It was held in the case of *Wilbur v. Wilbur*, 197 Cal. 1, 239 P. 332, 334, that: "The findings of the trial court upon conflicting evidence are conclusive, and all reasonable inferences are to be indulged in support of the findings. *Treadwell v. Nickel*, 194 Cal. 243, 261, 228 P. 25. The burden is upon appellant who claims error to show its existence. *Hayne on New Trial and Appeal* (Rev. Ed.) § 285, p. 1576, and cases cited. Where two or more inferences may reasonably be deduced from a certain state of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the trial court."

It was further said in the case of *Mah See v. North American Accident Insurance Company*, 190 Cal. 421, 213 P. 42, 44, 26 A. L. R. 123, that: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. *Anderson v. Los Angeles Transfer Co.*, 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 519, 520, 153 P. 951; *Hassell v. Bunge*, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' *Bandle v. Commercial Bank of Los Angeles*, 178 Cal. 546, 547, 174 P. 44, 45."

[5, 6] The undisputed evidence of Baumstark shows that he knew that children were playing around his truck prior to the time that he started it. He walked around the rear of the truck to see that no children were there, then went to its right side, where he stepped up on the running board and stood "for a few minutes to see if everything was clear." The laundry wagon was equipped with a high body built out of wood with a cab over the driver's seat. Just how long Baumstark stood on the running board is not clear. A few minutes

certainly would mean more than one minute. His view of the left-hand side of the truck was obscured by the body and cab during this period. It is entirely possible that Jose Parra approached the left-hand side of the truck during this time and was not seen by Baumstark. The fact that the child was not seen by him when he threw the laundry bag into the truck and walked around the rear of it would permit the reasonable inference that the baby approached the left side of the truck during this time and was in a position of danger when the truck started upon its backward course. Whether due care required Baumstark to have looked further for children in places of danger before backing his truck was a question of fact for the jury to determine. The jury by its verdict concluded that Baumstark was guilty of negligence in the operation of the truck and therefore resolved this question against appellant. There being a reasonable inference to be drawn from the evidence pointing toward negligence upon the part of the driver of the truck, we cannot disturb the verdict of the jury by holding that it was not supported by the evidence.

Appellant complains that the trial court refused to give an instruction upon punitive damages which had been requested by him. This instruction was as follows: "You are instructed that the plaintiff does not ask for, neither are you permitted to award, what is termed punitive damages in this case, or to add anything to your verdict by way of punishment of the defendants. Such damages as you may award must be reasonable, and be proven by the plaintiff by the fair preponderance of the evidence. You can only award damages to plaintiff for permanent injury or disability to the extent that you believe from the preponderance of the evidence as a whole, that the child has been permanently injured as a result of the accident complained of." In support of his argument that it was prejudicial error to fail to give this instruction, he cites the cases *Mabb v. Stewart*, 133 Cal. 556, 65 P. 1085, and *Spencer v. San Francisco Brick Co.*, 5 Cal. App. 126, 89 P. 851, which hold that in a proper case it is reversible error for the court to refuse an instruction on punitive damages.

[7] "A judgment will not be reversed because of the giving or refusing of instructions which do not harm the appellant. To justify a reversal, under the Constitution it must appear, from a consideration of all the evidence, that any error in this respect resulted in a miscarriage of justice. It is not necessary to invoke the remedial provision of the Constitution to show that errors in instructions are harmless where the verdict would be the same with correct instructions." 2 Cal. Jur. 1026. Without holding that the requested instruction should have been given,

but assuming that the court should have done so, we must determine whether or not appellant suffered any prejudice by the refusal of the court to give it.

[8] An examination of the evidence shows that Jose Parra was very seriously injured. His attending physician described his wounds as follows: "The child was immediately taken to the operating room for examination and I found a cut beginning on the right side of the head at the outer corner of the eye, piercing the skin of the upper eye-lid over to the nose and across the nose into the left eyebrow and right upward and backward over the crown of the head and ending about two and a half to three inches above and just posterior to the right ear. Another cut extended from the bridge of the nose below the right eye going just below the eyelid and ending about one-half inch below the end of the other cut. The flap of the scalp was turned back on a straight line from the end of the cut to the rear to the outer corner of the right eye, the skin and soft tissues and muscles being pulled back. Also the periosteum being torn off and slipped loose from the parietal bone of the skull." This physician further testified that it took between thirty and fifty stitches to suture the wounds. The child was under the care of this physician for three weeks when he was taken to the County Hospital, where he remained for over five months under treatment. The lid of the right eye had been so badly torn that it became everted, and at the time of the trial, about a year after the accident, it could not be closed. It was the opinion of experts that this condition could only be cured by one or more operations. There was some evidence tending to show that the sight of the right eye was seriously impaired. However, the weight of this evidence was to a certain extent negated by a showing that this condition might have been caused from a chronic disease of the blood from which the child was suffering.

[9] Considering the seriousness of the injuries, we believe that the verdict of the jury awarding damages in the sum of \$1,950 was not excessive. Certainly it carried no punitive damages as the amount awarded could only be considered as moderately compensatory for the injuries suffered. We therefore conclude that the appellant suffered no injury or damage by the failure of the trial court to give his proposed instruction upon the question of punitive damages. This being the case, we are precluded by the provisions of section 4½ of article 6 of the Constitution from disturbing the verdict.

Judgment affirmed.

We concur: CARY, P. J.; BARNARD, J.

JORDAN v. GREAT WESTERN MOTORWAYS et al. *

Civ. 129.

District Court of Appeal, Fourth District, California.

Dec. 1, 1930.

Rehearing Denied Dec. 20, 1930. Hearing Granted by Supreme Court Jan. 29, 1931.

1. Trial ⇐253(1).

Instructions purporting to contain conditions necessary to verdict must embody all pleaded defenses on which substantial evidence has been introduced.

2. Appeal and error ⇐1170(9).

In personal injury action, giving plaintiff's formula instructions stating circumstances authorizing verdict for plaintiff, but not embodying element of contributory negligence, held prejudicial error (Const. art. 6, § 4½).

Formula instructions given at plaintiff's request told jury circumstances under which they could find verdict for plaintiff, which included reference to negligence of defendant as proximate cause of automobile accident and resulting injuries to plaintiff. Instructions, however, made no reference to contributory negligence of plaintiff, which was an issue before jury, and in fact conceded to be an issue by certain instructions covering subject of contributory negligence requested by plaintiff and given.

3. Appeal and error ⇐1170(9).

Giving of conflicting instructions covering subject of right of way at intersection as between respective automobiles held prejudicial error (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15; Const. art. 6, § 4½).

First instruction covering subject of right of way at street intersection as between respective automobiles gave law as it stood prior to St. 1925, p. 412, § 15, amending St. 1923, p. 560, § 131, which amendment was in fact applicable because collision occurred after such amendment went into effect. Subsequent instruction set out provisions of section 131, and a third instruction covered duty of bus driver to yield right of way and that failure to do so constituted negligence.

4. Automobiles ⇐245(64).

Whether negligence of respective drivers of automobiles which collided at street intersection is independent or concurrent is generally for jury.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 2 P.(2d) 786.

5. Appeal and error ⇨1001(1).

Finding of jury on question whether negligence of drivers of respective automobiles is independent or concurrent is conclusive on appeal if supported by any evidence.

6. Automobiles ⇨245(87, 88).

Whether guest was contributorily negligent, so as to preclude recovery for injuries sustained in collision in action against owners of both automobiles, *held* for jury under evidence.

7. Evidence ⇨474(8).

Person having opportunity to observe speed of moving vehicle is qualified to give opinion regarding speed, and previous lack of experience goes only to weight of testimony.

8. Evidence ⇨474(3).

Lay witnesses having requisite opportunity for observation may testify regarding health of another.

9. Damages ⇨166(1).**Evidence** ⇨471(13).

In personal injury action, permitting theatrical booking agent to testify that plaintiff, an acrobatic dancer, was in poor health, *held* not erroneous, because immaterial and calling for conclusion.

10. Damages ⇨158(1).

Testimony showing plaintiff suffered from vaginal bleeding after injury in automobile collision *held* properly admitted under pleadings.

Testimony that plaintiff suffered from vaginal bleeding for a long time after injury was objected to on ground that internal injuries were not within issues as framed. Complaint alleged that plaintiff received severe bruises, gashes, and injuries as result of the collision.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Irene Jordan against the Great Western Motorways and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Bryce P. Gibbs, of Los Angeles, for appellant Great Western Motorways.

Swing & Wilson, of San Bernardino, for appellant Eslow.

A. S. Maloney and Martin J. Coughlin, both of San Bernardino, for respondent.

CARY, P. J.

Plaintiff brought this action against the defendants Eslow and the Great Western Motor-

ways, a corporation, hereinafter referred to as Motorways, to recover for personal injuries sustained in a collision between Eslow's car and a bus belonging to Motorways. Defendant Eslow filed his answer denying the allegations of the complaint and the defendant Motorways did likewise and further set up the defense of contributory negligence. A jury brought in a verdict against both defendants from which each defendant has appealed.

The defendants severally contend that the judgment should be reversed because (1) certain errors in the instructions given were prejudicial; (2) each contends that the other was alone to blame; (3) each contends that the plaintiff was guilty of contributory negligence sufficient to bar her recovery; (4) that certain evidence regarding the speed of the automobiles and the condition of the health of plaintiff was given by lay witnesses who were without the qualifications necessary to give such testimony, and (5) that evidence admitted regarding internal injuries was not within the issues.

The accident took place March 1, 1928, in the city of San Bernardino at the intersection of Sixth street and Arrowhead avenue. Arrowhead avenue runs north and south, while Sixth street runs east and west across it. It is a blind intersection at which the permissive speed is 15 miles per hour. Plaintiff, an acrobatic dancer by profession, was the guest of defendant Eslow, riding in his automobile. Eslow's car, going east on Sixth street, and the Motorways bus going north on Arrowhead avenue, were approaching this intersection at or about the same time. As Eslow approached the intersection his view was partially obstructed by three other cars in the vicinity. One of these cars just ahead of him and going east on Sixth street turned south on Arrowhead avenue, another, coming south on Arrowhead avenue, turned west on Sixth street, and a third, going south on Arrowhead avenue, crossed directly in front of Eslow and proceeded south. The jury might well have believed from the evidence that in spite of the fact that it was a blind intersection and that each driver's view was further obstructed by the other three cars mentioned defendant Eslow drove his car through the intersection at 20 miles an hour and collided with the bus without even seeing it until just at the moment of impact and that the Motorways bus at the same time was passing through the intersection at a speed estimated between 30 and 40 miles an hour and that the driver of the bus was not keeping a lookout and failed to see Eslow's car. Plaintiff, seated on Eslow's right, noticed the bus a few seconds before the collision, whereupon she immediately cried out to Eslow to look out. The evidence is somewhat uncertain as to whether Eslow's car ran into the bus or the bus ran into Eslow's car, but, in any event, they came togeth-

er at a point within the southeast quarter of the intersection and the bus traveled approximately 150 feet north of the north curb line of Sixth street before it was brought to a stop.

Numerous objections are made to the instructions. It may be noted at the outset that by instruction No. 1, given at plaintiff's request, the jury were told that the burden was upon plaintiff to prove by a preponderance of the evidence that plaintiff was free from contributory negligence, while by instruction No. 11, also given at plaintiff's request, they were told that the burden was upon defendants to prove that plaintiff was guilty of contributory negligence.

By instruction No. 6—a formula instruction—given at plaintiff's request, the jury were told that if the negligence of defendant Eslow proximately contributed to the accident and plaintiff's injuries their verdict "must be for plaintiff and against said defendant," also that if the negligence of defendant Motorways proximately contributed to the accident and plaintiff's injuries their verdict "must be for the plaintiff and against said defendant," also that if the negligence of both defendants "contributed or proximately caused" the accident and plaintiff's injuries their verdict "must be for the plaintiff and against both said defendants." By instruction No. 7—another formula instruction—also given at plaintiff's request, the jury were told that if defendants or either of them were not driving his or its automobile at a careful and prudent speed and such driving proximately contributed to the collision their verdict "must be in favor of plaintiff and against the defendants or defendant" so driving, also that if defendants or either of them were driving at a speed to endanger the life, limb, or property of any person and such driving proximately caused or contributed to the collision their verdict "must be in favor of the plaintiff and against the defendant or defendants so driving." It will be noted that in these two instructions the admonition that under certain conditions the jury's verdict "must be in favor of the plaintiff" is repeated five times.

[1, 2] If instructions purport to contain the conditions necessary to a verdict for one party, they must contain all of those conditions and not overlook pleaded defenses on which substantial evidence has been introduced. *Beyerle v. Clift*, 59 Cal. App. 7, 9, 209 P. 1015; *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 393, 394, 264 P. 237; *Sinan v. Atchison, etc., Co.* (Cal. App.) 284 P. 1041; *Starr v. Los Angeles Railway*, 187 Cal. 270, 278, 201 P. 599; *Keena v. United Railroads*, 57 Cal. App. 124, 126-128, 207 P. 35. By requesting instructions 1 and 11 hereinabove referred to, plaintiff conceded that the question of the contributory negligence of plaintiff was before the jury, yet in plaintiff's formula instructions

Nos. 6 and 7 no reference is made to the fact that before finding a verdict for plaintiff the jury should find plaintiff to be free from contributory negligence. This omission was error.

[3] Defendant Motorways complains of several instructions given at the request of defendant Eslow. In one of these, No. 15, the jury were told that if defendant Eslow, while going at a lawful rate of speed, entered the intersection before the Motorways bus, Eslow had the right of way and it was the duty of the bus driver to yield such right of way to him and if he did not do so and a collision occurred defendant Motorways was guilty of negligence and liable to plaintiff for any injuries proximately caused thereby. While this instruction might possibly have been correct as far as right of way is concerned under the law as it stood prior to the 1925 amendment to section 131 of the Motor Vehicle Act (St. 1923, p. 560), yet it was not the law at the time the accident happened, since the 1925 amendment was then in effect and provided: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." Stats. 1925, p. 412, § 15. In instruction No. 9, also given at defendant Eslow's request, there were set out the provisions of section 131 of the Motor Vehicle Act above quoted. Instruction No. 16, likewise given at defendant Eslow's request, told the jury that if Eslow "had the right of way at the intersection of Arrowhead avenue and Sixth street as defined in these instructions" it was the duty of the driver of the bus to yield such right of way and if he did not do so it constituted negligence on the part of the bus driver. It is at once apparent that by No. 15 the court gave to the jury the law regarding rights of way at intersections as it stood before the 1925 amendment, while by instruction No. 9 it gave them the law as it stood after the 1925 amendment—a direct conflict—and then by No. 16 the jury were told that if Eslow had the right of way "as defined in these instructions" and the Motorways bus did not yield it to him defendant Motorways was negligent. Since the jury might well have found that the defendant Eslow was the first to enter the intersection, and at the same time it is an undisputed fact that the Motorways bus was approaching from the right, it can be seen that a jury could not help but be confused by these conflicting instructions.

Plaintiff, in a brief evidencing commendable diligence in research, contends that these errors were not prejudicial and should not warrant a reversal of the judgment. We are not unmindful of the provisions of section 4½ of article 6 of the Constitution, nor of the decisions in this state in which errors in instructions have been held without prejudice

where, notwithstanding, the reviewing court has been able to conclude that the jury were fully and fairly instructed on the law of the case. But here not only were the jury instructed that the burden was upon both plaintiff and the defendants to prove the facts regarding contributory negligence, but in five different instances the jury were told that their verdict must be for the plaintiff under certain conditions which did not include the necessary condition that plaintiff be free from contributory negligence, and further the jury were given an instruction which, under the facts in the case, might well have given them to understand that both defendants had the right of way and yet were further instructed that if they should find that the defendant Eslow had the right of way, the failure of defendant Motorways to yield that right of way was negligence. Under these circumstances we feel that it cannot be said that the jury were fully and fairly instructed as to the law nor can it be said that the errors complained of were without prejudice.

As the errors in instructions will necessitate a new trial, we shall proceed to consider some of the other questions presented by the record.

[4, 5] Regarding the contention of each defendant that the other was alone to blame it is quite apparent from the evidence that the negligence of the defendants, if any, was concurrent and so simultaneous as to allow no break between cause and effect. As to defendant Eslow, viewing the evidence in its aspect most favorable to plaintiff, the jury could well have believed that although his car could have been stopped in ten feet had it been going at the rate that he testified, yet it traveled 55 feet after plaintiff had called his attention to the danger from the bus, while as to defendant Motorways the jury might well have concluded that its bus was passing through the intersection at 30 to 40 miles an hour. Furthermore, the question of whether the negligence of two defendants is independent or concurrent is generally one for the jury. *Springer v. Pacific Fruit Exchange*, 92 Cal. App. 732, 738, 739, 268 P. 951. And if there be evidence to support it, their finding is conclusive on this court. *Dougherty v. Ellingson*, 97 Cal. App. 87, 93, 275 P. 456; *Gett v. Pacific Gas & Electric Co.*, 192 Cal. 621, 625, 626, 221 P. 376.

[6] Regarding the alleged contributory negligence of plaintiff, this court, under the facts, cannot say as a matter of law that plaintiff neglected to use that care which was necessary under the circumstances.

[7] Defendants complain of several alleged errors in the admission of evidence. Plaintiff, over objection of counsel that she was not qualified so to do, was allowed to testify as to the speed of the motor bus and Eslow's car. It has been repeatedly held that a person having the opportunity to observe the speed of a moving vehicle is qualified to give his opinion as to such speed and that his previous experience or lack of experience goes only to the weight rather than to the competency of his testimony. *Kramm v. Stockton Electric R. Co.*, 22 Cal. App. 737, 755, 756, 136 P. 523; *Hutchinson v. Miller & Lux, Inc.*, 60 Cal. App. 1, 5, 212 P. 394; *Scragg v. Sallee*, 24 Cal. App. 133, 141, 142, 140 P. 706; *Shropshire v. Pickwick Stages*, 85 Cal. App. 216, 223, 258 P. 1107; *Bowman v. Motor Transit Co.* (Cal. Sup.) 284 P. 443.

[8, 9] Complaint is further made that the witness Halperin, a theatrical booking agent and friend of plaintiff, was allowed to testify regarding plaintiff as follows:

"Q. Do you know whether or not she was in good health or not? A. No she was in poor health."

The question was objected to as immaterial and calling for the conclusion of the witness. Lay witnesses having the requisite opportunity for observation may testify as to the health of another. *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 5, 6, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; *Chicago, etc., Ry. Co. v. Van Vleck*, 143 Ill. 480, 32 N. E. 262, 263; *Ewing v. Wichita R. & L. Co.*, 91 Kan. 388, 137 P. 940.

[10] Defendant Motorways urges that plaintiff was allowed improperly to testify that she had suffered from vaginal bleeding (a term used by the physician) for a long time after the injury, the objection being that internal injuries were not within the issues as framed. The complaint contains the following: "That the said plaintiff herein received severe bruises, gashes and injuries as a result of said collision." This allegation was sufficiently broad to admit the testimony complained of. *Samuels v. California, etc., Ry. Co.*, 124 Cal. 294, 296, 56 P. 1115; *Martin v. Pacific G. & E. Co.*, 203 Cal. 291, 302, 303, 264 P. 246; *Dullanty v. Smith*, 203 Cal. 621, 626, 265 P. 814; *Lauder v. Currier*, 3 Cal. App. 28, 29, 84 P. 217.

The judgment is reversed as to both defendants.

We concur: MARKS, J.; BARNARD, J.

COLEMAN v. DAWSON.

Civ. 4205.

District Court of Appeal, Third District,
California.

Dec. 4, 1930.

Rehearing Denied Jan. 3, 1931. Hearing De-
nied by Supreme Court Feb. 2, 1931.**1. Assignments ⇨41.**

Scrivener's error in respect to interest transferred in contract was immaterial, where assignment of proper interest was made as part of same transaction.

Although it appeared that scrivener incorrectly inserted one-twentieth in contract for transfer of undivided interest in letters patent, intention of parties was nevertheless properly carried out by execution and delivery as part of same transaction pursuant to understanding of parties under same date and assignment of undivided two-twentieths interest, which was the amount intended to be transferred.

2. Contracts ⇨164.

Separate instruments executed and accepted at same time as part of same transaction must be construed together.

3. Vendor and purchaser ⇨22.

Description of ranch in contract for conveyance as land consisting of 94.6 acres located about 4 miles northeast from Porterville was adequate.

Since description enabled absolute identification, and it was apparent that owner was attempting to designate a particular ranch which he proposed to convey, rather than a specific acreage, it was immaterial that tract actually contained 96.055 acres, instead of 94.6 acres.

4. Alteration of Instruments ⇨24(1).

Contract to convey ranch with adequate description to identify property was properly admitted, regardless of addition of specific description acknowledged as correct.

5. Alteration of Instruments ⇨2.

Alteration of instrument is material, affecting validity, only when it results in changing intention of parties so as to substantially affect interests.

6. Exchange of property ⇨4.

Transfer of stock in corporation to manufacture and sell patented machines was not condition precedent to obligation to convey land under contract for interest in patent.

The contract for transfer of interest in patent in accordance with contemporaneous agreement to convey land in consid-

eration thereof acknowledged receipt of \$10,000 as payment in full of undivided interest in and to letters patent, with further provision that, in case owners of patent later decided to form a corporation to finance sale and development of mechanical device, grantee of interest therein would join in transferring and conveying his interest to corporation in consideration of issuance to him of specified percentage of total capital stock.

7. Specific performance ⇨114(2).

Complaint in action to enforce specific performance of agreement to convey land in exchange for interest in patent sufficiently alleged adequacy and fairness of consideration.

The complaint alleged that real property described in agreement to convey was at all times and was now of value of less than \$8,000, and that value of undivided interest in patent transferred in accordance with agreement was and was at time of execution of agreement the sum of \$10,000, which amounted to specific declaration that \$2,000 promissory note given for interest in addition to asserted value of land did not exceed value of conveyed interest in patent rights.

8. Pleading ⇨406(5), 433(7).

Any defect in form of allegation as to adequacy and fairness of consideration is waived by failure to demur and cured by findings and judgment.

9. Appeal and error ⇨931(1).

Appellate court, unless evidence is pointed out to contrary, will assume that evidence amply supports findings.

10. Appeal and error ⇨901.

Appellate court is not bound to search record for evidence to sustain finding.

11. Appeal and error ⇨931(1).

Appellate court, where attention is not called to evidence to contrary, must assume that record supports findings that transfer of patent interest was fully consummated.

12. Specific performance ⇨71.

Specific performance is proper action to enforce contract to convey patent rights.

13. Courts ⇨489(3).

State courts have jurisdiction in proper action to enforce contract to convey patent rights.

14. Exchange of property ⇨8(4).

Evidence held to sustain finding that contract for exchange of land for interest in patent was not procured by means of fraud.

There was evidence to support statements made by owner of patent rights respecting cost of patent to him and cost of manufacturing machine, in addition to which it was found that purchaser of patent interest did not wholly rely upon statements, but made independent investigation and watched operation of the machine, thereafter declaring he was satisfied with it and would buy share in patent rights if owner would take ranch in part payment therefor.

15. Exchange of property ⇨3(1).

Alleged statements of owner of patent that machine could be leased and operated at profit were mere expressions of opinion and may not furnish basis of action for rescission.

16. Vendor and purchaser ⇨37(4).

Assertions as to value of property or profit which may be earned are ordinarily classed as mere opinions.

17. Appeal and error ⇨926(5).

Objection to admission of certified copy of patent must be assumed to have been properly sustained in absence of request to have it marked for identification.

Since attention of appellate court was not called to any request to mark certified patent for identification and objection to its admission in evidence was sustained, it must be presumed that it was not a proper part of record on appeal, and appellate court was therefore unable to determine whether it was in fact a machine similar in character to one involved in action and therefore material to issues.

18. Specific performance ⇨129.

Loss of rental on land wrongfully detained to date of judgment held issue under pleadings and properly allowed (Civ. Code, § 3283; Code Civ. Proc. § 580).

Complaint in action to specifically enforce agreement to convey property alleged reasonable value of use and occupation of property and asked damages for detention of premises for specified years and for such other sum as might accrue before rendition of judgment.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by R. B. Coleman, also known as Robert B. Coleman, against John B. Dawson. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, *By-Products Fuel Mach. Co. v. Dawson*, 294 P. 19.

Edward Winterer and Winterer & Ritchie, all of Los Angeles, for appellant.

Bordwell, Mathews & Wadsworth and Odell S. McConnell, all of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a decree enforcing specific performance of an agreement to convey real property.

The defendant owned a tract of land four miles northeast of Porterville, consisting of 96.055 acres. The plaintiff owned five United States patents covering a machine designed to manufacture and compress certain by-products into briquettes for fuel purposes. January 10, 1924, a written agreement was executed between these parties for the sale of an undivided one-tenth interest in these patent rights for \$10,000, to be paid by the promissory note of the defendant for the sum of \$2,000 and the conveyance of the Porterville ranch at a valuation of \$8,000. The terms and conditions of the agreement were incorporated in three documents executed at the same time. These instruments are construed together as a part of the same transaction. The first two are in the following language:

"Receipt for Payment on Account of Purchase of Interest in Letters Patent Covering Material Compressing Machine

"The undersigned, R. B. Coleman of Los Angeles, California, the owner of United States Letters Patent Nos. 1,067,476, July 15, 1913; 1,113,121, October 6, 1914; 1,260,514, March 26, 1918; 1,260,605, March 26, 1918, and 1,310,004, July 15, 1919, covering a certain machine or mechanical device designed primarily for compressing by-products and waste materials, Herewith Acknowledge the receipt of Ten Thousand Dollars (\$10,000.00) to him in hand paid by John B. Dawson of Los Angeles, California, as payment in full of an undivided one-twentieth interest in and to said Letters Patent and in and to said Invention and Device.

"Within five (5) days after date, the undersigned agrees to Make, Execute and Deliver to John B. Dawson, a formal Transfer and Assignment of said interest in said Letters Patent and said Invention and Agrees to cause the same to be recorded and entered on the records of the United States Patent Office at Washington, D. C.

"It Is Understood and Agreed that should the owners of said Letters Patent later decide to form a corporation to finance the sale and development of said Mechanical Device and Invention, the said John B. Dawson will join with the undersigned in transferring and conveying his interest in and to said Letters

Patent and said Invention to said corporation in consideration of the issuance to him of one-twelfth ($\frac{1}{12}$) of the total capital stock thereof. This provision, however, is not to be construed as a subscription to the capital stock of any corporation.

"Dated this Tenth day of January, 1924.

"Robert B. Coleman

"Accepted: John B. Dawson."

"Los Angeles, Cal., Jan. 10/24

"I hereby agree to convey to R. B. Coleman free and clear of incumbrance except 2d installment of taxes 1923-24 my land consisting of 946/10 acres located about 4 miles Northeast from Porterville, Cal. Certificate of Title showing the land clear in my name to be furnished not to cost more than \$25.00 with delivery of Deed.

"John B. Dawson."

[1] The defendant's answer admits the execution of the first document above quoted, except that it is alleged the plaintiff agreed to sell and transfer an undivided two-twentieths interest in the patents instead of only one-twentieth therein as erroneously recited in the document. This error was conceded. It was immediately corrected. The court found that the scrivener incorrectly inserted "one-twentieth" in the document instead of the agreed two-twentieths interest in the patents. The appellant may not complain of this error, for the intention of the parties was promptly carried out. As a part of the same transaction, and pursuant to the understanding of the parties, the plaintiff executed and delivered to the defendant, on the same date, an assignment of an undivided two-twentieths interest in the patents, which transfer was indorsed and signed by the defendant as accepted. This assignment contained the following language:

"Now Therefore, For and in consideration of the sum of Ten Dollars (\$10.00) to me in hand paid and other good and valuable consideration paid, I said Robert B. Coleman, have sold and by these presents do hereby sell, assign and set over to the said John B. Dawson, an undivided two-twentieths ($\frac{2}{20}$) interest in and to each and all of the above-identified letters patents and application for patent, the same to be held and enjoyed by the said John B. Dawson jointly with me and not independently of me, and with the distinct understanding that neither of us can operate under said patents or assign or obligate our interests without the written consent of the other, except that I the Robert B. Coleman can make similar assignments to others who will become partners with us in the ownership of said patents, and I do hereby authorize and request the Commissioner of Patents to issue the patent on the application above identified as Serial No. 590708, in accordance with this assignment.

"In Testimony Whereof, I have hereunto set my hand and seal at Los Angeles, California, this tenth day of January, 1924.

"Robert B. Coleman [Seal.]

"Accepted: John B. Dawson

"Witnesses:

"_____
"_____"

In part fulfillment of the foregoing agreement of sale and exchange of properties, the defendant executed and delivered to the plaintiff on the same date his promissory note for \$2,000, without interest, due one year from the date thereof. The balance of the \$10,000, which was the consideration for the sale and exchange of properties mentioned in the first document heretofore quoted, consisted of the Porterville ranch of the agreed value of \$8,000, which the defendant was to convey to the plaintiff. Upon demand the defendant refused to deed this land to the plaintiff. Thereupon this suit for specific performance was commenced.

The defendant's answer admits the execution and delivery of the instruments above quoted, but alleges the invalidity of the transaction on account of the clerical error of inserting in the first-mentioned document the word "one twentieth" instead of "two-twentieths," the transfer of which undivided shares were agreed upon by the parties. The answer further alleges that the second instrument heretofore quoted was rendered void on account of the addition thereto, by the plaintiff, after the defendant had signed and delivered the document, of a particular description of the land in question. It was then alleged the agreement was for a transfer of an unqualified two-twentieths interest in the patent rights whereas the plaintiff had assigned only a joint interest therein to be enjoyed in common with the plaintiff and other joint share owners with the restriction that "neither of us can operate under said patents or assign or obligate our interests without the written consent of the other." The answer further alleges that the transaction was inequitable since the real property was worth \$10,000 instead of \$8,000 as contemplated by the contract. Finally, the answer attempts to allege that the agreement to exchange the properties was procured by means of fraud, consisting of false representations that the plaintiff had expended \$100,000 in perfecting the machine upon which he held the patents involved in this action; that the machine would successfully manufacture marketable pressed briquettes at a cost which would enable them to be sold at a good profit; that the machine could be manufactured at a cost which would justify its sale for \$1,600, and that the machines could be leased for a rental of \$2,500 for the period of the term of the patents in addition to 50 cents royalty per ton on all briquettes manu-

factured; that all of said representations were false and that the defendant relied upon them and was thereby deceived and defrauded to his damage. The answer then alleges that the agreement to purchase the patent rights is void, and that the defendant duly served upon the plaintiff a notice of rescission and an offer to restore to him everything of value received on account of said transaction. Thereupon the defendant prays that the agreement and the \$2,000 note be annulled.

The court adopted findings favorable to the plaintiff on all the material issues. A decree was rendered directing that the Porterville ranch be forthwith conveyed to the plaintiff, and that he recover \$300 damages as the rental value thereof during the period that he was wrongfully deprived of the possession. From this judgment the defendant has appealed.

[2] The three documents heretofore quoted appear to have been intended by the parties as a part of the same transaction. They were executed and accepted at the same time. They should, therefore, be construed together as one instrument in ascertaining the terms and intention of the contracting parties. 6 Cal. Jur. 298, § 181.

[3] The reference to the defendant's ranch, which appears in the foregoing instrument No. 2, as "my land consisting of 94 $\frac{9}{10}$ acres located about 4 miles northeast from Porterville, Cal.," is an adequate description to bind the owner under the circumstances of this case. It enabled the court to absolutely identify the tract. It is immaterial that the tract actually contained 96.055 acres instead of only 94.6 acres. It is apparent the owner was attempting to designate a particular ranch which he proposed to convey as part consideration for the patent rights, rather than a specific acreage. The difference in the acreage is small and unimportant. After signing and delivering the agreement to convey that ranch, the plaintiff procured and added to the instrument a more definite description of the land. When this document was shown to the defendant at the trial with the addition of the more particular description, which was appended thereto, it was read to him. He testified: "If that is a correct description of the land, I own it." Subsequently he admitted that it was a correct description of the property. Referring to this description, which was compared with that which is contained in the certificate of title, Mr. Dawson testified:

"Q. Did you compare the description Mr. Dawson? A. Yes sir.

"Q. Is it a correct description? A. It is. * * *

"Q. Now calling your attention to the Plaintiff's Exhibit 3 (the agreement to convey

real estate) I will ask you if the property described in paragraph 1 of the second amended complaint is the same property as the property described in Plaintiff's Exhibit, to-wit, 94.6 acres located about four miles northeast of Porterville, Tulare County? * * * A. Yes. * * * It is the same property."

The addition of the particular description of the property to the agreement to convey it does not alter the intent of the parties.

[4, 5] There was, therefore, no error in admitting this instrument in evidence over the objection of the defendant, after the addition of the specific description had been acknowledged as correct. The alteration of the document constituted no material change. An alteration of an instrument is said to be material so as to affect its validity only when it results in changing the intention of the parties so as to substantially affect their interests. Jones on Evidence (3d Ed.) §69, § 560; 1 Cal. Jur. 1068, § 4; Lasky v. Bew, 22 Cal. App. 393, 395, 134 P. 353; 1 R. C. L. 967, § 4. In the authority last cited it is said: "That is a material alteration which so changes the terms of the instrument as to give it a different legal effect from that which it originally had and thus works some change in the rights, interests, or obligations of the parties."

[6] There is no merit in appellant's contention that the transfer to him of one-twelfth of the capital stock of a corporation to manufacture and sell the briquette machines was a condition precedent to his obligation to convey the real property to the plaintiff. The first document above quoted does contain the following paragraph: "It is understood and agreed that should the owners of said Letters Patent later decide to form a corporation to finance the sale * * * of said mechanical device * * * the said John B. Dawson will * * * [convey] his interest in and to said Letters Patent * * * in consideration of the issuance to him of one-twelfth ($\frac{1}{12}$) of the total capital stock thereof." This transfer of interest in the letters patent to a corporation, in the event one should be organized, was clearly a conditional agreement dependent upon the subsequent organization of such a corporation. It in no way affected the defendant's obligation to convey the land to plaintiff as part consideration for the purchase of an undivided two-twentieths interest in the letters patent. There was no definite assurance that such a corporation would be organized. Neither the organization of the corporation to manufacture and market the machine, nor the issuance to the defendant of one-twelfth of the stock of such corporation, was a condition precedent to the maintenance of an action for specific performance of the agreement to convey the real estate.

[7, 8] The appellant asserts that the contract for exchange of properties is unjust and unfair, and that neither the pleadings nor evidence supports the court's findings to the effect that the consideration was adequate, and that the agreement was fair and reasonable. We think this contention is without merit. The second amended complaint alleges that the real property described in defendant's agreement to convey it "was at all the times * * * and is now, of the value of less than eight thousand dollars (\$8,000.00)"; that "the value of said undivided two-twentieths ($\frac{2}{20}$ ths) interest in said United States Letters Patent * * * is now, and was at the time of the execution of said agreement * * * the sum of ten thousand dollars (\$10,000.00); that said contract was, and is, fair, just and reasonable." This amounts to a specific declaration that the \$2,000 promissory note, plus the asserted value of the land, does not exceed the value of the conveyed interest in the patent rights, which is alleged to be worth \$10,000. No demurrer was filed to this second amended complaint. Moreover, the defendant deliberately accepted in writing both the first agreement to exchange properties and the assignment of the shares. The adequacy and fairness of the consideration is sufficiently alleged. It was an issue at the trial of the case, and any defect in the form of this allegation is waived by a failure to demur to the pleading and is cured by the findings and judgment of the court regarding that issue. In 23 California Jurisprudence, 495, § 52, it is said: "A defective allegation as to adequacy may be cured by findings and judgment for the plaintiff where the averments of the answer and the evidence offered at the trial show that both of the parties understood that that issue was presented."

On page 497 of the same authority last mentioned it is further said: "A failure to allege the value of the land may be excused * * * where the consideration agreed on has been accepted, the acceptance constituting a waiver of any claim of inadequacy."

[9, 10] The appellant has directed the court's attention to no evidence which refutes the court's specific findings that "the value of said undivided two-twentieths ($\frac{2}{20}$ ths) interest in said * * * Letters Patent * * * is now, and was at the time of the execution of said agreement * * * the sum of ten thousand dollars (\$10,000.00); that said contract was, and is, fair, just and reasonable," and that "The real property * * * is not now, and was not, at any of the times therein mentioned, * * * of any value in excess of \$2,365.00." The transcript of evidence consists of 930 pages. When the appellant fails to point out any evidence to the contrary, in support of a judgment, the appellate court will assume that the evidence amply supports the findings of the

trial court. An appellate court is not bound to search the record for evidence to sustain a finding. 4 C. J. 677, § 2576; Davis v. Mene, 52 Cal. App. 368, 198 P. 840.

[11] The appellant contends that the contract may not be enforced for the reason that it lacks mutuality, in that the respondent cannot be required to transfer the patent rights on the records of the United States Patent Office. The contract does impose upon the plaintiff the obligation to "cause the same [transfer of interest] to be recorded and entered on the records of the United States Patent Office." The appellant may not complain on this account, for assuming that a state court lacked jurisdiction to compel such a transfer upon federal records, nevertheless we must assume that part of the transaction has been fulfilled. The complaint alleges: "On the 29th day of March, 1924, plaintiff caused said transfer and assignment to be recorded and entered on the records of the United States Patent Office." This allegation is not denied in the answer. Our attention is called to no evidence to the contrary. We must therefore assume the record amply supports the findings of the court to the effect that the transfer to the appellant was fully consummated.

[12, 13] Specific performance is a proper action to enforce a contract to convey patent rights of which proceeding the state courts have jurisdiction under such circumstances as are presented in the present action. 20 Cal. Jur. 876, § 7; Butterfield v. Harris, 20 Cal. App. 471, 129 P. 614; Stevens v. Privett, 88 Cal. App. 706, 264 P. 549.

[14] Regarding the appellant's charge that the contract was procured by means of fraud, several alleged false representations are specified. Chief among these are that (1) the plaintiff owned all patents which had been issued by the government for manufacturing briquettes, (2) the plaintiff's briquette machine was perfect, (3) he had expended \$100,000 in perfecting the machine, (4) the machine could be manufactured at a cost of \$1,600 and could be leased for \$2,500 plus a royalty of 50 cents per ton for all briquettes manufactured. Other alleged false representations are specified which relate to the mistake regarding the proportion of the total number of shares of the patent rights which were to be transferred to the appellant, and to the contingent promise on the part of Dawson to accept one-twelfth of the capital stock of a corporation in the event of its organization. These latter charges involve a construction of the contract and have been heretofore disposed of. Findings were adopted by the court adverse to the appellant on all of these charges of fraud. We are of the opinion the record adequately supports each of these findings. There is a conflict of evidence as to some of these allegations of fraud.

On none of these issues has the appellant attempted to quote any evidence in support of his charges. He has sometimes made a general statement of the existence of evidence which he deems to be favorable, citing the transcript where such evidence may be found, leaving the court to search the pages of a voluminous record for contradictory evidence. By the aid of respondent and much labor this conflicting testimony has been discovered. We are satisfied these charges of fraud are captious and unfounded. Mr. Coleman testified regarding these alleged false statements: "Do you know how much these patents have cost you? * * * A. Yes sir. Q. How much, please? A. \$121,700.67." Regarding the cost of manufacturing the machine, Mr. Humphrey, who operated the machine for the plaintiff in 1923, was called as a witness in behalf of the defendant and testified the machine was manufactured by the Fulton Iron Works in 1923 for \$1,600. There is substantial evidence to support these statements which the plaintiff is alleged to have made. Moreover, the court found that the appellant did not wholly rely upon these statements, but made an independent investigation and watched the operation of the machine. There is evidence to support this finding. After watching the machine in operation the appellant declared he was satisfied with it and would buy the shares in the patent rights if the plaintiff would take his Porterville ranch in part payment therefor.

[15, 16] The alleged statements that the machine could be leased for \$2,500 and royalties, and that it could be operated at a good profit, were mere expressions of opinion, and may not furnish the basis of an action for rescission. Assertions as to the value of property or the profit which may be earned in an enterprise are ordinarily classified as mere opinions of the owner. *Rendell v. Scott*, 70 Cal. 514, 11 P. 779; *Lee v. McClelland*, 120 Cal. 147, 52 P. 300; 12 R. C. L. 379, §§ 130, 131.

[17] In an effort to prove the allegation that the plaintiff claimed to hold all the patents which had been issued upon briquette manufacturing machines, he offered in evidence a certified copy of a patent to Emil Fernhold for an invention of a machine which he contends was designed for use for the same purpose. An objection to this offer was sustained on the ground that a proper foundation for its reception had not been laid. There was no preliminary showing as to the nature

of the machine. There was no offer to establish such proof. Our attention is not called to any request to mark this certified patent for identification. We must presume that it is not a proper part of the record on appeal. We are therefore unable to determine whether it is in fact a machine similar in character to the one which is involved in this action. The objection must therefore be assumed to have been properly sustained. In 2 California Jurisprudence, 696, § 400, it is said: "The rule that errors in excluding evidence will not be considered unless the evidence excluded, or a showing of its materiality, appears in the record, is especially true of writings offered in evidence." *Howard v. Howard*, 67 Cal. App. 56, 69, 226 P. 984.

[18] It is asserted the court has allowed damages in excess of the amount claimed as rental during the time the land was wrongfully detained from the plaintiff. The complaint alleges that "the reasonable value of the use and occupation of said real property is the sum of one hundred dollars (\$100.00) per annum. * * *" The prayer of the complaint asks for \$200 damages for detention of the premises for the years of 1924, 1925, and "for such other sum as may accrue before the rendition of judgment." The court found that the defendant had received as rental for the premises the sum of \$100 per year for the years of 1924, 1925, and 1926, during which time the land was wrongfully detained from the plaintiff, and that that sum was a reasonable value of the use of the property. The sum of \$300 was thereupon awarded as damages on that account. This sum is supported by the pleadings and the evidence. The loss of rental for the year 1926 was an issue under the pleadings, and was properly allowed. Section 3283, Civ. Code. Section 580 of the Code of Civil Procedure provides in part: "The court may grant him [the plaintiff] any relief consistent with the case made by the complaint and embraced within the issue."

It was unnecessary to file a supplemental complaint to recover this rental. 21 Cal. Jur. 169, § 115.

The appellant has assigned 42 points as grounds for reversal. Many of them are interwoven and included within those essential points which have been heretofore disposed of. We are unable to find any merit in any of the assignments. We are convinced that a detailed discussion of the remaining points is not warranted.

The judgment is therefore affirmed.

110 Cal. App. 214

**BY-PRODUCTS FUEL MACH. CO. v.
DAWSON.**
Civ. 4206.

District Court of Appeal, Third District,
California.

Dec. 4, 1930.

1. Licenses Ⓒ18½.

Corporation had no legal authority to issue or deliver stock until permit therefor had been first secured from Corporation Commission (St. 1917, p. 675, § 3).

2. Specific performance Ⓒ87.

Corporation failing to secure authority to issue required amount of stock was not entitled to specific performance of agreement to convey interest in patent for stock (St. 1917, p. 675, § 3; Civ. Code, § 3386).

Agreement to transfer interest in patent for stock to be issued in corporation requires the issuance of 2,000 shares of capital stock to comply with offer of exchange out of a total number of 3,000 shares to be issued, while the permission for sale of stock granted by corporation commission was for sale of a total number of 5,000 shares, with right to transfer only 500 shares for patents, and that only after the previous sale and issuance of 500 shares at par for cash.

3. Specific performance Ⓒ87.

Party seeking specific performance must, before being entitled thereto, first substantially perform all conditions precedent required by contract (Civ. Code, § 3392).

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by By-Products Fuel Machine Company against John B. Dawson. Judgment for plaintiff, and defendant appeals.

Reversed.

Edward Winterer and Winterer & Ritchie, all of Los Angeles, for appellant.

Bordwell, Mathews & Wadsworth and Odell S. McConnell, all of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment enforcing specific performance of a contract to convey an undivided one-tenth interest in five patents in consideration of 250 shares of the capital stock of the corporation respondent. This action grows out of the same facts and was tried upon the same evidence which was adduced in the case entitled *Coleman v. Daw-*

son, 294 P. 13, in which an opinion of this court was this day filed.

By the terms of a written contract the defendant agreed to purchase an undivided one-tenth interest in five patents on a briquette manufacturing machine for \$10,000. The purchase price was represented by defendant's note for \$2,000 and his 96-acre ranch near Porterville. The one-tenth interest in the patents was transferred to the defendant. He executed and delivered to Coleman his note for \$2,000, but refused to convey the ranch. In an action for specific performance of the contract, a conveyance of the ranch was directed by the court to be made. In the *Coleman v. Dawson* Case, *supra*, this judgment was affirmed. The contract which was enforced in the last-mentioned case contained the following provision:

"It is understood and agreed that should the owners of said Letters Patent later decide to form a corporation to finance the sale and development of said Mechanical Device and Invention, the said John B. Dawson will join with the undersigned in transferring and conveying his interest in and to said Letters Patent and said Invention to said corporation, in consideration of the issuance to him of one-twelfth (1/12th) of the total capital stock thereof. * * *

"Dated this Tenth day of January, 1924.

"Robert B. Coleman.

"Accepted: John B. Dawson."

"The By-Products Fuel Manufacturing Company was duly incorporated with 3,000 shares of capital stock of the par value of \$100 a share. Coleman was the original owner of the patent rights. He sold and transferred similar undivided interests therein to nine other individuals besides the appellant. He retained a large proportion of the interest in these patents and was the chief organizer of the corporation. All of the shareholders of the patents, including the appellant, joined in a written offer to transfer their respective interests therein to the respondent corporation in consideration for which shares of the capital stock of equivalent value were to be issued to them. This offer to transfer these interests in the patents contained the following language:

"We, the undersigned, subscribers to the capital stock of the By-Products Fuel Machine Company, do hereby offer to sell, assign and set over to your corporation, in full payment of Two Thousand (2000) shares, par value \$200,000.00 of the capital stock, the following property, to-wit [describing the patents involved]. * * *

It required the issuing of 2,000 shares of the capital stock of the corporation to comply with the foregoing offer of exchange. Since the appellant was entitled to one-twelfth of the total number of 3,000 shares, his propor-

tion would be 250 shares of the total value of \$2,500. All of the shareholders in the patents actually conveyed their interests therein to the corporation, except the appellant. He refused to do so, claiming that his contract with Coleman for the purchase of one-tenth interest in the patent rights was procured by means of fraud and therefore void.

[1] The respondent had no legal authority to issue or deliver stock to the appellant until a permit therefor had been first secured from the corporation commission as required by the California Corporation Securities Act (St. 1917, pp. 673, 675, Deering's Gen. Laws 1923, Act 3814, § 3).

April 7, 1924, the respondent corporation applied to the California Corporation Commission for a permit to sell 1,000 shares of the capital stock of the corporation for cash and to issue 2,000 additional shares in payment for the transferred interests in the patents. This petition named the eleven shareholders in the patents and the number of shares of capital stock in the corporation to which each would be entitled, aggregating a total of 2,000 shares. This included 250 shares to which the appellant would be entitled upon transferring his interest in the patents. The Corporation Commission granted this petition August 12, 1924, only in part and conditionally. The permit provided:

"By-Products Fuel Machine Company

"* * * is hereby authorized to sell and issue 1,000 shares of its capital stock as herein below set forth:

"1st: To sell and issue 500 shares of its capital stock at par, for cash. * * *

"2nd: Whenever and as often as shares are sold and issued under the preceding paragraph, to issue to the 11 persons named in its application, or any of them, a certificate * * * evidencing a like number of shares of its capital stock, not exceeding 500 shares under this permit, and an aggregate of 2,000 shares under this and any future permits, in full consideration for the transfer and assignment to applicant, first to be made, of the letters patent * * * clear of all liens, liabilities or encumbrances. * * *

"Applicant has an authorized capitalization of \$500,000, divided into 5,000 shares of the par value of \$100 each. * * *

"This permit is issued upon each of the following conditions:

"(a) That prior to the sale or issuance of any of said shares, said 11 persons named in the application shall:

"1st—Duly * * * assign and transfer to said company * * * [said] Letters Patent, * * * (a) Shall forthwith file the same for record in the United States Patent office; * * * (b) Shall file a duplicate of such instrument * * * with said Commissioner of Corporations.

"(b) That this permit shall not become effective for any purpose unless and until said 11 persons named in the application shall execute his or their agreement in writing with said company (and file a copy thereof with the Commissioner of Corporations) in which he or they shall, * * * agree * * * that in the event of the dissolution or insolvency of said company, occurring while said shares shall be so required to be held in escrow, the owners of such shares shall not, without the consent of said Commissioner, participate in any distribution of assets * * * until after the owners of all other securities shall have been paid the full face or par value thereof. * * *

"(e) * * *

"1. Each subscription for said shares shall be upon the express condition that unless bona fide subscriptions for 100 shares shall have been obtained from responsible subscribers, and there shall have been paid on account thereof the sum of \$10,000 in cash, on or before the 15th day of February, 1925, such subscription may by such subscriber be, and thereupon shall be deemed to have been rescinded.

"2. * * * Otherwise, all rights of applicant to sell and issue shares under paragraph 1st hereof are suspended. * * *

"(f) * * * All certificates evidencing any of the shares authorized herein, in paragraph 2nd, to be issued shall be forthwith deposited with a depository, * * * to be held as an escrow pending the further order of said Commissioner * * * while said certificates shall be so held the holder of the shares evidenced thereby shall not sell, or offer for sale, or otherwise transfer, or agree to sell, or transfer, such shares, until the written consent of said Commissioner shall have been obtained so to do."

Under such circumstances the appellant refused to transfer to the corporation his interest in the patents. After notice, this action for specific performance was instituted. The court adopted findings favorable to the plaintiff on all essential issues, and thereupon directed the transfer to be made.

The appellant contends that specific performance will not lie in the present case for the reason that the contract to purchase the one-tenth interest in the patents is void on account of fraud and on account of all the other reasons assigned on appeal in the case of *Coleman v. Dawson*, supra. He also asserts that the findings and judgment in this case are not supported by the evidence chiefly for the specific reason that the issuing of shares of the corporation in payment for the appellant's interest in the patents was not authorized by the corporation commissioner, and that the plaintiff is therefore unable to perform its part of the contract.

The alleged invalidity of the contract to purchase the one-tenth interest in the patents

is without merit for the reasons stated in the opinion of this court which was this day filed in the case of *Coleman v. Dawson*, supra.

[2] Specific performance of the agreement to convey to the plaintiff one-tenth interest in the patents will not lie under the circumstances of this case. The contract to transfer his interest in the patents is conditional upon the actual issuance to appellant of clear title to one-twelfth of all the capital stock of the corporation, free from any condition. The evidence seems uncontradicted that the respondent has never been in a position to issue and deliver to the appellant his share of the capital stock of the corporation free from conditions, or at all. The issuance of capital stock to be delivered to the shareholders of the patents in payment thereof was limited and restricted by the commissioner to numerous conditions. No shares could be issued for this purpose until a similar number of shares had first been sold to subscribers for cash. It was stipulated that: "No stock was sold * * * except the nine shares of stock to the original nine incorporators." Even upon this condition of first selling 500 shares for cash, only 500 other shares were actually authorized to be issued in payment for the transfer of the patent rights. Eleven owners of interests in these patents, including the appellant, were entitled to a total number of 2,000 shares of the capital stock. It may reasonably be assumed the commissioner's authorization to issue 500 shares for these patent owners was intended to be divided pro rata among them in proportion to their respective claims. The issuance of these shares was also conditioned upon the absolute assignment of the respective interests in the patents and a transfer of the title thereto "In the United States Patent Office." It was admitted at the trial this transfer of title was not registered in the United States Patent Office. The authorization to issue shares of capital stock was also conditioned upon the shares being placed in escrow for certain enumerated purposes and upon the execution of an agreement to this effect on the part of each of the eleven shareholders of the patents, copies of which agreements were to be filed with the corporation commissioner. These last-mentioned agreements were not executed or filed in compliance with this condition. The authorization to issue shares of the capital stock was also made subject to the payment of "all other securities" which were held against the corporation. From the first 500 shares authorized to be sold for cash, \$10,000 was required to be paid before February 15, 1925, or the subscription for such shares was deemed to have been re-

scinded. No shares were sold for cash on or before that date, or at all, except the nine shares which were sold to the original incorporators. It is then provided by the terms of the authorization that, unless the net sum of \$8,000 derived from the sale of shares for cash is deposited prior to February 15, 1925, subject to withdrawal by the corporation only upon the written consent of the corporation commissioner, then "all rights of applicant to sell and issue shares * * * are suspended." For noncompliance with this provision we assume that all authority to issue stock for any purpose was forfeited.

Moreover, it is recited in the conditional authorization to issue shares that "applicant has an authorized capitalization of \$500,000, divided into 5,000 shares of the par value of \$100 each."

The application for authorization to issue shares was not made on this basis. It was founded upon the assumption there were but 3,000 shares of the capital stock. If in fact the company was recapitalized for 5,000 shares, the appellant was entitled to one-twelfth thereof, or 416 $\frac{2}{3}$ shares. Therefore, an authorization to issue only 2,000 shares for payment to the patent owners with only 250 shares thereof to go to the appellant as his proportion would not comply with the terms of the agreement which entitled him to one-twelfth of all the shares.

From the foregoing, it is apparent the respondent was not authorized to issue or deliver to the appellant, free from entanglements and conditions, the shares of capital stock of the corporation to which he is entitled. The respondent could therefore not be compelled to perform his part of the agreement for the reason that he was unable to do so. This being true, specific performance of the same contract will not lie against the appellant.

Section 3386 of the Civil Code provides: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance."

[3] To be entitled to specific performance, the party seeking this remedy must first substantially perform all the conditions precedent which are required by the terms of the contract. Section 3392, Civ. Code; 23 Cal. Jur. 453, § 23.

The judgment is reversed.

110 Cal. App. 381

PEOPLE v. LEWIS et al.
Cr. 1980.

District Court of Appeal, Second District,
Division 2, California.
Dec. 12, 1930.

1. Criminal law §404(4).

Revolver found in rear of house where defendant was arrested *held* properly received in robbery prosecution under circumstances.

Evidence showed that defendant at time of attempted arrest broke away from officer and ran into alley, and that officer thereafter saw some one go in the back door of defendant's home, warranting belief that revolver was thrown to the place where it was found by defendant as he made entrance into his house from the rear.

2. Criminal law §1167(4).

Filing of amended information setting up count theretofore dismissed on former trial *held* not prejudicial.

The record established that court of its own motion ordered count to be refiled after a new trial had been granted, and that district attorney thereafter confessed error, and together with counsel for defendant stipulated to facts establishing that plea of former jeopardy was well taken as to such count, and court not only instructed jury to return a verdict in favor of defendant on such count, but also during argument of counsel instructed them to disregard statements of district attorney that they could consider testimony of complaining witness on that count.

3. Criminal law §713.

District attorney's statement to jury that former jeopardy requiring dismissal of count was because of failure to obtain witness was not error.

Facts stipulated as furnishing evidence of former jeopardy in respect to certain count refiled in amended information contained motion of district attorney to dismiss on ground that process server had been unable to locate complaining witness, so that district attorney was well within his rights in stating to jury that jeopardy in such count was because of fact that one of witnesses was not obtainable after jury had been sworn.

4. Criminal law §1037(2).

Defendant failing to request trial judge to correct alleged error in respect to misconduct in argument could not complain on appeal.

5. Robbery §24(1).

Evidence *held* to sustain conviction for robbery.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Jesse D. Lewis was convicted of robbery, and he appeals.

Affirmed.

R. E. Parsons, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

The defendant was charged by information, together with one Robert D. Whelchel, with two offenses of robbery. After the jury had been sworn and the trial commenced, the court on motion of the district attorney dismissed count I. The jury returned a verdict of guilty of the offense charged. The defendant Lewis was granted a new trial and Whelchel was sentenced to San Quentin. In the minutes of the court of March 10, 1930, we find this entry: "Motion for a new trial is argued and granted. The court orders count I of the information be refiled." In accordance with this order, an amended information was filed, charging the defendant with two counts of robbery, the first count being identical with count I in the information previously filed and which had been dismissed. During the second trial, and over the objection of the defendant, who had interposed the plea of former jeopardy, testimony was introduced identifying the defendant as one of two men who robbed the Richfield service station at Slauson and Avalon boulevard in Los Angeles of about \$40 on the evening of January 2, 1930, at about 7 o'clock p. m., which was about one hour and forty-five minutes before another service station at Eighty-First street and Western avenue was robbed by two men identified as the defendant and Whelchel. No other witnesses were called whose testimony related exclusively to count I, and after the noon recess the deputy district attorney announced that he had examined the law during the recess and had concluded that the defendant had been placed in jeopardy on that count and was willing to stipulate that the jury should be instructed to return a verdict of former jeopardy as to count I. Thereupon the deputy district attorney and counsel for defendant stipulated to the facts showing that count I had been dismissed subsequent to the time the jury was sworn to try the case and that defendant had been rearraigned on the same charge and entered his plea of former jeopardy. This all took place in the presence of the jury, whereupon the

judge said that at the proper time he would give the necessary instructions. He did so instruct the jury and they returned a verdict of former jeopardy as to count I and guilty of count II. This appeal is from the judgment pronounced upon the verdict of guilty and from an order denying appellant's motion for a new trial.

[1] The first assault upon the judgment is based upon the argument that the court erred in admitting into evidence a .32-caliber Colt automatic revolver, and we are therefore compelled to set down the testimony which is said by the respondent to furnish the foundation for its admission. The complaining witness as to the second count identified the appellant as one of the men who committed the offense and the one who held the gun. He testified when the revolver was exhibited to him in court that it was very similar to the one used and that he "would say it" was "the same gun." Two police officers testified that they were hidden out near the home of the appellant about fifteen minutes after the robbery when a Chrysler automobile drove up, from which Whelchel first alighted, to be followed in a few seconds by the appellant. When Officer Fountain attempted to arrest appellant, he resisted, finally escaping the first attempt to place him under restraint. This officer testified that when appellant fled he fired a couple of shots at him, at the second of which appellant apparently fell near an alley. He further swore that after turning Whelchel over to Lieutenant Stanger, he searched the alley for the appellant, but when he got back into the alley, directly behind appellant's home, he saw some one go in the back door; that he then came around front, and from the house next door telephoned for additional officers; that when he had finished telephoning he noticed Lewis "with about this much of his body in the open door of his home." After the other officers arrived and appellant was placed under arrest, they found the revolver which was received in evidence under a work bench in the rear of the house and near the garage.

It is apparent from the testimony we have recited that the jury were justified in believing from the testimony offered that the revolver was thrown to the place where it was found by the appellant as he made entrance into his house from the rear. Under such circumstances, and particularly with the identification of it by the complaining witness, the case of *People v. Stoerkel*, 87 Cal. App. 336, 262 P. 825, disposes of the argument. In that case the rule is announced which distinguishes the instant situation from the authorities upon which appellant relies.

[2-4] It is next sought to predicate error upon the asserted misconduct of the district attorney in filing the amended information setting up count I and introducing some tes-

timony relevant thereto when, it is argued, that he must have known that the appellant had once been placed in jeopardy upon that charge. We can conceive of instances where the contention would be attended by more serious doubts than present themselves here. From all that appears in the record the court of its own motion ordered count I to be refiled. The district attorney frankly confessed error and together with counsel for defendant stipulated to the facts establishing that the plea of former jeopardy was well taken. The court not only instructed the jury to return a verdict in favor of the defendant on count I, but also during the argument of counsel instructed them to disregard the statement of the district attorney that they could consider the testimony of the complaining witness on that count "in the matter of identification," saying to them that the evidence given on count I would not be before them for any purpose. It is difficult for us to believe that in a case as free of complexities as the present one that appellant suffered any serious prejudice or damage. It is asserted, however, that the deputy district attorney should not have advised the jury in his argument that it was their duty to "find the defendant" had "once been put in jeopardy for that robbery, because of the fact that in making my motion to dismiss, because one of the witnesses was not obtainable, I made the motion after the jury was sworn." The appellant, of course, points to the words "because one of the witnesses was not obtainable" as being objectionable. However, the facts to which they stipulated as furnishing evidence of former jeopardy contained the motion of the district attorney to dismiss on the ground that the process server had been unable to locate Mr. Parker, who, we may add, was the complaining witness. It is obvious, therefore, that the district attorney was well within his rights. It is sufficient to say respecting the other assignments of misconduct that, if there was any overstepping of the legitimate bounds of argument at all, that it was of an insignificant character and at no time except in the instance already noticed did counsel ask the trial judge to correct the error or give him an opportunity to undo the harm it is now urged was done his client. Under such circumstances and under a well-known rule of law he is foreclosed of his contention before this tribunal.

[5] It is urged with a great deal of conviction that the evidence is insufficient to support the verdict of the jury. We have already recited sufficient to indicate that the jury was justified in its finding. However, it is proper to add that it was testified that some money was found stuck down behind the seat of the automobile from which Whelchel and appellant were seen to alight; that appellant at the time of his arrest admitted in effect that he

was the one who had scuffled and broken away from the officer a few minutes before. We cannot agree with appellant's contention.

No other points require discussion.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 548

In re SIMONINI'S ESTATE.

SIMONINI v. BANK OF ITALY NAT.
TRUST & SAVINGS ASS'N et al.
Civ. 7609.

District Court of Appeal, First District,
Division 2, California.
Dec. 19, 1930.

1. Husband and wife ⇨131(3).

Conveyance to husband and wife presumptively vested undivided one-half interest in wife as separate property (Civ. Code, § 164).

2. Husband and wife ⇨262(2).

Burden was on surviving husband to establish property conveyed to husband and wife was community property.

3. Husband and wife ⇨262(1).

To overcome presumption against community property, under circumstances, husband was required to show property conveyed to spouses was purchased with community funds, without intention by husband to make gift to wife.

4. Husband and wife ⇨264.

In proceeding to set apart probate homestead, evidence held not to establish property was community property.

Only testimony offered on such issue by petitioner to have the property set aside was to the effect that the property was acquired after marriage in the name of himself and his deceased wife and was paid for out of the earnings of both.

5. Homestead ⇨140.

Decedent's interest being separate property, rather than community property, surviving husband was not entitled to have property set aside to him absolutely, but only for limited period (Code Civ. Proc. § 1468).

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Antoinetta Simonini, deceased. Petition by Ottavio Simonini, also known as Otovio Simonini, as O. Simonini, and as Davide Simonini, opposed by the Bank of Italy National Trust & Savings Association, as executor, and by another, for an order setting apart as a probate homestead certain property. From an order setting apart a probate homestead for a limited period only, petitioner appeals.

Affirmed.

Joseph A. Garry, of San Francisco, for appellant.

Robert L. McWilliams, of San Francisco, for respondents.

SPENCE, J.

This is an appeal from an order setting apart a probate homestead.

The appellant, as the surviving husband of decedent, petitioned for an order setting apart as a probate homestead certain property alleged by petitioner to be community property of petitioner and decedent. The court found that said property was not community property, but that petitioner and decedent were the owners of said property as tenants in common. It was ordered that the property be set aside to the petitioner as a homestead "for a limited period, to-wit: the period of ten (10) years from the date of this order, and that said property so set apart shall belong one-half thereof to said Ottavio Simonini, the surviving husband of said decedent, and one-half thereof to the estate of Antoinetta Simonini, the said decedent, in equal shares."

[1-5] Appellant contends that the court erred in setting apart the homestead for a limited period only. He claims that the uncontroverted evidence shows that the property was community property and not separate property and that it should have been set apart to him absolutely. We find no merit in this contention. On the hearing the only testimony offered by petitioner on this issue was to the effect that the property was acquired after marriage in the name of himself and his deceased wife and was paid for out of the earnings of both. The conveyance presumptively vested an undivided one-half interest in the wife as her separate property. Civ. Code, § 164; Gilmour v. North Pasadena Land & Water Co., 178 Cal. 6, 171 P. 1066; Pabst v. Shearer, 172 Cal. 239, 156 P. 466. The rule is well established by the foregoing cases that the burden was upon the husband to establish that the property was community property. In order to overcome the presumption, it was not only necessary to show that the property was purchased with community funds, but in addition it was necessary to show that there was no intention on the part of the

husband to make a gift to the wife. This petitioner failed to do, and the court properly found that the property was not community property. The interest of the decedent being in the nature of separate property rather than community property, petitioner was not entitled to have the property set apart to him absolutely but only for a limited period. Code Civ. Proc. § 1468.

On the hearing of the petition respondents offered no evidence except the judgment roll in a previous action, which judgment roll was admitted. In that action appellant had sought to quiet title against respondents to the property involved and judgment had been rendered in favor of respondents and against appellant. In view of our conclusion that appellant was not entitled to have said property set apart absolutely but only for a limited period as ordered by the court, we deem it unnecessary to discuss the effect of this judgment upon the rights of appellant in this proceeding.

The order is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



110 Cal. App. 408

**FIRST NAT. BANK OF SAN PEDRO v.
ARMSTRONG et al.**
Civ. 6669.

District Court of Appeal, Second District,
Division 1, California.
Dec. 15, 1930.

1. Limitation of actions ⇨182(3).

Benefits of statutes of limitations are available only under affirmative defense.

2. Limitation of actions ⇨195(3).

Defendant has burden of establishing defense of statute of limitations, especially when dependent on facts not appearing in complaint or plaintiff's evidence.

3. Corporations ⇨271.

In creditor's action on stockholders' liability, findings that corporate notes did not extend pre-existing indebtedness, and that creditor did not release existing indebtedness, held not inconsistent under pleadings.

It appeared from examination of findings as a whole that one of allegedly inconsistent findings merely negated allegation in certain special defense, and that findings in question had reference to different transactions.

4. Corporations ⇨268(1).

Creditor's complaint on stockholders' liability, describing corporate notes merely as incidental to action, need not allege presentation for payment, or satisfy other requirements of actions against indorsers.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the First National Bank of San Pedro, a corporation, against W. M. Armstrong and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Bauer, Wright & Macdonald, of Los Angeles, W. W. Worthington, Loucks & Phister, of San Pedro, for appellants.

Goodspeed, Pendell & McGuire, of Los Angeles, for respondent.

HOUSER, J.

Defendants appeal from a judgment rendered against them in an action wherein they were charged with liability as stockholders of a corporation.

It appears that the corporation of which defendants were stockholders was indebted to the plaintiff in approximately the sum of \$90,000, and that said corporation, together with several other corporations, were being "merged" into a new corporation by a procedure which included the taking over by the new corporation of the assets of each of the old corporations and the assumption by the new corporation of the liabilities of each of the old corporations; to be followed by an issuance of a certificate of stock by the new corporation to each of the old corporations in proper proportionate amounts. The plan of consolidation also included the purchase for cash of additional stock in the new corporation by each of the old corporations. To that end, the corporation of which the defendants were stockholders made arrangements with the plaintiff to borrow money from it with which to purchase stock in the new corporation amounting to the sum of \$68,000. In the late afternoon of the same day on which the \$68,000 was paid by the plaintiff on behalf of the old corporation for the additional stock purchased by it, the indebtedness of \$90,000 theretofore owed by it to the plaintiff was paid by the new corporation.

For a reversal of the judgment, it is first urged by appellants that, since as to them (as stockholders), at the time the action was commenced, the statute of limitations had run on the \$90,000 indebtedness owed by the old corporation to the plaintiff, for the reason that the entire transaction hereinbefore outlined amounted merely to a discharge in part of that indebtedness and a renewal thereof as

to the balance of such obligation, the statute also had run as against the latter debt.

[1, 2] It is a rule of law, established by the weight of authority, that the benefits which may result to a defendant from the provisions of statutes of limitations are available only by means of an affirmative defense interposed by him; and that, especially when dependent upon facts not appearing in the complaint or introduced in evidence by the plaintiff, the burden of establishing the facts constituting such a defense rests on the defendant. *Pierce v. Southern Pacific Co.*, 120 Cal. 156, 162, 47 P. 874, 52 P. 302, 40 L. R. A. 350; *San Diego Realty Co. v. Hill*, 168 Cal. 637, 639, 143 P. 1021; *Wise v. Williams*, 72 Cal. 544, 548, 14 P. 204; *Wright v. Ward*, 65 Cal. 525, 527, 4 P. 534; *Strauss v. Canty*, 169 Cal. 101, 145 P. 1012; *Van Buskirk v. Kuhns*, 164 Cal. 472, 129 P. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932; *Farrell v. Palmer*, 36 Cal. 187; *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 P. 1060; 16 Cal. Jur. 626; 37 C. J. 1243; 17 R. C. L. 1004.

With reference to the facts in the instant case appertaining to the defense of the statute of limitations, the finding by the trial court was: " * * * That none of the notes mentioned or described in the plaintiff's complaint was made, executed or delivered for the purpose of evidencing or extending any pre-existing indebtedness of said (old corporation) to the plaintiff."

Although the direct evidence in support of such finding is not particularly strong, when certain ambiguous circumstances which are capable of being construed in favor of the finding, together with the legal principle that on the defendants rested the burden of establishing the necessary facts, are also taken into consideration, it is concluded that the requirement of sufficiency of the evidence to support the finding is satisfied.

[3] It is further contended by appellants that, because of what might appear to be an inconsistency between the finding to which reference has been had and another finding made by the trial court, it follows that the findings as a whole do not support the judgment. The particular language of the finding to which attention is directed is that: " * * * Nor did said plaintiff agree to release the (old corporation) from any liability on account of any indebtedness theretofore existing between the plaintiff and the said (old corporation) to any extent whatsoever."

In making the loan of the total sum of \$68,000, the plan followed was that it was divided into several different amounts for each of several of which a promissory note was executed by the old corporation in favor of the plaintiff and a like promissory note for the same amount was executed by some individual in favor of the old corporation, and

which latter promissory note was then indorsed by the old corporation and delivered to the plaintiff as collateral security for said principal note. The complaint herein, although founded upon the liability of the stockholders for the entire indebtedness of \$68,000, to a considerable extent was made up of separate counts relating to each of the several principal promissory notes which were so executed; and the separate defense of one of the defendants, as expressed in his answer to the complaint, among other things, contained the allegation: "That defendants are informed and believe and upon such information and belief allege that the promissory note set forth in said complaint was given by the said B. Houssels to the International Packing Corporation of California, a corporation, upon the understanding and agreement between the said B. Houssels, the plaintiff herein, and the International Packing Corporation of California, a corporation, that the said promissory note was for the amount of the stockholders' liability owed by the said B. Houssels on account of stock held by him in said International Packing Corporation of California, a corporation; that said plaintiff agreed to release the International Packing Corporation of California, a corporation, from all liability on account of any indebtedness theretofore existing between the plaintiff and the said International Packing Corporation of California, a corporation, to the amount of said promissory note of the said B. Houssels, to-wit: in the sum of two thousand and four hundred dollars (\$2,400)."

By a comparison between the language employed in the finding in question and the special defense to which reference has just been had, it will be noted that said finding is in direct response to said defense. Although the latter part only of the finding is the subject of criticism by appellants, an examination of the finding as a whole discloses the fact that it simply negatives the allegation contained in such special defense to the effect that the collateral or individual promissory note to which reference was had in the complaint was executed with the understanding that it was "for the amount of any stockholders' liability," or that, by reason of the giving of such promissory note, the plaintiff agreed to release the old corporation from any portion of any liability arising on account of former indebtedness theretofore existing between the plaintiff and the old corporation. Thus explained, no inconsistency is apparent between the two findings to which attention has been directed.

[4] Appellants further urge that the complaint failed to state a cause of action, in that it contained no allegation that either of the promissory notes indorsed by the old corporation was ever presented for payment, or, indeed, as a prerequisite to the bringing of

an action upon an indorsed negotiable instrument, that either or any of the several acts incumbent upon the drawee or holder of such an instrument had been performed.

The only reply necessary to such contention is that the action was on the liability of stockholders arising out of the total new indebtedness of the old corporation to the plaintiff, as evidenced by the corresponding notes of the old corporation to the plaintiff. Although each of the several collateral notes was set forth in the complaint, the entire action was not brought on the assumption by the plaintiff that each of the several defendants was liable to the plaintiff by reason of his having executed that promissory note. Those notes were but incidental or evidentiary of the cause of action stated in the complaint. Each of them was taken as collateral security for the particular sum of money represented by the principal promissory note. Its injection into the action merely showed, or tended to show, a part of the details which made up the ultimate transaction on which the liability of the stockholders depended, and furnished some evidence of an item contained in the total indebtedness for which the action was brought. Consequently it was wholly unnecessary that the complaint contain an allegation either with reference to whether the collateral promissory notes were or either of them was ever presented for payment, or as to either of the other ordinary requirements in an action against an indorser of a promissory note.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

110 Cal. App. 544

APPLEGATE v. SORRAL.

Civ. 7713.

District Court of Appeal, First District, Division 2, California.

Dec. 19, 1930.

1. Death ☞103(4).

In action for death, where there is no substantial conflict in evidence regarding intimacy of relations between decedent and heirs, trial court may weigh evidence and direct verdict in accordance with opinion.

2. Appeal and error ☞928(1).

In support of judgment appellate court must assume that trial judge carefully weighed evidence before instructing jury plaintiff could not recover more than certain sum.

3. Death ☞77.

In action for death, evidence of pecuniary loss to heirs held not to justify recovery of more than \$150 plus nominal damages.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Tishia Applegate, administratrix of the estate of Helen Gordon Munns, deceased, against Eugene Sorral. From the judgment, plaintiff appeals.

Affirmed.

Hibbard & Kleindienst, of Los Angeles, for appellant.

George H. Moore, of Los Angeles, for respondent.

STURTEVANT, J.

Late at night on the 26th day of November, 1926, Helen G. Munns was killed in an automobile collision. Later this plaintiff was granted letters of administration and commenced this action against the defendant to recover damages in favor of the heirs of the deceased. The defendant answered and a trial was had before the trial court sitting with a jury. The jury brought in a verdict in the sum of \$151. From a judgment entered thereon the plaintiff has appealed and has brought up typewritten transcripts.

[1-3] In her brief the plaintiff contends that the trial court erred in instructing the jury on the subject of damages. Among others the court gave an instruction as follows: "The court instructs the jury that the plaintiff can not recover more than \$150, plus nominal damages, and nominal damages have been spoken of as a trifling sum such as one cent, a few cents, or a dollar." If that instruction was properly given, the judgment should be affirmed. Otherwise it should be reversed. In this connection the defendant contends that the evidence in the record showed that no one of the heirs of the decedent nor all of them were entitled to recover anything, that is, that the evidence showed affirmatively that no one of the heirs suffered any pecuniary loss by reason of the death of Mrs. Munns. The decedent was survived by her mother, Mrs. Olga Bunk, who resides at Council Bluffs in the state of Iowa, and so far as the record discloses has never been in California. The decedent was also survived by her husband. In her brief the plaintiff argues that the record shows that at least the mother and husband were entitled to relief in a sum larger than that awarded by the verdict. The record does not show when Helen G. Munns ceased to live with her own family, but it does show that as early as June 29, 1921, she was at Tulsa in the state of Oklahoma, and that while there she and William G. Munns intermarried. No member of

the Bunk family was called as a witness. William G. Munns, the surviving husband, was called as a witness and made many conflicting statements as to when he got married and during what time or times he and his wife lived together as man and wife. The evidence is not contradicted to the effect that from February to August, 1926, the husband was in jail and that presumably during that time he and his wife were living separate and apart. In August, the husband left Los Angeles for Inyo county and later went to San Diego county. There is no evidence that after he left they lived together. He testified that for eight hours he and his wife were together during the last Saturday in August, 1926. That testimony was flatly contradicted by a witness who testified that during the month of August Mrs. Munns was not in Los Angeles at all. The husband testified that the last time he and his wife kept house together was in December, 1925, but the record does not show whether that housekeeping was for the period of one day or longer. Mrs. Richards testified that for eighteen months prior to the death of the decedent the latter lived with Mrs. Richards and that during that time the decedent did not communicate with her husband nor with any other member of her family; and that during said period of time Mrs. Munns engaged an attorney to commence an action to obtain a divorce. Mrs. Richards further testified that during the time Mrs. Munns was with her, Mrs. Richards supported her. There was evidence that at times the decedent earned \$25 per week, but there is no evidence that at any time she made any contributions toward the support of any one of her kith or kin or that she received any assistance from any one of them. About the time Mr. and Mrs. Munns intermarried, they went to Council Bluffs and there saw Mrs. Bunk. They never saw her afterwards, and the evidence does not show that any communications of any kind or nature passed between the decedent and her mother or other members of the family. An undertaker was engaged by Mrs. Zuelke, a bystander. His bill for burying the decedent was \$308; but there was no evidence that any one of the family contracted for said sum. After it had been incurred the decedent's mother paid \$150 to the undertaker. In the case of *Bond v. United Railroads*, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50, the Supreme Court entered upon a long discussion as to the elements and the amount of damage in this class of cases. At page 285 of 159 Cal., 113 P. 366, 372, the

court said: "With regard to the danger of excessive verdicts from this rule, we can only say that the remedy is practically committed entirely to the judge who presides at the trial in the court below. If he does his duty, he will carefully weigh the evidence himself, and will not allow a verdict to stand for its full amount if he believes it gives more damages than the pecuniary loss that it may be reasonably supposed the plaintiff will actually suffer by being deprived of the services, earnings, society, comfort, and protection of the child." The duty so cast on the trial judge may properly be exercised either before the jury retires or later on an application to grant a new trial. Where, as here, there is no substantial conflict in the evidence regarding the intimacy of the relations existing between a decedent and her heirs, the trial court is at liberty to weigh the evidence and direct the verdict in accordance with the opinion so formed by the trial judge. In *Estate of Sharon*, 179 Cal. 447, at page 459, 177 P. 283, 288, the court said: "It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. There are numerous decisions to this effect." (Citing them.) In the case of *Spencer v. San Francisco Brick Co.*, 5 Cal. App. 126, 89 P. 851, it was held that as there was no evidence to justify an award of punitive damages, the trial court erred in refusing to give an instruction to that effect; and thereafter, when a motion for a new trial was made, that the court also erred in denying the motion. No good reason appears why the trial court should allow the jury to bring in an excessive verdict and then put the parties to the trouble and expense of presenting a motion for a new trial. As stated by the court in *Bond v. United Railroads*, supra, it was the duty of the trial judge to "carefully weigh the evidence himself." In support of the judgment we must assume that he did so. Certainly there is nothing in the record to show that he abused his discretion in so weighing the evidence.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

110 Cal. App. 360

ORRICK et ux. v. HOEPTNER.

Civ. 6186.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1930.

Action $\Rightarrow$ 50(1).

Husband and wife suing for personal injuries to wife and for medical expenses incurred could join action for damages to their automobile (Code Civ. Proc. § 427, subd. 8).

Appeal from Superior Court, Los Angeles County; George W. McDill, Judge.

Action by T. O. Orrick and wife against J. P. Hoeptner. Judgment for plaintiffs, and defendant appeals.

Affirmed.

LeRoy Reames and James R. Jaffray, both of Los Angeles, for appellant.

D. Z. Gardner, of Los Angeles, for respondents.

IRA F. THOMPSON, J.

Plaintiffs, husband and wife, brought this action for personal injuries to the wife, for medical expenses incurred, and property damage all growing out of the collision of defendant's and plaintiffs' automobiles on the 20th day of December, 1927. The court awarded judgment to plaintiffs in the sum of \$960 for the injuries to the wife, medical expenses incurred by her, and for damage to their automobile. From this judgment defendant appeals.

Appellant's contentions are substantially that there was a misjoinder of parties plaintiff, and that there were two causes of action not separately stated. These same contentions were embodied by him in a demurrer in the lower court, which was overruled.

The case of Farrar v. Whipple, 65 Cal. App. 123, 223 P. 80, is squarely in point, and we see no reason which compels us to depart from the rule there announced. In that case the defendants appealed from a judgment entered against them for damages arising out of personal injuries to the plaintiff Josephine Farrar and for damages to the automobile of the husband.

On page 126 (of 65 Cal. App., 223 P. 80, 81) of the report the court says: "It is argued that an action for damages to personal property of the husband cannot be joined with an action for damages for personal injuries sustained by the wife alone. Subdivision 8 of section 427 of the Code of Civil Procedure is cited. This reads in part that in any action brought by the husband and wife all consequential damages suffered or sustained by the husband alone may be alleged and recov-

ered without separately stating them, and 'that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately.' By the terms of the section the husband may be joined with his wife in suing for consequential damages resulting from personal injuries sustained by the wife alone. His action then becomes an action for damages for personal injuries, and as such is within the terms of that portion of the section which has just been quoted and which authorizes the joinder of an action for injuries to person and property growing out of the same tort." See, also, Meek v. Pacific Electric Ry. Co., 175 Cal. 53, 164 P. 1117; Fassett v. Nascimiento (Cal. App.) 291 P. 269.

The construction given to section 427 in Farrar v. Whipple, supra, is conclusive upon the appellant here.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 376

PEOPLE v. LACKSHAN.

Cr. 2000.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1930.

Criminal law $\Rightarrow$ 1159(1).

Appellate court affirmed conviction of robbery, where defendant had fair and impartial trial and evidence supported verdict.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Jack G. Lackshan was convicted of robbery, and he appeals.

Affirmed.

Charles J. Orbison, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

This is an appeal from a judgment sentencing appellant for the crime of robbery and from an order denying his motion for a new trial. Heretofore, the appellant wrote to one of his attorneys directing him to dismiss the appeal because it was his "belief that" he "could not receive a fair and impartial consideration" of his case. We declined to dismiss the appeal on the basis of that letter because it assumed as its premise a belief un-

worthy of notice. Emanating from another source, we should be bound to take a different view relative thereto, but coming as it does from one whom we may suppose is suffering from remorse for the crime of which he has been convicted, we sympathize with it as the pitiful outburst of a tortured soul.

Appellant's counsel say that they have examined the transcript with great care, both with respect to the trial upon the plea of not guilty and also with respect to the plea of not guilty by reason of insanity, and are convinced that he had a fair and impartial trial upon both; that the evidence is ample to establish the offense and also the sanity of the appellant. The Attorney General's office agrees with this state of the record.

Inasmuch as no points are raised, nothing remains for us to consider.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 323

BABCOCK v. JEWELL et al.
Civ. 6420.

District Court of Appeal, Second District,
Division 1, California.

Dec. 10, 1930.

Rehearing Denied Jan. 5, 1931. Hearing Denied by Supreme Court Feb. 5, 1931.

1. Pleading Ⓒ252(1).

Amendment to complaint setting up new cause of action may affect defendant as of date of filing only.

2. Pleading Ⓒ250.

Fact that amendment to complaint relating solely to identical cause of action increases amount of damages claimed presents no tenable legal objection.

3. Limitation of actions Ⓒ127(3).

Amended complaint for recovery of alleged usurious interest merely increasing amount related solely to identical cause of action as respected bar of limitation (St. 1919, p. lxxxiii).

The findings of the trial court amply sustained by evidence were to effect that affirmative allegations contained in answer relating to whether amended complaint set up different cause of action were untrue, including a denial by trial court of truth, not only of allegation that transaction set forth in original complaint was different from that stated in amended complaint, but as well a further denial of allegation that transactions were separate

distinct transactions, involving separate and distinct purchases of trust deeds.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by Edith Babcock against W. E. Jewell, M. E. Jewell and others. Judgment for plaintiff, and defendants named appeal. Affirmed.

John C. Miles, of Los Angeles, for appellants.

Frazier McIntosh, of Los Angeles, for respondent.

HOUSER, J.

Plaintiff brought an action to recover from defendants alleged usurious interest and penalty for the exaction thereof. The original complaint contained the allegation that the defendants "did take and receive from the plaintiff herein the sum of three hundred seventy-two and 09/100 dollars (\$372.09) for the loan by defendants to plaintiff of the sum of twelve hundred eighty-eight dollars (\$1288.) in money for six (6) months, which said loan the plaintiff did fully repay. * * * " Later, an amended complaint was filed by which it was charged that the amount received by defendants was \$6,172 for a loan made by defendants to plaintiff of the sum of \$4,500 for six months. Judgment was rendered in favor of plaintiff in the sum of \$2,557.71.

Among other defenses to the amended complaint, defendants Jewell alleged:

"That the transaction set forth in plaintiff's complaint is an entirely different transaction from that set forth in plaintiff's original complaint; that the transactions between the plaintiff and defendant were separate, distinct transactions involving separate and distinct purchases of trust deeds at a fixed and definite discount. * * *

"That several causes of action have been improperly united in said complaint which does not appear upon the face of said complaint but that nevertheless said alleged cause of action set forth in plaintiff's complaint includes three separate transactions all of which are barred by section 3 of that certain initiative measure adopted by the people at a general election on November 5, 1918, and designated and known as the 'Usury Law of the State of California,' for the reason that more than one year has expired since the payment of any of said obligations and the filing of said amended complaint."

With reference to the facts upon which such defense was founded, the trial court found "that all the allegations of the answer (except certain facts not here material) are untrue."

The only point expressly made by appellants in their opening brief is that the trial court erred in determining that plaintiff's alleged cause of action was not barred by the statute of limitations. However, the point upon which the applicability of the statute turns, and which is argued by respective counsel, is whether, considering the complaint as charging assumpsit as for money had and received in a certain amount, plaintiff had the right to so amend the complaint as to charge defendants with having received a different amount and thereby increase the claim for damages.

Adverting to the language employed, first, in the original complaint, and, secondly, in the amended complaint, it will be noted that, in the former, defendants were alleged to have received the sum of \$372.09 for a loan of \$1,288; while in the latter, it was alleged that defendants received the sum of \$6,172 for a loan of \$4,500. As far as is disclosed by the respective pleadings, nothing appears which clearly indicates that the cause of action set up in the one complaint is not identical with that set up in the other. In each of them, apparently, a loan of a definite amount of money constituted the transaction from which arose the claim for the usurious charge against defendants. No language is used which would indicate that the money lent or the interest collected represented more than a single transaction. To the contrary, the words to the effect that defendants received a certain sum of money "for the loan" by defendants to plaintiff of another specified amount, "which said loan the plaintiff did fully repay," would afford a basis for the presumption that but one possible cause of action could have arisen from the dealings between or among the several parties by reason of the facts to which reference was had in the complaint.

By the provisions of the so-called "Usury Law" (St. 1919, p. lxxxiii), the right to maintain an action of the character of that here involved is limited in time to one year after the accrual of the cause of action.

[1,2] The authorities are harmonious to the effect that an amendment to a complaint which sets up a new cause of action may affect the defendant as of the date of its filing only, and does not relate back to the date of the filing of the original complaint. *Hogarty v. Philadelphia & R. R. Co.*, 255 Pa. 236, 99 A. 741, 8 A. L. R. 1405; 37 C. J. 1074. But if the complaint herein, as amended, related solely to the identical cause of action set forth in the original complaint, the fact that by the amendment the amount of damages claimed was increased, would present no tenable legal objection. 5 C. J. 1400; 2 R. C. L. 764, and authorities there cited.

[3] As hereinbefore stated, the findings by the trial court, which were amply sustained by the evidence introduced on the trial of the action, are to the effect that the affirmative allegations contained in the answer of the defendants relating to whether the amended complaint set up a different cause of action from that embraced in the original complaint, were untrue; which statement includes a denial by the trial court of the truth, not only of the allegation contained in the answer that the transaction set forth in the original complaint was different from that stated in the amended complaint, but as well, a further denial of the additional allegation in said answer "that the transactions between the plaintiff and defendant were separate, distinct transactions, involving separate and distinct purchases of trust deeds. * * *". From a consideration of such findings, it follows that the execution of the three promissory notes constituted but a single transaction, and that the amended complaint related solely to the identical cause of action set forth in the original complaint. The action having been commenced within the period permitted by the terms of the statute, the defense interposed by the defendants to the effect that the statute had run as against the cause of action cannot be sustained.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

110 Cal. App. 320

HENDERSON v. RIGGLES.

Civ. 6088.

District Court of Appeal, Second District,
Division 1, California.

Dec. 9, 1930.

1. Executors and administrators ⇐97.

Administratrix, though unauthorized to bind estate without court's consent, could personally employ accountant to perform services for her having relation to estate.

2. Executors and administrators ⇐97.

That contract employing accountant was entered into by administratrix because of fear of litigation and by advice of then counsel did not affect validity of contract.

3. Executors and administrators ⇐97.

Finding of facts authorized accountant to recover compensation due him under terms of agreement with administratrix personally.

Findings stated that administratrix had paid to accountant a certain sum, which was less than amount accrued under contract, that no services were performed by accountant under contract subsequent to April, 1926, that prior to such date estate had been reduced to cash, that formal closing of estate alone remained to be done, and that there were no services required under agreement, but that accountant was ready to perform the contract, which provided that employment should continue up to entry of final decree of distribution.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by A. P. Henderson against Emma Riggles, commenced in a municipal court. Judgment for defendant was reversed by the superior court, and defendant appeals.

Affirmed.

Chambers & Lyman, of Los Angeles, for appellant.

Kelby & Lawson and Clyde C. Triplett, all of Los Angeles, for respondent.

CONREY, P. J.

The defendant, while acting as the duly appointed administratrix of a decedent's estate, entered into a written contract with the plaintiff employing the plaintiff as accountant, adviser, and financial agent to assist her in the business affairs of said estate; said employment to continue up to the entry of final decree of distribution of the estate at a salary of \$100 per month. The action was brought against the defendant individually to recover the unpaid portion of plaintiff's compensation under said agreement, which had accrued prior to final distribution of the estate.

The action was brought in the municipal court of the city of Los Angeles, where judgment was entered in favor of the defendant. On appeal to the superior court the judgment was reversed. The present appeal is by the defendant from the judgment of the superior court.

The appeal to the superior court was presented on the judgment roll. The findings of fact made by the municipal court were in substance as follows: That said contract was

entered into by the defendant by reason of fear of litigation and by the advice of her then counsel; that the defendant has paid to the plaintiff a certain sum (which sum is less than the amount accrued under the terms of the contract), and that the said sum so paid fully compensated the plaintiff for all the services rendered by him by reason of said contract; that no services were performed by the plaintiff under said contract subsequent to the month of April, 1926; that prior to April, 1926, said estate had been reduced to cash and the formal closing of the estate alone remained to be done and there were no services required under said agreement; that plaintiff was ready and willing at all times to perform all things to be done by him under said contract. Nevertheless, the municipal court held that the defendant was not indebted to the plaintiff in any sum whatever and accordingly entered judgment in favor of the defendant.

[1] The contract, although signed "Emma Riggles, Administratrix of the estate of Henrietta Adams, deceased," was her personal contract. While the administratrix was not authorized to bind the estate upon such a contract without first obtaining consent of the court in which the administration was pending, she did have the right personally to employ the plaintiff to perform services for her having relation to the conservation of the estate and the performance of labor necessary for the benefit of the estate. *England v. Winslow*, 196 Cal. 260, 265, 266, 237 P. 542. 11 Cal. Jur. p. 1048.

[2, 3] On the face of the findings of fact the plaintiff was entitled to recover the compensation due him under the terms of the agreement. The mere fact that the contract was entered into by the defendant "by reason of fear of litigation and by the advice of her then counsel" does not affect the validity of the contract. Under the plain terms of the contract the salary agreed upon had accrued prior to the commencement of the action. The facts as found did not support the conclusions of law or the judgment of the municipal court. The superior court was right in reversing that judgment.

The judgment of the superior court is affirmed.

We concur: HOUSER, J.; YORK, J.

110 Cal. App. 550

In re BEMMERLY'S ESTATE.**ABELE et al. v. ABELE et al.****Civ. 4326.****District Court of Appeal, Third District,
California.****Dec. 19, 1930.****1. Trial ☞168.**

Rules governing granting of nonsuit determine propriety of directed verdict.

2. Wills ☞326.

Nonsuit in will contest is proper only when disregarding conflicting evidence and giving to contestants' evidence all legal value, there is no sufficient substantial evidence to support favorable verdict.

3. Wills ☞50.

Testator has sufficient testamentary capacity if at time he understands nature of act, recalls nature and situation of property, and understands relations to persons having claims upon bounty.

4. Wills ☞324(2).

In proceeding to revoke probate of will, evidence held insufficient to present question for jury whether testatrix lacked testamentary capacity.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

In the matter of the estate of Emilie V. Bemmerly, deceased. Action by Frederick B. Abele and another, by Adolph Abele, their guardian, against Mary E. Abele, executrix, and others, to revoke the probate of a certain writing as the last will and testament of deceased. Judgment for the proponents, and the contestants appeal.

Affirmed.

Huston, Huston & Huston, of Woodland, for appellants.

Gaddis & McDonald, of Woodland, for respondents.

PLUMMER, J.

This is an appeal by the above-named contestants from a judgment of the superior court in favor of the respondents based upon a directed verdict.

On the 25th day of August, 1928, Emilie V. Bemmerly, a resident of Yolo county, died in the city of Berkeley. On the 17th day of September, 1928, an order was made by the superior court of Yolo county admitting to probate a certain writing as the last will and testament of said deceased. On the 10th day of September, 1929, the appellants began an

action to contest the admission of said writing to probate as the last will and testament of said deceased, and prayed judgment of the superior court revoking the probate thereof. Paragraph VI of the contest filed by the appellants reads as follows: "That at the time when said purported last will and testament was executed, the deceased was incompetent to make a last will and testament, and was not of sound and disposing mind or memory." It appears from the record that the cause was tried upon the issue of the soundness of mind of the testatrix. While the testimony set forth in the transcript appears to be practically overwhelming in support of the writing as the last will and testament of Emily V. Bemmerly, and of her soundness of mind at the time of its execution, nevertheless, in view of the fact that the court directed the verdict, we will confine ourselves first to a consideration of the testimony introduced by the contestants, and that portion thereof which the contestants claim warranted sending the cause to the jury undirected, and will later give a general summary of the whole case.

[1, 2] Both contestants and respondents concede the law to be that the right of the court to direct a verdict is absolutely the same as the right of the court to grant a nonsuit, and that a nonsuit may only be granted, when disregarding conflicting evidence and giving to the contestants' evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the contestants, if such a verdict were returned. Following this statement, we will set forth what the contestants claim to be the substantial testimony of Adolph Abele, the father of the contestants and the guardian of the contestants in this action. This witness testified that in 1915 he married Miss Emilie V. Bemmerly, the daughter of the deceased. The issue of that marriage was a boy and girl, who appear as contestants herein; that Emilie V. Bemmerly died April 12, 1924; that whatever unfriendly relations had existed between the witness and Emilie V. Bemmerly, deceased, had all been smoothed out in 1924; that the witness had not remarried since the death of his wife Emilie; that the two children, the issue of said marriage, had frequently visited the deceased prior to her last illness; that the deceased was first taken to Providence Hospital some time during the month of June; that about a month before her death, the deceased was removed to the home of Mrs. Williams in Berkeley; that about the 1st of August, 1928, the witness visited the deceased at the home of Mrs. Williams, and had some conversation with her about a \$150 check; that the next

time the witness visited Mrs. Bemmerly was on August 14, 1928; that he arrived at the home of Mrs. Williams at about 3:30 p. m. What the evidence shows is best indicated by quoting the questions and answers:

"Q. In what condition did you find Mrs. Bemmerly at that time, as compared with the first of August? A. Very bad.

"Q. Well, just tell the jury what? A. Well, when I came in there she was all nervous and she wanted to go home, but she never spoke; she just said, 'I want to go home. I want to go home.' And Mrs. Williams said, 'Adolph is here.' And she said, 'I want to go home;' and her eyes were all bleary and never noticed me at all.

"Q. Did she call you by name? A. No.

"Q. And so far as you could tell she did not recognize you? A. No, she did not recognize me.

"Q. And did she carry on any conversation with you? A. No, sir.

"Q. And was she sitting up in bed? A. Yes.

"Q. And how long were you there on this last time on August 14th? A. Well, Mrs. Williams got—told me to stay there until she got some of that there—they called it morphine at that time, but I heard afterwards it was strychnine.

"Q. Well, you don't know what it was she got, Mr. Abele? A. No; and then she quieted down and I went out.

"Q. Did you go in and see her again on the 14th? A. That evening, yes.

"Q. At what time in the evening? A. Oh, it must have been about 8 o'clock, I guess, right before bedtime.

"Q. And what was her condition then? A. Well, she was asleep there and I didn't say anything.

"Q. Did you have any conversation with her? A. No, sir.

"Q. She was simply asleep and nothing transpired? A. That is it.

"Q. Now, did you see her on the morning of the 15th? A. Yes, sir.

"Q. At about what time in the morning? A. Oh, it must have been about 8 o'clock, 8 or 9 o'clock.

"Q. Was she awake? A. She was awake; she was kind of moaning all the time.

"Q. And did she speak to you or recognize you? A. No.

"Q. Did you try to talk to her? A. Yes.

"Q. Did she answer you? A. No.

"Q. Did she give any indication of knowing that you were in the room? A. No.

"Q. Now, how long were you in the room on the morning of the 15th? A. Maybe five or ten minutes.

"Q. Did you see her again on the 15th? A. About 8 o'clock.

"Q. And what was her condition at that time? A. She did not know me.

"Q. The same as it was on the other visit? A. On the 14th, yes.

"Q. Did you see her on the 16th? A. Yes, sir.

"Q. About what time in the morning? A. I saw her about 9 o'clock.

"Q. When you left in the afternoon of the 16th about 3:30, did you see Mrs. Bemmerly? A. Yes, sir.

"Q. How long were you in the room? A. I was in there for five minutes.

"Q. And did you try to talk to her? A. There was not use; she was asleep.

"Q. Now, I will ask you, Mr. Abele, whether or not, on these occasions that you have mentioned, on the 14th, 15th and 16th, and the 19th and 20th, Mrs. Bemmerly was, in your opinion, a person of sound or unsound mind? A. Unsound mind."

The testimony as to the 19th and 20th shows that the deceased was apparently asleep at the times when the witness was in her room. The testimony of this witness, as set out in the transcript, was repeated several times, but what we have stated is all that the testimony shows, and the direct and cross-examination, though it covered the ground several times, affected no material change.

Preceding the introduction of the testimony of this witness, the contestants placed upon the stand other witnesses whose testimony did not relate to the mental condition of the deceased, and then offered the deposition of Mrs. Amelia Abele Williams, a niece of the testatrix, a professional nurse, and who acted as nurse for the deceased during her last illness. This witness testified that Mrs. Bemmerly was taken to the Providence Hospital some time in June, 1928, and left the hospital on or about July 19, 1928; that she was brought to the home of the witness and remained there until the time of her death; that she was brought there in a taxi; that for about a week after the deceased came to the home of the witness, deceased was up and around. About a week after the arrival of Mrs. Bemmerly from the hospital the doctor ordered her to bed, and that thereafter she remained in bed until the time of her death; that the deceased was suffering from heart trouble; that the attacks would last not longer than half an hour; that the deceased was given digitalis, a heart stimulant, and in the evening, one-eighth of a grain of morphine, as a sleeping potion; also, that the deceased was given cremo carbonates, a medicine for the stomach; that the morphine was administered nightly in order to induce sleep; the dose was usually given

about midnight; the digitalis was administered about every four hours; that the digitalis did not have any effect save and except to stimulate heart action; that the deceased was able to feed herself until a few days before her death; that the deceased had orders to remain quiet; that they kept the deceased in a sitting position in bed; that the deceased read the newspapers, including the home papers, up until a few days preceding her death; that the deceased gradually became physically weaker; that there was a marked change two or three days before her death, which took place on the 25th day of August, 1928. This witness also testified that Mrs. Bemmerly asked that a priest be called, and that a priest called on the 13th, and again on a later date. The witness also testified that Mrs. Bemmerly desired to be taken to her home in Woodland, and that on the evening of the 13th she called up Adolph Abele upon the phone, and that he came to the home of the witness on the 14th of August. The witness then described an attack which the deceased suffered on the 14th, and the testimony continued as follows:

"Q. And what about the severity of that attack as compared with previous attacks? A. That was about the same.

"Q. Well, how did it leave her? A. It left her—when the doctor called that morning, I forget now whether the 14th or the 15th—he warned us and advised us that he would not guarantee her heart to stand the trip to Woodland.

"Q. Now, returning to the 14th, the day that she had the attack, after you received the telephone from Adolph, how long did that attack last? A. Just about the same period—a slight attack.

"Q. And did you administer any morphine during that attack? A. That was in the morning; no, I didn't.

"Q. Then, as I understand you, according to your recollection she had no opiate between the night of the 13th and the night of the 14th? A. Only at night; only at her bedtime.

"Q. Now, you were there when Adolph arrived? A. Yes, sir.

"Q. And did Adolph go in the room and see her after he arrived? A. Yes.

"Q. Were you in the room at any time Adolph Abele and your aunt, Mrs. Bemmerly, the three of you together? A. Well, I can't recall, but we must have been together because I was the nurse.

"Q. Do you know what your aunt's condition was at the time Adolph arrived, with reference to being conscious or unconscious? A. She was conscious.

"Q. What was her condition with reference to being weak? A. She was weak.

"Q. Was she asleep when he arrived? A. I don't remember.

"Q. Do you know whether or not she recognized him when he arrived? A. I don't remember, but she must have; she was conscious.

"Q. Have you any recollection of being in the room with your aunt on the 14th, at the time Mr. Adolph Abele was present? A. I do not.

"Q. How many times did Mr. Abele see her on the 14th? A. I don't remember.

"Q. What was her condition on the night of the 14th, when you administered the morphine? A. Her usual condition.

"Q. Did Adolph spend the night in your home? A. Yes, sir.

"Q. Now, on the 15th, what was your aunt's condition? A. She was very bright.

"Q. Did you have any conversation with your aunt in the presence of Adolph, about going to Woodlawn? A. I don't recall.

"Q. Do you recall any conversation you had in the presence of your aunt, when Adolph Abele and yourself were present on the 15th? A. I do not recall any conversation.

"Q. And your aunt was better on the morning of the 15th? A. I did not say 'better'; I said 'bright.'

"Q. What was the difference in her condition with reference to brightness, when she was in one of those attacks. A. She was exhausted-like."

This witness further testified that up until three days before the death of the deceased, she was rational, and that her mind was all right; that her physical condition was getting weaker.

The witness Bertha Keehn testified that she went to the room of Mrs. Bemmerly on the 19th of August, and that at the time she went to the room Mrs. Bemmerly was asleep; that no conversation was had with Mrs. Bemmerly on account of the fact that she was sleeping.

The facts as disclosed by the record are substantially as follows: That the testatrix was taken ill on or about the 10th day of June, 1928. In about a week thereafter she was taken to the Providence hospital at Oakland, and remained there until the 19th of July, when her condition being much improved, she was brought to the home of Mrs. Williams at Berkeley; that Mrs. Bemmerly was up and around the house at this place for about one week, when she suffered a relapse and was ordered to her bed. She remained in bed from that time until her death, which occurred on August 25, 1928. Heart attacks continued at irregular intervals until the time of her death, lasting from half an hour to 45 minutes. She was kept, most

of the time, in a sitting position. The deceased was given digitalis every four hours, and one-eighth of a grain of morphine every evening. During the time Mrs. Bemmerly remained at Berkeley she was nursed by Mrs. Williams, a graduate nurse. After being ordered to bed, there was no material change in the condition of Mrs. Bemmerly until about the 19th of August. The deceased did not lose consciousness at any time until three days before her death. The deceased received visitors, read her home papers, and was able to converse with her relatives who called upon her. On the 13th of August, she asked to see a priest, who called upon her that day. On the 13th she asked to be taken to her home in Woodland, and Adolph Abele was telephoned to come and take her. Adolph Abele arrived at the Williams' home about 3 o'clock in the afternoon of August 14th. Mrs. Bemmerly was nervous and said she wanted to go home; did not say anything else except that she wanted to go home. While Adolph Abele was present on the afternoon of the 14th, Mrs. Williams administered to the testatrix a hypodermic of digitalis; the testatrix then quieted down. Abele did not see her any more that day until just before bedtime, about 8 o'clock. The testatrix was asleep, and Adolph Abele had no conversation with her. He saw her again on the morning of the 15th, about 8 o'clock, for five or ten minutes; she was awake and moaning; did not speak to, or recognize him. Abele saw her for five or ten minutes on the night of August 15th, at which time she was asleep, and he did not disturb her. Abele saw her again on August 16th, in the morning; the deceased was asleep at that time. On the morning of the 16th, after Adolph Abele had departed from Oakland, the testatrix asked Mrs. Williams to tell Mrs. Abele to get some papers and a pencil and come up to her room, as she wanted to make a will. This request was complied with. When Mrs. Abele arrived at the bedside of the testatrix, she informed testatrix that she could not do anything without a lawyer, and asked her if she would like to have Mr. Gaddis, who was then believed to be at San Rafael. The testatrix replied that she would like to have him. An attempt was made to communicate with Mr. Gaddis. In the meantime the testatrix requested Mrs. Abele to take down on some paper, items with regard to her property. The testatrix indicated her real property and certain bequests that she wished to be made. Mrs. Abele made this memoranda at about noontime on August 16th. At about noontime Dr. Cheney arrived, and communication not having been made with Mr. Gaddis, Dr. Cheney arranged to have Mr. Sutcliffe call at the Williams' home. Mr. Sutcliffe arrived at about 4 o'clock in the afternoon of August 16th. Mr. Sutcliffe was introduced

to the testatrix, discussed the items with the testatrix, contained in the memorandum made by Mrs. Abele, got the boundaries of her lands from the testatrix, and discussed with her her personal property, and the bequests she desired to make. Mr. Sutcliffe then drew up a will in lead pencil, which was executed by the testatrix and witnessed by Mrs. Abele and himself. Mr. Sutcliffe then stated that he would take the will with him and put it in typewritten form and return the next day and have it executed in typewritten form. Mr. Sutcliffe returned with the typewritten will on the 17th, and the typewritten will was then executed.

[3, 4] During the time we have covered by the testimony, it appears that the deceased had one or two attacks of what the witnesses called "hysterics." In addition, a great deal of testimony appears in the transcript, as we have stated, showing the competency of the testatrix, and the soundness of her mind at the time of the execution of the will on the 17th of August. There is no testimony tending to show that the testatrix was not, on the 17th of August, 1928, conscious, nor any testimony tending to show that she did not fully understand what she was doing, and the disposition she was making of her property.

The contestants further asserted that the will admitted to probate is unnatural, and in support of this contention, make the following statement: "By the terms of the will she divided a tract of land in Yolo county consisting of 120 acres, by devising 80 acres to her grandchildren, and 40 acres to the two nieces mentioned. After making cash bequests aggregating \$2,100, the residuum of the estate was equally divided between the two grandchildren and these same two nieces. Thus the share of the estate taken by the grandchildren only exceeds that of the nieces to the extent of 40 acres of land. According to the value of the land as fixed by the appraisal, these grandchildren received only \$10,000.00 more than the nieces. The evidence is silent as to any reason why the testatrix so preferred and favored the two nieces." And in support of their contention, the contestants introduced in evidence a will which was executed by the deceased on September 4, 1924, and thereafter destroyed. We think this will in itself is a sufficient answer to the claim of unnaturalness. In the third clause of the will of 1924 we find the following: "I declare that my two grandchildren named Frederick Bemmerly Abele and Mary Elizabeth Abele having received their share of their mother's estate in land, at the time of her death, I do now give, devise and bequeath to them, in equal shares, share and share alike, all moneys and property belonging to me at the time of my death, not herein

otherwise disposed of and not disposed of by and through the deeds of gift above referred to."

In the same will, the cousins, Christ Gumbinger and Charles Schnery, were bequeathed a promissory note which was owed by them to the deceased. To Bertha Mary Keehn was bequeathed all the contents of her residence, including furniture, carpets, etc. In the second paragraph of the will the deceased declared that at the date of making the same, she made, executed and delivered into the custody of E. E. Gaddis deeds of gift of all her real estate, with directions to deliver the same to the grantees named therein upon her death. This instrument shows that the testatrix did not, in 1924, at a time when there was no question made as to her competence, intend that the contestants in this action should receive all of her estate. The record does not show to whom the deeds were executed. The will under consideration gives 80 acres of land to the two grandchildren, 40 acres of land to two nieces, and among the bequests \$300 is given to Christ Gumbinger and \$300 to John Gumbinger, persons who are named in the will of 1924; and then, in the residuary clause, the estate was to be divided between Frederick Bemmerly Abele, a grandson, and Mary Elizabeth Abele, a granddaughter, the contestants herein, and Bertha Abele Keehn and Amelia Abele Williams, nieces.

It appears that the deceased had other nieces who were unmentioned in the will of 1924, and also were unmentioned in the will under consideration.

No attempt is made in this case to prove any hallucinations or delusions on the part of the deceased, or anything in the record indicating undue influence or influence of any kind whatsoever. The law is well settled in this state that a "testator of sound mind and disposing mind and memory, if, at the time of making his will he has sufficient mental capacity to be able to understand the nature of the act he is doing, and to understand and recall the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty, and whose interests are affected by the provisions of the instrument."

The testimony of Adolph Abele that he visited the room of the testatrix three times while the testatrix was asleep, once when she was drowsy and another time when the testatrix was suffering from a heart attack, moaning and saying she wanted to go home, is in fact, when analyzed, no evidence whatever of unsoundness of mind, and the witness' opinion of the unsoundness of mind of the testatrix, based upon such premises, does not rise to the dignity of what is called a

"scintilla" of evidence. To hold that such testimony is sufficient upon which to set aside the execution of a solemn instrument would be tantamount to the repealing of the probate law relating to the execution of wills. The two wills, executed four years apart, show that the testatrix had in mind the contestants in this action, and that she never intended to give them all of her property, as shown by the instrument introduced in evidence by the contestants.

Upon the record it is clear that had the cause been submitted to the jury, and the jury returned a verdict in favor of contestants, it would have been the duty of the trial court to set such verdict aside, and upon the long list of cases contained in the California Reports, if such verdict had not been set aside, it would be the duty of an appellate court so to do.

An analysis of the cases having to do with will contests would add nothing to the legal literature of this state which has not already been fully covered. For this reason we content ourselves with the foregoing summary of the facts.

Finding nothing in the record which would justify a verdict in favor of the contestants, it follows that the judgment of the trial court must be, and the same is hereby affirmed.

All concur.

110 Cal. App. 472

IN RE MATTLEY'S ESTATE.

PINEGAR v. McGEE.

Civ. 4327.

District Court of Appeal, Third District,
California.

Dec. 15, 1930.

1. Wills ☞571.

By terms of will giving war risk insurance policy with specified file number, testator sufficiently identified and specifically bequeathed such policy and its proceeds, requiring distribution thereof to legatee's estate, rather than estate of testator.

2. Wills ☞753.

Where testator, by terms of will, bequeaths certain insurance policy, legacy is specific in its nature.

3. Wills ☞439.

Will must be construed according to testator's intention.

Appeal from Superior Court, Amador County; C. P. Vicini, Judge.

After a supplemental inventory was filed by Ralph McGee, executor of the estate of Ernest M. Mattley, deceased, accounting for the receipt of the proceeds of a war risk insurance policy, a supplemental decree of distribution was made over the objection of Milton L. Pinegar, administrator of the estate of Pearl E. Pinegar, deceased, and from such decree, the administrator appeals.

Reversed with directions.

W. R. Barnes, of Los Angeles, for appellant.

A. L. Pierovich, of Jackson, for respondent.

R. L. THOMPSON, J.

This is an appeal from a supplemental decree of distribution.

Ernest M. Mattley was a World War veteran. He died September 11, 1926, leaving an estate consisting of about \$11,000. He also possessed an adjusted compensation insurance policy with the government of the United States of the value of \$1,561, and a separate war risk insurance policy of \$10,000 with the government, in which his sister, Pearl Pinegar, was named as beneficiary. Upon proceedings duly had, his holographic will was admitted to probate in Amador county. The respondent Ralph McGee was appointed and qualified as executor thereof. The will is in the following language:

"4417 East 3rd. Street
"Los Angeles, Calif.
"August 28, 1926.

"This is my last will.

"To Alice Mattley, I give \$100.—To Florence Mattley, I give \$100.—To Corinne Mattley, I give \$100—my diamond ring and my portable typewriter.

"To my brother George E. Mattley I leave my Adjusted Compensated Insurance Policy number 1765429. My share of the cabin.

"To my sister Mrs. Pearl Mattley Pinegar, I give my War Risk Insurance File number I 182941.

"The remainder shall be divided to my sister Mrs. Pearl Mattley Pinegar $\frac{5}{8}$ to my brother George E. Mattley $\frac{3}{8}$.

"Ralph McGee is appointed administrator.

"Ernest M. Mattley
"Ernest M. Mattley"

In due course of administration distribution of the \$11,000 was made on April 15, 1927. The executor was not discharged. Neither the proceeds of the adjusted compensation policy, nor the war risk insurance policy were included in the inventory or distributed in the original decree of distribution. Regarding this omission the respondent, in his brief, says:

"The respondent as executor did not include either the War Risk Insurance payable to

Pearl nor the bonus insurance payable to George in any of the proceedings of the estate."

The adjusted compensation insurance amounting to \$1,561 was paid by the government directly to George E. Mattley. During her lifetime Pearl Pinegar, as beneficiary, was paid by the government the monthly installments of \$56.63 as provided by the terms of the war risk insurance policy. She died at Los Angeles, January 26, 1929. Upon proceedings duly had, the appellant, Milton L. Pinegar, was appointed administrator of her estate. At the time of the death of Pearl Pinegar, there remained unpaid upon the war risk insurance policy the sum of \$6,802.67. This sum was paid to the executor of the estate of Ernest M. Mattley subsequent to the rendering of the original decree of distribution. The respondent assumes that this sum belongs to the estate of Ernest M. Mattley subject to administration. He thereupon filed a supplemental inventory October 29, 1929, accounting for the receipt of "Proceeds of War Risk Insurance policy, No. I 182941, \$6,802.67." This was the same policy which, by the terms of the will, was bequeathed to Pearl Pinegar. A supplemental petition for distribution of this sum of money was filed. Over the written objection of the administrator of the estate of Pearl Pinegar, deceased, a supplemental decree of distribution of this balance of the war risk insurance fund was made pursuant to the residuary clause of the will as follows, to "Pearl E. Pinegar, a sister, $\frac{5}{8}$ thereof," and to "George E. Mattley, a brother, $\frac{3}{8}$ thereof." From this supplemental decree of distribution, the administrator of the estate of Pearl Pinegar has appealed.

[1] Assuming, as the respondent does, that this fund from the war risk insurance policy belonged to the estate of Ernest M. Mattley, it was specifically bequeathed to Pearl Mattley Pinegar by the unambiguous terms of the will. By the language of the will, "To my sister Mrs. Pearl Mattley Pinegar, I give my War Risk Insurance File number I 182941," the testator sufficiently identified and specifically bequeathed to his sister that particular policy and the proceeds therefrom. In 28 R. C. L. 295, § 269, it is said:

"[2] "Where, by the terms of a will, the testator bequeaths a certain insurance policy or policies, * * * the legacy is specific in its nature." 2 Page on Wills (2d Ed.) 2043, § 1228; 6 A. L. R. 1374, note.

[3] A will must be construed in accordance with the intention of the testator.

There can be no question this was the intention of the testator. The balance of the proceeds from that policy did not belong to the residuum of the estate. The court therefore erred in distributing four-ninths of this fund to George E. Mattley.

The supplemental decree of distribution is therefore reversed, and the probate court is directed to distribute the entire balance of the war risk insurance policy number I 182941 to the estate of Pearl Mattley Pinegar, deceased.

All concur.

110 Cal. App. 299

ROSELLA v. PAXINOS et al.
Civ. 7449.

District Court of Appeal, First District,
Division 1, California.
Dec. 6, 1930.

Rehearing Denied Jan. 5, 1931. Hearing Denied by Supreme Court Feb. 2, 1931.

1. Appeal and error ⇨994(3).

In action for personal injuries, credibility of witnesses *held* for trial court.

2. Appeal and error ⇨1012(1).

In action for personal injuries, weight to be given testimony of witnesses *held* for trial court.

3. Appeal and error ⇨1011(1).

Findings for plaintiff in action for personal injuries could not be disturbed on appeal, notwithstanding contradiction in plaintiff's testimony, where evidence was conflicting.

4. Municipal corporations ⇨808(7).

Violation of ordinance, providing that openings in sidewalks should be guarded, if it proximately causes damage, is negligence.

5. Municipal corporations ⇨821(19).

In personal injury action, whether violation of ordinance requiring sidewalk openings to be guarded was proximate cause of injury to pedestrian, and consequently negligence, *held* for trial court.

6. Municipal corporations ⇨821(23).

In action for injuries sustained in falling down sidewalk stairway, whether trapdoor had always been left open *held* for trial court, on question whether pedestrian knew of danger.

7. Negligence ⇨67.

One not negligent may rely on presumption that others will exercise due care.

8. Negligence ⇨67.

It is not "negligence" to fail to anticipate danger which can come only from violation of law or duty on part of another.

[Ed. Note.—For other definitions of "Negligence," see Words and Phrases.]

9. Municipal corporations ⇨805(6).

Forgetfulness of known danger in sidewalk will not prevent recovery for personal injuries, unless it shows want of ordinary care.

10. Municipal corporations ⇨821(23).

In personal injury action, whether forgetfulness of sidewalk stairway down which pedestrian fell was negligence *held* for trial court.

11. Municipal corporations ⇨819(1).

Findings for plaintiff suing for injuries sustained in falling through sidewalk stairway *held* supported by testimony.

Appeal from Superior Court, City and County of San Francisco; T. H. Selvage, Judge.

Action by Joseph Rosella against Spiros Paxinos and others, doing business under the name and style of the Classic Grill, and others. Judgment for plaintiff, and Spiros Paxinos appeals.

Affirmed.

Frank J. Fontes, of San Francisco, for appellant.

Trefts & Young, of San Francisco, for respondent.

PER CURIAM.

The defendant Spiros Paxinos owned and operated a restaurant on the northeast corner of Third and Stevenson streets in San Francisco. He also maintained a stairway leading from the sidewalk on Stevenson street to the basement of the building. This stairway was parallel with the south wall of the building, the entrance thereto being from the west toward Third street. The opening was covered by two iron gratings which were fastened to the sidewalk on the south side of the entrance by means of hinges. When the gratings were raised, they were kept upright by means of bars extending across the opening to eyelets in the wall of the building. Across the east end of the opening from the easterly grating to the wall it was intended that another bar, which some of the witnesses described as a gate, should be kept in place. The purpose of this was to afford additional support to the upright gratings and protection to persons using the street.

On December 13, 1927, at about 7:30 p. m. the plaintiff, who was walking west along the north side of Stevenson street, fell through the easterly end of the opening into the basement of the building and was injured. The complaint alleged that the injuries were due

to the fact that defendant negligently left the opening unguarded. The answer denied the alleged negligence, and averred contributory negligence as a defense to the action. The court found in accordance with the complaint and against the averments of the answer. Defendant has appealed from the judgment entered against him, and contends that the findings are not supported by the evidence.

Plaintiff testified that he had been employed in selling newspapers in the vicinity of the restaurant since 1906. These he obtained from a newspaper office on Stevenson street. The night of the accident was dark and foggy, and it was testified by other witnesses that at night the opening could not be seen further away than five or six feet. A witness employed in a cigar store on the same corner also testified that he had frequently closed the bar or gate in order to prevent accidents. Plaintiff admitted that he had observed the stairway and gratings on many occasions. On the evening of the accident, after obtaining his papers, he walked west along Stevenson street, but failed to see that the stairway was open, and fell in. He testified that there was no bar in place across the same on this occasion. According to a physician, in addition to receiving bruises from the fall, he was injured in the region of the coccyx bone, which at the time of the trial in May, 1929, was still extremely sensitive. The plaintiff and other members of his family testified that he had been unable to work since the accident, and that his income from his employment had been about \$100 per month.

[1-3] As defendant points out, portions of plaintiff's testimony were contradictory, and in many particulars his recollection of events was uncertain, and his testimony that the bar or gate was not in place at the time of the accident was opposed by that of defendant and other witnesses. Nevertheless, the credibility of these witnesses and the weight to be given their testimony were questions for the trial court. We cannot say that plaintiff's testimony was inherently improbable, and, notwithstanding the contradictions therein, the conclusions of that court cannot be disturbed on appeal. *Pedrow v. Federoff*, 77 Cal. App. 164, 247 P. 212.

[4, 5] It was alleged and proved at the trial that the city and county of San Francisco had previous to the accident adopted an ordinance regulating the operation and construction of trapdoors and other openings in sidewalks. The ordinance provided, among other things, that all sides of such openings must be guarded by chains or bars, and also that it should be unlawful to keep the bars, openings, or gratings thereof open except during

the time necessary for the receiving or shipping of merchandise or supplies, and unless during the time the same remained open suitable guards or railings were provided to prevent accidents to the public. The violation of such an ordinance, if it proximately caused the damage complained of, was negligence, and this question was also one for the determination of the trial court. 19 Cal. Jur. Negligence, § 65, p. 632; *Benjamin v. Noonan*, 207 Cal. 279, 277 P. 1045.

[6-11] It is also claimed that plaintiff's knowledge of the existence of the stairway, together with his failure to observe its condition on the night of the accident, will bar a recovery. It has been held in several cases that, if a person knows of a dangerous defect in a sidewalk, he is bound at his peril to remember it. *Davis v. California St. Cable R. Co.*, 105 Cal. 131, 38 P. 647; *McGraw v. Friend, etc., Lumber Co.*, 120 Cal. 574, 52 P. 1004; *Reynolds v. Los Angeles Gas, etc., Co.*, 162 Cal. 327, 122 P. 962, 39 L. R. A. (N. S.) 896, Ann. Cas. 1913D, 34. The defendant and another witness testified that the trapdoor was always left open. There was no admission of this condition by the plaintiff; and whether it was true presented another question of fact. If the testimony was untrue, then the plaintiff, though he knew of the existence of the stairway, would have no reason to anticipate that the same would be left in a dangerous condition or that the ordinance would be violated. One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty on the part of another. 19 Cal. Jur. Negligence, § 35, p. 596; *Harris v. Johnson*, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560. Moreover, late cases hold that forgetfulness of a known danger will not always operate to prevent a recovery, for to forget is not negligence, unless it shows want of ordinary care, the question being one for the jury. *Meindersee v. Meyers*, 188 Cal. 498, 205 P. 1078; *Smith v. Southern Pacific Co.*, 201 Cal. 57, 255 P. 500; *Hayward v. Downer*, 65 Cal. App. 450, 224 P. 265. The above questions, which involved the weight to be given the testimony of witnesses, were properly for the jury or the court sitting as a jury, and we cannot say that its conclusions were unsupported.

Finally, it is urged that the damages awarded are excessive. While the evidence on this question presents some conflict, there was sufficient, if believed by the court, to justify the award, and the findings are fairly supported by the evidence.

The judgment is affirmed.

MALMSTEDT v. STILLWELL.

Civ. 7657.

District Court of Appeal, First District,
Division 1, California.

Dec. 13, 1930.

Rehearing Denied Jan. 12, 1931. Hearing De-
nied by Supreme Court Feb. 9, 1931.

1. Contracts ⇨164.

Though several contracts relating to same subject-matter must be construed together, it does not follow that for all purposes they constitute one contract (Civ. Code, § 1642).

2. Brokers ⇨54.

As affects broker's commission, vendor by accepting purchaser procured admits readiness, willingness, and ability of buyer to consummate sale.

3. Brokers ⇨54.

As affects broker's commission, vendor's execution of contract conclusively shows satisfaction with purchaser's qualifications and ability to carry out contract.

4. Appeal and error ⇨994(3).

Credibility of party as witness is question for trial court.

5. Brokers ⇨88(14).

Finding that agreement to purchase on terms agreed on was mutually abandoned after vendor was unable to procure transfer of lease held not to include finding that parties abandoned agreement to pay broker's commission.

6. Appeal and error ⇨996.

Inferences drawn by trial court, if finding substantial support in evidence, cannot be disturbed on appeal.

7. Appeal and error ⇨931(3).

Whenever from facts found other facts may be inferred which will support judgment, trial court will be deemed to have made such inferences.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by G. A. Malmstedt against F. A. Stillwell. Judgment for plaintiff, and defendant appeals.

Affirmed.

Robert E. Austin and John N. Helmick, both of Los Angeles, and J. E. Stillwell, of South Pasadena, for appellant.

W. C. Shelton, of Los Angeles, for respondent.

PER CURIAM.

This action was brought by plaintiff, as assignor of W. I. Hollingsworth and B. O. Miller, copartners doing business under the firm name of W. I. Hollingsworth & Co., to recover a broker's commission. The assignors were at all the times herein mentioned duly licensed real estate brokers. The case was tried by the court, which found for the plaintiff, and judgment was entered accordingly.

Defendant, who has appealed, claims that certain of the findings are unsupported and that the court erred in its conclusions of law therefrom.

The facts established by the evidence were as follows: In September of 1921, J. P. Simonsen and J. A. Fleming, who owned the Fountain Cafeteria in Los Angeles, wished to purchase another cafeteria. This fact was known to the brokers, who were endeavoring to procure one for the prospective buyers. Defendant and A. L. Plotner, his partner, owned and operated the Poinsettia Cafeteria, which was for sale. Knowing this, the brokers commenced negotiations with defendant for the purchase of the business, but refused to disclose the names of the prospective buyers until defendant promised to pay a commission in case of sale. This he agreed to do, and on September 28, 1921, signed and delivered to the brokers the following letter, referred to in the record as "plaintiff's exhibit 1":

"Gentlemen:—In the event a sale is consummated with your prospective tenant we hereby agree to pay you \$2,000.00, a commission on the sale price of same.

"Yours very truly, F. A. Stillwell."

At the same time defendant executed to the brokers a document referred to as "plaintiff's exhibit 2," which read as follows:

"Gentlemen:—For and in consideration of your service we hereby give you an exclusive option for forty-eight (48) hours to sell the Poinsettia Cafeteria and lease, including everything in use in it, and all broken packages, for \$50,000,—\$30,000 cash, and balance on or before six months from date of sale at the rate of 7% interest.

"Yours very truly, F. A. Stillwell."

On September 30, 1921, defendant and his partner wrote thereon the following:

"9/30 this contract is to be nolle and void after 3:30 p. m. on 9/30.

"F. A. Stillwell,
"A. L. Plotner."

The testimony shows that the figures 9/30 were intended to mean September 30. On the date last mentioned, according to the testimony, the following—which will be herein-after considered—was also written thereon by Simonsen, one of the owners of the Fountain Cafeteria:

"Accepted 9/30/21, 3 p. m. Contract to be drawn for the sale of the above.

"Fountain Cafeteria,
"By J. P. Simonsen, Prop."

On September 28 the brokers called on the owners of the Fountain Cafeteria, and showed them the above Exhibit No. 2. They thereupon offered in writing to purchase the Poinsettia Cafeteria for \$45,000, of which \$25,000, including a deposit of \$1,000 made at the time, was to be paid in cash and the balance on or before six months from the date the buyers should obtain possession. This writing—which was referred to as "plaintiff's exhibit No. 3"—was as follows:

"Received of Fountain Cafeteria check for \$1,000, being a deposit and part payment of the purchase price of the Poinsettia Cafeteria, located at 441 South Hill street. The purchase price of said cafeteria as is, including all broken packages, to be \$45,000.00 payable \$25,000.00 cash upon delivery of possession, including the above deposit, on or before October 15th, and balance on or before six months from date of possession, at the rate of six per cent (6%) interest.

"Seller agrees to deliver said premises free and clear of all encumbrances, rents and insurance to be pro-rated. This deposit is taken subject to the approval of the owner, and if not accepted said check shall be returned to the purchaser. It is also given subject to the purchaser inspecting the said premises and lease.

"W. I. Hollingsworth & Company,
"Per F. W. Kadletz.

"We hereby agree to purchase the above described premises on the terms stated in this receipt.

"Fountain Cafeteria,
"By J. P. Simonsen, Prop.
"J. A. Fleming."

The offer was submitted to defendant either on the above date or the following day. He disapproved the terms, changed the purchase price stated therein to \$50,000, the cash payment to \$30,000, the rate of interest from 6 to 7 per cent. per annum, and also inserted therein the following: "All unbroken packages to be cash on invoice and dishes not in use." He then wrote thereon the following: "Approved by owner, F. A. Stillwell," and redelivered the writing to the broker's agent. According to the latter, the writing was then returned to Simonsen and Fleming, who agreed to the changes made by defendant, at 3 o'clock p. m. of September 30, wrote their acceptance upon Exhibit No. 2 in the words and figures shown above.

It was testified that following this on the same day the document last mentioned was presented to defendant at his office.

It appears that the lease under which defendant held the premises provided that the

same should not be assigned or the premises sublet without the consent of the lessor. It was testified by the agent for the brokers that defendant was unable to obtain consent to the transfer of the lease or the subletting of the premises, and so admitted, and that thereafter on October 17, 1921, the deposit made by Simonsen and Fleming was returned to them. It was shown, however, that the latter and defendant continued negotiations, and on November 20, 1921, a contract for the sale of the cafeteria was made between them. This contract recited that the lease mentioned could not be assigned without the consent of the lessor, and that the latter's consent could only be obtained upon the payment of an increased rental. As part of this transaction, a new lease at an increased rent was executed by the owner of the premises to Simonsen and Fleming, and defendant by the contract agreed to sell the cafeteria to them for \$45,000, \$6,000 to be paid in cash and the balance in installments. The brokers' agent further testified that he was not consulted during these negotiations, and, while he sought on several occasions to communicate with defendant, the latter avoided him.

The findings which defendant contends are unsupported are as follows: The court found with respect to Plaintiff's Exhibits No. 1 and No. 2 that, while "said two instruments were executed at the same time they were not one agreement, nor were they so understood by the assignors"; also "that prior to the expiration of said forty-eight hours before the hour of 3:30 p. m. on said 30th day of September, 1921, said assignors effected a sale of said cafeteria and lease to J. P. Simonsen and J. A. Fleming, who at the time were ready, willing and able to purchase the same, and who agreed to purchase the same at the terms set forth by said defendant and agreed to by said A. L. Plotner, and said J. P. Simonsen and J. A. Fleming were accepted as purchasers by said defendant."

[1] While it is the rule that several contracts relating to the same matters are to be construed together (Civ. Code, § 1642), it does not follow that for all purposes they constitute one contract. The brokers' agent claimed that the two in question were not so intended, and the court so found. But whether this was true or not does not affect the result, as it sufficiently appears that the brokers procured from the buyers a binding obligation to purchase in accordance with the terms proposed by defendant.

[2-4] It is urged that there was no evidence that Simonsen and Fleming were able and willing to buy; but, as held in the following cases, where the owner accepts the buyer procured—which the evidence sufficiently shows was true in the present case—he thereby admits the readiness, willingness, and ability of

the purchaser to consummate the sale (Wood & Tatum Co. v. Basler, 37 Cal. App. 381, 173 P. 1109; Sobaje v. Schubert, 37 Cal. App. 709, 174 P. 364; Freeman v. Creelman, 60 Cal. App. 14, 212 P. 56); and it has also been held that the execution by the owner of a contract of sale is conclusive proof that he is satisfied with the qualifications of the purchaser and his ability to carry out the terms of the contract (McNamara v. Steckman, 202 Cal. 569, 262 P. 297). While the defendant testified that the purchasers were unable or unwilling to make the payments provided, his credibility was a question for the trial court. We think it clear that the real reason for the failure to consummate the sale was defendant's inability to transfer the lease or sublet the premises. In this connection, although Plaintiff's Exhibit No. 2 expressly provided that the sale should include the lease, Plaintiff's Exhibit No. 3 made no express reference thereto, but provided only that the seller should deliver the premises free and clear of all incumbrances. However, as stated, these documents should be construed together; and, from the evidence taken as a whole, it was manifestly the intention that the lease should be included in the sale.

[5] Stress is laid upon the further finding that, after defendant was unable to procure a transfer of the lease, the agreement to purchase on the terms agreed was mutually abandoned. It is urged that this finding refers to the brokers as well as to the parties to the agreement to purchase. There is no merit in this contention. Moreover, the evidence sufficiently shows that there was no abandonment of the brokers' claim for commission, and that the deposit was returned only after the defendant had informed the brokers that he could not perform.

[6, 7] The evidence in many particulars was conflicting, and appellant urges that inferences supporting his contentions should properly have been drawn therefrom. The rule is well settled, however, that the inferences drawn by the trial court, if they find substantial support in the evidence—which was the case here—cannot be disturbed on appeal (Russell v. Ramm, 200 Cal. 348, 254 P. 532); and whenever from the facts found other facts may be inferred which will support the judgment, such inferences will be deemed to have been made by the trial court (Anglo-California Trust Co. v. Oakland Railways, 193 Cal. 451, 225 P. 452).

No other questions raised by appellant require discussion.

The evidence was sufficient to support the conclusions of the trial court, and nothing appears which would warrant a reversal of the judgment.

The judgment is affirmed.

FIRST NAT. BANK OF SAN PEDRO v.
STANSBURY et al.*
Civ. 6038.

District Court of Appeal, Second District,
Division 1, California.

Dec. 15, 1930.

Hearing Granted by Supreme Court Feb. 9,
1931.

Appeal and error ⇨1217.

Since appellate court's jurisdiction ceases when remittitur issues, superior court *held* authorized to stay execution on judgment for appeal costs, pending final determination of principal action.

CONREY, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by the First National Bank of San Pedro against Charles Stansbury, with a cross-complaint by defendant, wherein John Balch was named as cross-defendant. From an order staying execution on a judgment for costs of appeal, pending final determination of issues on subsequent appeal, plaintiff and cross-defendant appeal.

Affirmed.

Goodspeed, Pendell & Neff, of Los Angeles, for appellants.

Miller & Ellis, of Los Angeles, for respondent.

YORK, J.

On August 3, 1923, a judgment for costs of appeal in the sum of \$1,242.55 was entered in above cause in favor of appellants and against respondent, in accordance with remittitur of this court on partial reversal upon an appeal in said cause reported in 62 Cal. App. 336, 217 P. 91. A mandamus proceeding was instituted by these appellants which resulted in a judgment against them for costs in the sum of \$77.10, and a marginal satisfaction of the judgment of August 3, 1923, was entered to the extent of the sum of \$77.10.

Upon a second trial of the principal cause judgment was rendered August 10, 1927, in favor of respondent and against appellants for \$31.75 costs only, upon which judgment an appeal by the bank and Balch is still pending.

Under date of October 13, 1927, appellants caused a writ of execution to issue on the judgment of August 3, 1923, for the collection of the unpaid portion thereof. Respondent thereupon obtained from the superior court of Los Angeles county an order to show cause why appellants should not be enjoined from collecting the judgment of August 3, 1923, until the appeal taken from the judgment of August 10, 1927, should be determined. On

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 5 P.(2d) 11.

November 1, 1927, said superior court made its order staying execution of the judgment of August 3, 1923, pending final determination of the issues in the principal action, and this appeal is taken from such order.

Appellants' main point is that the trial court had no power to stay execution on a judgment of the appellate court for costs on appeal as provided in the remittitur.

The cases of *Granger v. Sheriff*, 140 Cal. 195, 73 P. 816, and *Fischer v. Lukens*, 41 Cal. App. 358, 182 P. 967, both hold that when the remittitur issues the jurisdiction of the appellate court ceases, and that of the superior court reattaches. We therefore hold that the superior court of Los Angeles county had the power, upon a satisfactory showing by respondents, to stay execution of the judgment until a final determination could be had of the issues in the main action. No abuse of its discretion on the part of the superior court is shown herein.

The order is affirmed.

I concur in the judgment: HOUSER, J.

CONREY, J. (dissenting).

I dissent. First, I agree that the record is sufficient to call for a decision on the merits. Respondent contends that the bill of exceptions was not presented within the time allowed by law, and that for that reason there is no record authorizing this court to consider the merits of the appeal. The order staying execution was made and filed on the first day of November, 1927. On November 10, an order was made and filed, extending for thirty days from that date, the time to prepare and serve a draft of bill of exceptions. On November 29, the proposed bill of exceptions was served on the attorneys for respondent. It was objected by the attorneys for respondent, on the presentation of the bill, that the same could not be considered, because a rule of the superior court, referring to orders extending time, required that "every such order shall be served and filed before ten o'clock a. m. of the next judicial day," whereas, in fact (as shown by affidavit), the order extending time was never served on respondent or his attorneys. The court overruled this objection, and settled the bill. It is my opinion that the said rule of court, in relation to service of the order, was not imperative in any such sense that the failure to serve deprived the court of jurisdiction to settle the bill. The refusal of the court to sustain the objection

presumably was based upon a determination by the court that the omission to serve was inadvertent and excusable. *Lynch v. Coe*, 203 Cal. 422, 264 P. 747.

The order of November 1, 1927, from which the appeal now before us has been taken, was miscalled an order or decree of injunction. The proceeding is in its nature an application for stay of proceedings in execution of the judgment. The general question at issue may be stated thus: When, on appeal, a judgment has been reversed, and costs of the appeal have been awarded to the appellant and judgment for costs entered pursuant to the directions of the appellate court; and when thereafter the case has been tried again, with judgment in favor of the party against whom costs of the appeal had been assessed; and when thereafter a second appeal is pending, and issues are involved which ultimately might result in a money judgment against the party who obtained the costs judgment on the first appeal; may the trial court stay execution on the costs judgment, in order that the judgment debtor, if ultimately successful in the assertion of his claims in the action, may then set off the final judgment obtained by him, against the costs judgment of the first appeal? But this general question must be modified for the purpose of application to the present appeal. It should be remembered that the pending appeal in the Supreme Court is an appeal by the Bank and Balch. In that court Stansbury, as respondent, is defending a judgment in his favor for the sum of \$31.75. If he is successful there he will have a final judgment for that sum only. The record before us shows, by an affidavit presented to the court on the hearing of the motion for stay of execution, and not denied, that appellants had given to the sheriff written instructions "to offset and satisfy" said sum of \$31.75 out of the execution then in his hands. Under these circumstances, it seems clear that no lawful reason exists to justify a further stay of execution. The proceeding for stay of execution was not a suit in equity, based upon facts which, if proved, would justify interposition by a chancëllor to prevent enforcement of the judgment. Decisions relating to such suits in equity have no proper application to this case. So far as the case made by this record is concerned, the order staying proceedings in execution of the costs judgment against respondent is an arbitrary denial of a legal right.

For the foregoing reasons, I think that the order should be reversed.

MCGAFFEY CANNING CO., Inc., v. BANK OF AMERICA et al.

Civ. 7232.

District Court of Appeal, First District,
Division 1, California.

Nov. 10, 1930.

Rehearing Denied Dec. 10, 1930. Hearing Denied by Supreme Court Jan. 8, 1931.

1. Attachment ⇨296.

Third-party claim not being pleading, technical niceties and verification should not overshadow claimant's right to possession of attached property (Code Civ. Proc. § 689).

2. Attachment ⇨296.

Third-party claim to attached property in form of affidavit setting out facts and sworn to is "claim verified by oath" within statute (Code Civ. Proc. § 689).

"Verify" is defined as to testify or affirm formally or upon oath.

[Ed. Note.—For other definitions of "Verification; Verify," see Words and Phrases.]

3. Attachment ⇨296.

Third-party claim in form of affidavit sworn to before authorized officer was sufficient without phraseology for verifying pleadings (Code Civ. Proc. § 689).

4. Attachment ⇨299.

Sheriff was not chargeable with conversion in respect to attached property released under third-party claim after refusal of attachment creditor to furnish indemnity bond (Civ. Code, § 3440).

Since the contents of the third-party claim were sufficient to state an apparent right in claimant, as pledgee, to possession of attached property, the sheriff was not required to determine at his peril whether or not the circumstances connected with the issuance of warehouse receipts and delivery to claimant as set out in third-party claim satisfied provisions of Civ. Code, § 3440.

5. Sheriffs and constables ⇨140.

Evidence respecting sheriff's release of attached property did not warrant nonsuit as to sheriff in conversion action.

Although greater part of attached property was released in accordance with third-party claim after attachment creditor's failure to furnish indemnity bond, there was affirmative testimony that, in addition to property claimed, there was other additional property apparently released, although of minor value.

6. Attachment ⇨299.

Statutory provision authorizing sheriff to release property claimed by third person, unless indemnifying bond is given, does not protect third person asserting invalid claim (Code Civ. Proc. § 689).

7. Attachment ⇨299.

Failure of attaching creditor to furnish indemnity does not absolve hostile claimant of all liability for wrongful appropriation.

8. Attachment ⇨177.

Lien acquired by attachment is vested interest affording specific security for satisfaction of debt.

9. Attachment ⇨186.

Attached property in custody of sheriff was constructively in possession of attaching creditor through sheriff as agent.

10. Trover and conversion ⇨17.

Any one with lien on property may maintain action for damages against person whose acts diminish value of security or render it ineffectual.

11. Trover and conversion ⇨3.

Though conversion action requires evidence of tortious exercise of dominion, defiance of injured party's rights need not be willful or corrupt.

12. Trover and conversion ⇨4.

Any wrongful assumption of authority over chattels, inconsistent with another's right of possession or subversive of vested interest, amounts to "conversion."

[Ed. Note.—For other definitions of "Conversion," see Words and Phrases.]

13. Trover and conversion ⇨17.

Special interest of attaching creditor in property held in sheriff's custody as agent is sufficient foundation for action for conversion.

14. Trover and conversion ⇨4.

Affirmative act in defiance of attachment lien without legal excuse and leading to relinquishment of property by sheriff constitutes "conversion."

15. Attachment ⇨313.

Claimant securing release of attached property under third-party claim, unless in fact legally justified in claiming as trustee, was liable in conversion for nullification of attachment lien.

16. Trial ⇨165.

Testimony conflicting with testimony supporting plaintiff's contention must be disregarded for purposes of nonsuit.

17. Warehousemen ⇨15(3).

Delivery of warehouse receipt to one lending money on security of merchandise stored is equivalent to delivery of merchandise.

18. Warehousemen ⇨15(3).

Efficacy of pledgee's symbolic possession of pledged property by delivery of warehouse receipt depends on pledgor's complete relinquishment of possession and control.

19. Warehousemen ⇨15(3).

Warehousing by pledgor without open, visible, unequivocal change in possession manifested by substantial outward signs that control of property has wholly ceased is ineffective (Civ. Code, § 3440).

20. Pledges ⇨11.

"Actual change of possession" required to validate pledge means actually existing and truly and absolutely carried out (Civ. Code, § 3440).

[Ed. Note.—For other definitions of "Actual and Continued Change of Possession," see Words and Phrases.]

21. Pledges ⇨11.

Actual change of possession validating pledge must be shown by particular facts and circumstances and usually determined by court or jury from all evidence (Civ. Code, § 3440).

22. Warehousemen ⇨15(3).

Appointment of owner, or one of staff, as warehouseman's custodian of goods stored, is circumstance for consideration on question of actual change of possession.

23. Pledges ⇨11.

Pledgee of property in pledgor's field warehouse must so segregate and mark it as to indicate his possession to ordinarily prudent business men.

24. Pledges ⇨11.

Actual, open, visible, and unequivocal change of possession validating pledge of attached goods to holder of warehouse receipt held for jury (Civ. Code, § 3440).

Appeal from Superior Court, Ventura County; T. A. Norton, Judge.

Action by McGaffey Canning Company, Inc., against the Bank of America and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Superseding opinion in 284 P. 977.

Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles, for appellant.

James C. Hollingsworth, of Ventura, for respondents Robert E. Clark and National Surety Co.

Frank M. Bering, of Los Angeles, for respondents Bank of America and Lawrence Warehouse Co.

JOHNSON, Justice pro tem.

This action, begun in Los Angeles county and afterwards transferred for trial to Ventura county, sounds in conversion. A jury was impaneled for the trial of the case, but, the court having granted a motion for a nonsuit, the plaintiff appealed from the judgment thereupon entered in favor of all the defendants.

According to the record, the motion purports to have been made only on behalf of the defendants Bank of America and Lawrence Warehouse Company. Upon the appeal, however, the parties have dealt with the case as if the other defendants had joined in the motion, and, accordingly, we do likewise.

Our previous decision of the appeal (284 P. 977) was vacated and a reargument had in order to give consideration to certain matters which were not discussed in the original briefs; but were first pressed upon the attention of the court in the petitions for rehearing. In fact, one of the legal points now stressed by plaintiff was not raised at all until presented in a supplemental brief filed by plaintiff after the reargument. To that brief and the new point there urged the defendants have made no reply.

This action is a sequel to an action brought by the same plaintiff in Los Angeles county against William F. Gasman, in which judgment for \$10,240 went in favor of plaintiff on May 2, 1924. In that action plaintiff had caused a writ of attachment to issue on August 20, 1923, to the sheriff of Ventura county. The writ was accompanied by instructions to the sheriff to attach all canned goods, cans, cases, and other materials of the debtor in the canning plant located at Camarillo, in Ventura county, operated under the name of Ventura County Canning Company, which was a copartnership composed of Gasman and two others, William Heck and W. A. Clarke. According to the return of the sheriff, he levied upon 12,000 cases of canned apricots and all other personal property of said Gasman by taking such property into his custody and placing a keeper in charge. Of the 12,000 cases of apricots, 4,000 are described in the return as No. 10 cans, and 8,000 as No. 2½ cans. Thereupon, the Bank of America, through its vice president, made a third-party claim to 7,773 cases of No. 2½ cans and 3,958 cases of No. 10 cans, or a total of 11,731 cases, which

were then in the custody of the sheriff under the writ, and valued in the claim at \$40,000.

In its claim the bank averred that it had made certain loans to the Ventura County Canning Company on the security of the property described, and that such property was held by the bank in pledge by virtue of warehouse receipts issued by the Lawrence Warehouse Company in favor of the bank, and delivered into the bank's possession before the attachment. The Lawrence Warehouse Company is a corporation with its office and principal place of business in Los Angeles; and the contention of the defendants is that this company was warehousing the canned apricots in the premises in which the canning operations were being conducted by the Ventura County Canning Company.

Upon receipt of the bank's claim the sheriff duly notified the plaintiff. After some hesitation the plaintiff refused to furnish an indemnity bond to the sheriff, upon the ground that the claim was legally insufficient, and that there had not been the change of possession required by law for consummation of a pledge. Left without the protection of an indemnity bond, the sheriff withdrew his keeper, thus releasing from his custody, not only the 11,731 cases claimed by the bank, but also whatever else had been seized under the writ. The apricots included in the claim of the bank and so released from attachment were ultimately delivered by the warehouse company to the bank and sold by the bank for its own account, the entire proceeds being applied towards satisfaction of its loans.

The judgment obtained later by plaintiff against Gasman remaining wholly unsatisfied, plaintiff began this action on December 8, 1924 against the bank, the warehouse company, the sheriff, and the surety on the sheriff's official bond, to recover damages for conversion.

[1-3] So far as the sheriff and his surety are concerned, the chief point presented by plaintiff relates to the sufficiency of the third-party claim. It was made on behalf of the bank by the vice president in the form of an affidavit, to which the affiant took oath before a notary public. Plaintiff contends that an oath so taken by a claimant, without addition of the phraseology used in verifying a pleading, is not a "claim verified by his oath" within the meaning of section 689, Code of Civil Procedure. Such a claim, however, is not a pleading, and may frequently have to be drawn by persons unfamiliar with legal jargon. The affidavit criticized conforms to the usual practice, and in such matters technical niceties should not overshadow the rights of a claimant to legal possession. One of the definitions of the word "verify" in the Standard Dictionary is "to affirm under oath," and in the New English Dictionary one of the meanings given is "to testify or affirm formally or upon oath." In our opinion an affidavit setting out the

facts and sworn to before an authorized officer meets fully the demands of the law, and puts the attaching creditor to his election either to protect the sheriff with a sufficient indemnity bond or to submit to release by the sheriff of the property claimed.

The plaintiff argues that the sheriff's liability is governed by the decision in *Arena v. Bank of Italy*, 194 Cal. 195, 228 P. 441. In that case, however, there was first filed a claim clearly insufficient on its face, and hence, under the law as it read at the time, the claim furnished no basis for the demand for indemnity made by the sheriff. An amended claim was then filed, and, upon the strength of the amended claim, the sheriff, without any further demand, released the attached property. Such release, without notice to the attaching creditor or renewal of the demand for indemnification, was held to be contrary to law. The case has no similarity to the case before us.

In this instance the contents of the claim were sufficient to state an apparent right in the bank, as a pledgee, to possession of 11,731 cases, and the sheriff was not required to assume a judicial pose and determine, at his peril, whether or not the circumstances connected with the issuance of the warehouse receipts and their delivery to the bank satisfied the provisions of section 3440 of the Civil Code. Where a litigant's courage oozes under the pressure of a demand for indemnification against a third-party claim sufficient on its face, the law will not make the sheriff the scapegoat. *Taylor v. Bernheim*, 58 Cal. App. 404, 408, 209 P. 55.

[4, 5] So far, then, as concerns the 11,731 cases claimed by the bank, the sheriff is not chargeable with conversion. But his return shows seizure and custody of a total of 12,000 cases of apricots and all other personal property of the debtor found in the premises. Under section 4159 of the Political Code the sheriff's return is prima facie evidence of the facts therein stated; and, in addition, the record contains affirmative testimony of the undersheriff and of William Heck, one of Gasman's partners, that, besides the apricots claimed, there was a small lot of canned goods and some other things stored in the warehouse. Such additional property, which was apparently released by withdrawal of the keeper, was clearly of minor value; and in the briefs originally filed by plaintiff no charge on this score was made against the sheriff or his surety. In plaintiff's petition for rehearing, however, the contention was made that the sheriff had released, to plaintiff's prejudice, property not included in the bank's claim, and that as to such property, at any rate, plaintiff was entitled to have the case submitted to the jury. The plaintiff is technically within its rights in this contention, and we must hold that, upon the evidence as it stood at the time of the motion,

neither the sheriff nor his surety was entitled to a judgment of nonsuit.

The really vital questions in the case, between the plaintiff on the one hand and the bank and the warehouse company on the other, are whether, as to the property claimed by the bank, there had been a change of possession sufficient to protect the bank as a pledgee; and, if not, whether dominion and control achieved by interjection of a wrongful third-party claim, and the resulting defeat of the attachment lien, amounted to a conversion of the property so taken from the custody of the sheriff.

This latter question was not raised in the trial court on the motion for a nonsuit, that motion having been predicated and granted solely upon the asserted ground that the evidence conclusively showed, as a matter of law, that there had been an actual delivery of possession by the Ventura Canning Company to the Lawrence Warehouse Company, which had issued its warehouse receipts to the Bank of America and was at the time of the attachment maintaining possession in behalf of the bank. The defendants insist that the warehouse company was using the premises of the Ventura Canning Company as a so-called "field warehouse," and had acquired, as a warehouseman, sufficient legal possession for the issuance of effective warehouse receipts.

In determining the propriety of the judgment of nonsuit in favor of the bank and the warehouse company, the question whether liability for conversion may follow procurement of possession by the interposition of an unsustainable third-party claim may more conveniently be considered before adverting to the subject of "field warehousing."

The bank in its petition for rehearing contended that plaintiff's failure to maintain the attachment by giving the sheriff an indemnity bond worked a forfeiture of the attachment lien, leaving the property claimed as fully subject to the control and disposition of the claimant as if the sheriff had never made seizure, and that as a result no action for conversion could lie in favor of the plaintiff.

Such result undoubtedly follows when an attachment is intercepted by a claim sufficient in form which is also lawfully grounded. But plaintiff in its brief, filed after the reargument, urged for the first time that the frustration of an attachment lien by assertion of a claim wrongful in fact must necessarily find its remedy in an action for conversion. This contention, made late it is true, has not been answered by the defendants, and on neither side do the briefs contain any citations directly on the point. We have been left, therefore, to our own independent study and research.

[6] Section 689 of the Code of Civil Procedure authorizes the sheriff to release attached property claimed by a third person, unless the attaching creditor gives the sheriff an indem-

nifying bond in double the value of the property. This provision, as we conceive, is for the protection of the sheriff, and is not designed to give immunity to a third person who defeats the attachment by assertion of a specious or invalid claim.

[7] It is true that the attaching creditor may preserve his lien by indemnifying the sheriff, but that may not always be a practicable remedy. In this instance the value placed on the property claimed was \$40,000; and the plaintiff had to elect between furnishing a bond of \$80,000 or submitting to relinquishment of custody by the sheriff. One might well pause under such circumstances and it may not be said that the failure of an attaching creditor to furnish indemnity absolves a hostile claimant of all liability for wrongful appropriation. *Smith v. Kaufman*, 94 Ala. 364, 367, 10 So. 229.

[8] The lien acquired by an attachment is a vested interest affording specific security for satisfaction of the debt put in suit. If this security is made worthless by unlawful procurement of the property under an invalid third-party claim, there is no undertaking to which the attaching creditor may have recourse. Hence, without immediate opportunity for a judicial probe of the claimant's title, the creditor must go remediless, unless the law reserves to him a right of action for damages for tortious intermeddling with his attachment lien. In this connection it is to be noted that at the time in question the statute did not provide, as it now does, for an immediate judicial hearing, on petition of the attaching creditor, to determine the title of the claimant.

[9, 10] While the property was in the custody of the sheriff, it was constructively in the possession of plaintiff through the sheriff as his agent. *Taylor v. Bernheim*, 58 Cal. App. 404, 408, 209 P. 55. And one who has a lien on property, though not in actual physical possession of it, may maintain an action for damages against any person whose acts diminish the value of the security or render it ineffectual. *Hansbrough v. Standrod & Co.*, (Idaho) 286 P. 923; 11 C. J. 9, § 19.

[11] While an action for conversion requires evidence of a tortious exercise of dominion, the defiance of the injured party's rights need not be willful or corrupt. 24 Cal. Jur. 1023. It is the substantial injury inflicted which constitutes the gravamen of the action.

[12] Any wrongful assumption of authority over chattels, inconsistent with another's right of possession or subversive of his vested interest therein, amounts to conversion. Thus, in *Cobb v. Dows*, 9 Barb. (N. Y.) 230, 242, quoted by our Supreme Court in *Dodge v. Meyer*, 61 Cal. 405, 421, it is said: "The proof need not show a tortious taking, or that

the defendants acted in bad faith. If it should appear that they obtained the goods fairly from a person whom they had reason to think was the true owner, or if they acted under a mistake as to the plaintiffs' title, or under an honest but mistaken belief that the property was their own, they would still be liable to plaintiffs if their acts in regard to it amount to a conversion. If they have taken it into their own hands or disposed of it to others, or exercised any dominion over it whatever, they are guilty of a conversion, and their liability to plaintiffs is established." An unjustified claim of title may amount to conversion (*Kilmer v. Hutton*, 131 App. Div. 625, 116 N. Y. S. 127, 136); and, though the claimant may act in good faith or under mistake, yet he is not exonerated from liability where the law charges him with the duty to know before he intrudes. (*First National Bank v. Morgan*, 213 Ala. 125, 128, 104 So. 403; *U. S. Zinc Co. v. Colburn*, 124 Okl. 249, 250, 255 P. 688).

[13, 14] The special interest which an attaching creditor has in property held in the custody of the sheriff as his agent is a sufficient foundation for an action for conversion. *Carvell v. Weaver*, 54 Cal. App. 734, 737, 202 P. 897. And an affirmative act in defiance of the attachment lien, done without legal excuse and leading to relinquishment of the property by the sheriff, does constitute conversion. In *Gafford v. Stearns*, 51 Ala. 434, 442, the court said: "Possession, and the right of possession, accompanied by a lien for the payment of money advanced, or a debt previously contracted, entitles the plaintiff to maintain the action against any one disturbing his possession." In consonance with this principle, a purchaser of grain, in *Hahn v. Sleepy Eye Milling Co.*, 21 S. D. 324, 112 N. W. 843, was held liable in conversion to a threshing company which had a paramount statutory lien. In like manner, in *Kennard v. Harvey*, 80 Ind. 37, the purchase and removal of a tenant's crop, with notice of a landlord's statutory lien, was declared to amount to conversion. So also, in *Hugo State Bank v. Hugo Nat. Bank*, 96 Okl. 135, 220 P. 868, appropriation by the defendant of crops on which a lien had been created by contract was treated as a conversion. A somewhat similar case arose in *Rew v. Maynes*, 147 Iowa, 15, 125 N. W. 804. In that case, while the judgment went against the landlord because he predicated his right of recovery on ownership of the crop instead of on impairment of his lien, the court took occasion to mark the distinction. "If," it said, "plaintiff had predicated his right to recover on his contract lien, and demanded from defendant possession of the corn on the ground that the security of his lien was impaired to the extent to which corn was taken from the premises by defendant, he would have had a right of action for conversion." Again, in *Mogul Producing & Re-*

fining Co. v. S. Engine & Pump Co. (Tex. Civ. App.) 244 S. W. 212, a materialman, who had a lien for removable pumps installed in a refinery, recovered damages for conversion from a purchaser of the property who refused to surrender the pumps. In analogy with the cases cited, reference may be made to *Interstate National Bank v. McCormick*, 67 Mont. 80, 214 P. 949, 34 A. L. R. 721. There, goods shipped by rail to a buyer were detained in the custody of the carrier by an injunction procured by the buyer in an action against the seller, and were so held for eighteen days, until demurrage charges exceeded the value. The draft for the purchase price, to which the bill of lading was annexed, was payable to the bank, which, not being a party to the injunction suit, could have no recourse to the injunction bond. Accordingly, since the injunction interfered unlawfully with the bank's right of control and disposition of the goods, the bank was adjudged entitled to recover damages from the buyer in an action for conversion.

In accord with the views expressed in the cases cited, we have the declaration of our own Supreme Court in denying the petition for rehearing in *Arena v. Bank of Italy*, 194 Cal. 195, 211, 228 P. 441, 448. Speaking there of release of attached property on a third-party claim insufficient in law, the court said: "This being so, and said bank having been a co-actor with its codefendant, the sheriff, in procuring an unlawful release of the property in question from the lien of said attachment and the delivery thereof to itself, it must be held liable for whatever damages the plaintiff sustained from the conversion of said property accomplished thereby." In the *Arena* Case the claim presented was insufficient on its face; but, as to a claimant, we perceive no difference in principle, whether the destruction of the attachment lien is accomplished by a claim insufficient on its face or by a claim which, though valid on its face, is invalid in fact. In either case the injury inflicted is the same.

[15] Accordingly, we reach the conclusion here that, unless the Bank of America was in fact legally justified in claiming as a pledgee, the plaintiff should be entitled to recover in conversion for the nullification of its attachment lien.

We are thus brought back to the inquiry whether it may be said that, as a matter of law, plaintiff's evidence conclusively established the existence of a valid pledge to the bank.

In considering this question it will be necessary to have in mind the circumstances surrounding the dealings between the parties. The canning business of the Ventura County Canning Company was carried on in a workshop or factory at Camarillo, rented from the California Fruit Confection Company, which

conducted its business on the other side of a wooden partition in the same building. The rent payable by the canning company was 12½ cents per case, and its output for the canning season was about 50,000 cases. A man named Pace, employed by the canning company, served as its cookroom foreman and superintended the canning operations, at a salary of \$60 per week.

With the consent of its landlord, the canning company, on June 28, 1923, sublet its entire shop, on a month to month tenancy, to the Lawrence Warehouse Company, at a rent of \$1 per month, for warehouse purposes. This lease was recorded July 28, 1923.

Notwithstanding this sublease the canning company continued to conduct its business in the shop as before, using during the apricot season 150 to 200 employees. Pace continued to act as cookroom foreman; and at the same time he acted also as the sole representative of the Lawrence Warehouse Company on the premises. In fact, he drew his salary of \$60 a week from the warehouse company, and that company then rendered a bill for the amount to the canning company. Practically all Pace's time was given to superintendence of the canning processes. At night an employee of the canning company slept on a cot in a cubby-hole above a small office partitioned off from the shop, and during the night the premises with its contents were in his care.

When the cans had been filled and were ready for stacking, they were moved on trucks to another part of the shop and stacked by skilled employees of the canning company, in rows set about four and a half feet apart, and reaching to the ceiling. At the time of the attachment there were three or four such stacks in place. Frames made of slats were placed around the several stacks for the purpose of separating them and simplifying the count. The canning was done at the north end of the shop and the storage at the south end. There was nothing to separate the canning department from the storage department except an intervening space about fifteen feet in width.

As the cases were stacked, they were inventoried by Pace who kept the records. He then issued nonnegotiable warehouse receipts for the Lawrence Warehouse Company. The form used was an acknowledgment of receipt for storage "for account of, and to be delivered upon written order, without surrender of this receipt, to Bank of America, Los Angeles."

Referring to these receipts, Heck, one of the partners interested in the cannery, said in his testimony: "We jumped in the car, as soon as we got them, and went to Los Angeles, and to the Bank of America, and got all the money we could."

As receipts were issued, stack cards of the Lawrence Warehouse Company were placed

on the stacks, about six feet from the floor, each specifying the aisle, stack, and mark, and giving the date, lot number, and quantity. These cards bore, also, the statement, "Warehoused to Bank of America."

When fruit was to be marketed, a release was issued from the Los Angeles office of the Lawrence Warehouse Company on order of the Bank of America; and, upon delivery of the release to Pace, withdrawal of the quantity designated followed. The cans were then labeled, packed in cases, and shipped by the canning company to fill orders obtained through brokers, who appear to have assumed responsibility to the bank for the proceeds of sale.

The canning company really paid Pace's salary; and though the warehouse company, according to the sublease, was charged the nominal rent of \$1 per month, there was an accompanying agreement obligating the canning company to pay the warehouse company for issuing receipts three cents per case for the first 50,000 cases and lesser amounts for additional quantities.

[16] No sign of the Ventura County Canning Company seems to have been displayed on the building. There was a sign of the California Fruit Confection Company on the outside, and a sign of the Lawrence Warehouse Company inside the shop near the south end. While Mr. Heck said the warehouse company had two of its signs on the outside, his co-partner, Mr. Clarke, said there was none on the outside to his knowledge. For purposes of nonsuit the testimony of Heck on this point must be disregarded.

The question now before us is whether, under the circumstances recited, there was error in granting the motions of the bank and the warehouse company for a nonsuit instead of letting the case go to the jury as to them.

[17, 18] When there is actual delivery of merchandise to a warehouseman, with actual and explicit change of possession, and a warehouse receipt is issued and delivered to one lending money on the security of the merchandise in store, the delivery of the warehouse receipt is the legal equivalent of the delivery of the merchandise itself; but such symbolic possession by the pledgee is dependent for its efficacy upon complete and actual, as distinguished from merely formal or colorable, relinquishment of possession and control by the pledgor.

If, under the facts of this case, there was a transfer of possession from the canning company to the warehouse company of such exclusive character that it must be declared, as a matter of law, that there was indisputable compliance with the requirements of section 3440, Civil Code, then the judgment of nonsuit was properly entered; but if a contrary conclusion was reasonably deducible from the

evidence, the case should have been allowed to go to the jury as the triers of the facts.

It is contended by the defendants that the warehouse company used the premises as a so-called "field warehouse," and cases from other jurisdictions are cited in support of such a system and as authority for the order of nonsuit.

Union Trust Co. v. Wilson, 198 U. S. 530, 25 S. Ct. 766, 49 L. Ed. 1154, certifies answers to certain questions propounded by the Circuit Court of Appeals in a case arising in Illinois. A leather dealer named Flanders walled off a part of his basement and let it at a nominal rent to the Security Warehouse Company. The compartment had doors fastened with padlocks bearing the name of the company, and the warehouse company had the only keys. It had also a key to the building, so as to have access both day and night. There were two signs on the outside, stating in large letters that the premises were occupied by the company as a public warehouseman. The company received leather from Flanders, stored it in the locked compartment, and issued warehouse receipts, which were indorsed by Flanders to the Union Trust Company as security for loans. Flanders became bankrupt and the trustee for creditors filed a bill, claiming the leather in storage. The court said that no question under the statutes of Illinois was suggested, and that since the warehouse company had the leather under lock and key in a place not visible to Flanders' patrons, to which the company had legal title and right of free access, and since there was no reason to doubt the good faith of the transaction, there was a sufficient delivery to validate the pledge. In so ruling the court is careful, however, to say (page 537 of 198 U. S., 25 S. Ct. 766, 768): "We deal with the case before us only. No doubt there are other cases in which the exclusive power of the so-called bailee gradually tapers away until we reach those in which the courts have held as matter of law that there was no adequate bailment."

Manufacturers' & Traders' Bank v. Gilman (C. C. A.) 7 F.(2d) 94, 95, is a similar case. There engines and engine parts were kept in a locked room for the bank as a pledgee. There was a written indenture of trust, whereby the general manager of the pledgor was named as trustee for the bank. He had the key to the room, which was rented to the bank, and the stored material was tagged so as to state that it was "Property of N. B. Gladwin, Trustee." In a proceeding instituted by the receiver in bankruptcy against the bank it was held that there was a valid pledge.

Sexton v. Kessler & Co., 225 U. S. 90, 32 S. Ct. 657, 56 L. Ed. 995, is a case brought by a trustee in bankruptcy to set aside a certain alleged illegal preference in the transfer of securities. The New York house of Kessler

& Co. was indebted to the English house of the same name, and, for the protection of that creditor, set apart certain earmarked securities, which were kept on a separate shelf in the firm's vault and listed in a document transmitted to the English house. In the panic of 1907 the New York house became embarrassed and filed a petition in bankruptcy. Before doing so, however, it delivered the earmarked securities to an agent of the English house then in New York. It was held that the English house had an equitable lien superior to the rights of the trustee. This case can hardly be said to have a bearing on the case before us, especially since such securities are not in the same class with goods and chattels.

The remaining cases cited by defendants were either heard upon appeal after a decision in the trial court upon the facts, or were decisions rendered by the trial judge after taking the evidence himself, or upon a hearing after reference to a master to take testimony and report his conclusions. Thus, in *Dunn v. Train* (C. C. A.) 125 F. 221, 222, the court said: "It being a question of intention, and a question whether the change in the situation of the property was such as to be notice of a change of possession, it was, under the circumstances, largely a question of fact, to be determined under rules of law." And the findings of the trial judge in favor of the pledgee were sustained. A similar situation existed in *Love v. Export Storage Co.* (C. C. A.) 143 F. 1.

Bush v. Export Storage Co. (C. C.) 136 F. 918, and *Evans v. New York & P. S. S. Co.* (D. C.) 163 F. 405, were decisions by the trial judge after submission of the cause upon the evidence taken before him. Again *Philadelphia Warehouse Co. v. Winchester* (C. C.) 156 F. 600, and *American Can Co. v. Erie Preserving Co.* (C. C.) 171 F. 548, were decisions confirming the master's report. *Israel v. Woodruff* (C. C. A.) 299 F. 454, falls into the same category, being an appeal from a decree confirming the report of the master. The Appellate Court there said (page 456 of 299 F.): "The experienced trial judge having approved the master's report, it will be permitted to stand, unless an obvious error has intervened in the application of the law, or some serious or important mistake appears to have been made in the consideration of the evidence." *National Union Bank v. Shearer*, 225 Pa. 470, 74 A. 351, 17 Ann. Cas. 664, and *State v. Robb-Lawrence Co.*, 17 N. D. 257, 115 N. W. 846, 16 L. R. A. (N. S.) 227, have but a remote application to the present case; but each came up for review of a judgment entered upon the verdict of a jury, and the judgment was affirmed.

While in *American Can Co. v. Erie Preserving Co.* (C. C.) reported in 171 F. at page 548, the trial judge approved the master's

report to the effect that the goods pledged were conspicuously marked and set apart in a way to give the pledgee exclusive dominion, yet in a companion case, bearing the same title and reported in the same volume at page 540, the same judge, dealing with other goods, found that there was only a semblance of an attempt to warehouse those goods in the premises of the pledgor. Accordingly in that case he held that there was no such change of possession as to validate the receipts in the hands of the pledgee. The judgments in both these cases were affirmed on appeal in *American Can Co. v. Erie Preserving Co.* (C. C. A.) 183 F. 96, the court, as to the case reported in 171 F. 540, saying (page 98 of 183 F.): "Warehouse receipts would give constructive possession of goods actually warehoused; but it is plain that the warehousing company did not maintain a warehouse in any proper sense, because it had no exclusive and unequivocal possession."

In *Macdonald v. Aetna Indemnity Co.*, 90 Conn. 415, 97 A. 332, cited also by defendants, one Rodebaugh, a grain dealer at Buffalo, entered into a written contract with the American Warehousing Company, whereby he leased to the warehouse company as a "field storage warehouse" the property on which his grain business was conducted. The plot of ground was marked at the corners by stakes bearing the initials of the warehouse company; and one of Rodebaugh's employees acted as custodian for the warehouse company. Warehouse receipts were issued to the Bank of Buffalo as collateral security for loans to Rodebaugh. The bank was further protected by bonds given by the Aetna Indemnity Company to indemnify against any loss "through the negligence or dishonesty" of the warehouse company or its custodian. After the lease to the warehouse company, and before the issuance of receipts to the bank, Rodebaugh transferred his business to the Niagara Company, of which he became president; and upon Rodebaugh's death, a few months later, the Niagara Company filed a petition in bankruptcy, and a receiver was appointed, who took the grain into his possession. Immediately after Rodebaugh's death, however, the warehouse company had asserted its right to possession of the grain, and placarded the interior of the mill, the elevator, the bins, and bags with conspicuous signs declaring its interest in the property, and maintained possession until ousted by the receiver. The receiver having taken and sold the grain, the bank caused suit to be brought by the insurance commissioner on the indemnity bond furnished by the warehouse company, charging negligence by that company. In the trial court the judgment sustained the claim of the Bank of Buffalo under the bond. This judgment was reversed on appeal; but the court said that up to the time of Rodebaugh's death

there had been no such change of possession as to validate a pledge; that the marking of corner stakes was not adequate notice, and any possession of the custodian, who remained in the employ of the pledgor, was really the possession of his employer. The case turned on what was done by the warehouse company the day following Rodebaugh's death and two weeks before the appointment of the receiver. The court ruled that possession was then actually taken before any specific lien had been acquired by any creditor, and that there had been no illegal preference under the bankruptcy law. In its decision the court took into consideration the statute of New York. At the time of the transactions, which occurred between January, 1906, and August, 1907, the statute had a qualification not embodied in section 3440 of our Civil Code. The statute then in force in New York declared transfers without actual change of possession fraudulent, "unless it appear, on the part of the person claiming, under the sale or assignment, that it was made in good faith, and without intent to defraud such creditors or purchasers." 4 Consol. Laws of N. Y. c. 41, § 36. Under our law good faith, without good works, supplies no saving grace.

In *Union Trust Co. v. Wilson*, 198 U. S. 530, 537, 25 S. Ct. 766, 768, 49 L. Ed. 1154, the general principle applicable in cases of questioned change of possession was couched by Judge Holmes in this form: "When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense." At the same time he added a word of caution about cases where the exclusive power of control "tapers away."

Such a case is exhibited in *In re Rodgers* (C. C. A.) 125 F. 169. There, Rodgers, a dealer in seeds in Chicago, prior to his bankruptcy, had made certain written contracts with the National Storage Company, whereby Rodgers leased to the company part of his premises, and the storage company agreed to store his goods therein and issue its receipts therefor. The receipts were used by Rodgers as collateral security for loans. The storage company had some signs inside the building, but not conspicuously placed; and its inspector visited the premises several times a week. The keys, however, were kept by Rodgers alone, access being obtainable only through him; and he continued to conduct his business on the premises as of old. Upon each pile of bags for which receipts were issued there was placed a small tag; but Rodgers was left in a situation to deal with the seeds much as he pleased. In a controversy which arose between the trustee in bankruptcy and the holders of receipts, the court ruled upon appeal that there had never been a change of possession sufficient to validate the receipts,

and consequently there existed no enforceable pledge.

In *Security Warehousing Co. v. Hand*, 206 U. S. 415, 27 S. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789, affirming the decree of the Circuit Court of Appeals upon the facts recited in 143 F. 32, the court said in reference to certain warehouse receipts issued to the Racine Knitting Company and transferred to pledgees (page 421 of 206 U. S., 27 S. Ct. 720, 722): "The general law of pledge requires possession, and it cannot exist without it. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779. There was scarcely a semblance of an attempt at such change of possession from the hands of the knitting company to the hands of the warehousing company. Actual possession of the property in question was exercised by and existed with the knitting company substantially the same after the issuing of the receipts as before. It is a trifling with words to call the various transactions between the knitting company and the warehousing company a transfer of possession from the former to the latter. There was really no delivery, and no change of possession, continuous or otherwise. The alleged change was a mere pretense, a sham."

In that case the Racine Knitting Company had leased to the warehouse company certain portions of the knitting company's premises both at Racine and at Stevens Point, Wis. Employees of the knitting company, nominated by the warehouse company, acted as custodians for the latter. The stored goods were kept within slatted inclosures or fencelike palings, and the inclosures were provided with sliding doors secured with padlocks to which the appointed custodian had keys. These, however, were kept by the custodian in such a way as to be accessible when desired by officers of the knitting company. There were some interior signs of the warehouse company, and some use was made of identification cards also. Nevertheless it was held that the facts did not show the open, exclusive, unequivocal possession required by law.

Warehousing on the premises of the owner proposing to pledge his merchandise is effective when done in obedience to legal requirements; but when done only far enough to get the goods represented by documents without really getting them stored, the documents are but scraps of paper. The term "field warehousing" is not a talisman to give dominion by enchantment. Taking exclusiveness of possession and control as the criterion, we find now and then a case where it may be said as a matter of law that, through the field warehouse, open, exclusive, and unequivocal possession passed constructively to a pledgee; and then again in other cases we find that as a matter of law the possession of the warehouseman "tapers away" to nothingness. Between these two extremes lies the

aggregation of cases in which the facts are such that different men may with reason reach opposing conclusions. Cases of that character, when tried by a jury, must be allowed to go under proper instructions to the jury for their determination of the facts in controversy.

[19] Whether warehousing is called "field warehousing" or by any other name, it cannot be effectively conducted in this state without compliance with the law as declared in section 3440 of the Civil Code. Merely colorable or constructive change of possession accomplishes nothing in favor of a pledgee. There must be open, visible, unequivocal change of possession, manifested by such substantial outward signs as to make it evident to the world that the control of the owner has wholly ceased, and that another has acquired, and is openly exercising, the exclusive dominion over the property. *Stevens v. Irwin*, 15 Cal. 503, 506, 76 Am. Dec. 500; *Cahoon v. Marshall*, 25 Cal. 197, 201; *Godchaux v. Mulford*, 26 Cal. 316, 324, 85 Am. Dec. 178; *Sequeira v. Collins*, 153 Cal. 426, 431, 95 P. 876; *Hassell v. Bunge*, 167 Cal. 365, 366, 139 P. 800.

[20, 21] Actual change of possession means existing in act, and truly and absolutely carried out, as opposed to formal, potential, virtual, or theoretical change. *Bunting v. Saltz*, 84 Cal. 168, 170, 24 P. 167; *Guthrie v. Carney*, 19 Cal. App. 144, 150, 124 P. 1045. The proof required to show actual change of possession is not measured by any fixed set of rules. Dependence must be placed upon the facts and circumstances of each particular case; and usually the determination must rest upon the finding of the court or the jury after hearing the evidence adduced on both sides. *Claudius v. Aguirre*, 89 Cal. 501, 503, 26 P. 1077; *Dubois v. Spinks*, 114 Cal. 289, 293, 46 P. 95; *Feeley v. Boyd*, 143 Cal. 282, 285, 76 P. 1029, 65 L. R. A. 943; *Jarvis v. Webber*, 196 Cal. 86, 99, 236 P. 138; *Bosbyshell v. Cline*, 51 Cal. App. 109, 113, 196 P. 274; *Gray v. Little*, 97 Cal. App. 442, 449, 275 P. 870.

[22] The appointment of the owner, or one of his staff, as a warehouseman's custodian of goods stored, while not conclusively ineffectual, is nevertheless a circumstance to give pause, and must be carefully weighed in connection with the other facts in evidence. *Goldstein v. Nunan*, 66 Cal. 542, 544, 6 P. 451; *Hickey v. Coschina*, 133 Cal. 81, 84, 65 P. 313; *Bucher v. Allen*, 11 Cal. App. 650, 651, 105 P. 942; *Vail v. Nichibel Bussan Co.*, 65 Cal. App. 60, 63, 223 P. 577; *Gray v. Little*, 97 Cal. App. 442, 449, 275 P. 870.

In this case a foreign element is introduced by the interjection of the warehouse company between the pledgor and the pledgee. If the loans had been made without resort to warehouse receipts, and the fruit had been stacked

and kept on the premises as shown in the evidence, with Pace as custodian for the bank, there would then have been the simple question whether the pledgee had been placed in actual exclusive possession and control. Instead of actual possession the bank claims to have obtained symbolic possession by virtue of the warehouse receipts; but these receipts can have no virtue, unless the warehouse company had the same actual and exclusive possession and dominion which would have been essential to the protection of the bank, if it had acted independently in reliance on the goods instead of on the receipts.

[23] In *re Spanish-American Cork Products Co. (C. C. A.)* 2 F.(2d) 203, 204, the company, desiring to borrow money from a bank, leased a portion of its premises to one of its employees; and there, in care of the employee as agent for the bank, was stored under lock and key the cork intended to be pledged, the doors having a placard, reading "Property of A. E. Nichol, Agent." The custodian had general instructions from the bank to receive payments in its behalf and release cork; and as payments were made he supervised removal of the quantity released. Upon the trial of an issue between the trustee in bankruptcy of the cork company and the bank, the district court decided that the bank had not the possession necessary to a pledge, and the decree was affirmed on appeal. The court expressed its views in the following language: "All authorities agree that possession is necessary to the validity of a pledge. The necessary indication of possession varies, of course, according to the nature and bulk and situation of the property. The rule is the pledgee must either have actual exclusive possession of the property, or if it remains on the pledgor's premises he must so separate and mark it as to give notice of his possession to the public, who might deal with the pledgor on the faith of it. In this case the cork was in the building occupied by the bankrupt, engaged in the cork business. Those who dealt with it had a right to assume in the absence of notice that the stock of cork carried in the building for use in the business was the property of the company which was using it. There was nothing on the outside to put anybody on inquiry. The public dealing with the cork company or interested in it could not be required to search for notice of some other ownership of the stock of cork by making an obtrusive and prying inspection of the inside of the cork company's premises to find and inquire the meaning of the signs of agency of one of the bankrupt's employees. There is no binding nor well-considered case that goes to that length. It is the duty of the pledgee to make such segregation and marks as will indicate his possession to business men of ordinary prudence dealing

with the pledgor in the ordinary course of business."

What is there said concerning a transaction directly with a pledgee applies with equal force to a transaction through the medium of a "field warehouseman."

[24] In the discussion in which we have indulged, we are not to be understood as intimating any opinion upon the question whether the circumstances in evidence do, or do not, show a change of possession satisfying the law. As is said in *Byrnes v. Moore*, 93 Cal. 393, 394, 29 P. 70: "Every case of the kind here involved has its own peculiar features, and must be determined on the particular facts which surround the given transaction or transfer." We hold merely that the circumstances are not such that it can be said absolutely as a matter of law that there was an actual, open, visible, and unequivocal change of possession. The plaintiff was therefore entitled to the submission of the facts to the jury for their verdict on this point under appropriate instructions as to the rules of law by which they should be guided.

The judgment is reversed as to all the defendants.

We concur: TYLER, P. J.; CASHIN, J.

110 Cal. App. 334

MacLEOD v. LONG, Mayor, et al.
Civ. 141.

District Court of Appeal, Fourth District,
California.
Dec. 10, 1930.

1. Municipal corporations ⇨ 205, 206.

Riverside board of public utilities held without power to employ accountant to audit books of water and light departments (St. 1907, p. 1277).

St. 1907, p. 1277, gives board of public utilities of city of Riverside exclusive control and management of city-owned public utilities, but gives auditor entire charge and control of records, books, documents and accounts of department of public utilities. It also authorizes mayor to have books of all departments audited by persons appointed by him, expense to be paid out of general fund.

2. Mandamus ⇨ 168(2).

On application for peremptory writ of mandate, burden is on plaintiff to show duty to perform act sought to be compelled (Code Civ. Proc. § 1085).

S. Mandamus ☞ 168(2).

That alternative writ of mandate requires defendants to perform act required, or show cause, does not shift burden of proof to defendants.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Petition by A. D. MacLeod, doing business under the name of MacLeod, MacFarlane & Co., for writ of mandate against Joseph S. Long, as Mayor of the City of Riverside and President of the Board of Public Utilities of said city and others. From an order granting motion to quash petition and dismissing the proceedings, plaintiff appeals.

Affirmed.

Hanley & Shannon and Whitehead, Bole & Blythe, all of Los Angeles, for appellant.

Eugene Best and Loyal C. Kelley, both of Riverside, for respondents.

CARY, P. J.

Plaintiff filed a petition against the defendants Joseph S. Long as mayor of the city of Riverside and president of the board of public utilities of said city; H. W. Pierson, as auditor of said city, and Harry N. Dunbar, as treasurer of said city, praying that the defendant mayor and the defendant auditor be commanded to issue, sign, countersign and deliver to plaintiff two warrants upon the treasury of said city, one directing the treasurer to pay out of the funds of the water department the sum of \$4,350.65 as authorized by resolution of the board of public utilities of said city, and the other to pay a like sum out of the funds of the electric light department of said city. The defendants filed both general and special demurrers to the petition and also motions to quash. The motions to quash were granted, the proceedings dismissed, and from the order thus made plaintiff appeals.

The petition in substance alleges that the department of public utilities of the city of Riverside is under the control of the board of public utilities consisting of five commissioners, including the mayor; that the electric light department and the water department of said city are subdepartments of the department of public utilities; that on November 16, 1928, said board of public utilities entered into an agreement with plaintiff employing him to make a complete audit of the books of both the electric light and the water departments; that between November 16, 1928, and February 8, 1929, plaintiff did make such audit and duly performed all the conditions required by said contract; that the total amount due plaintiff by reason thereof was the sum of \$23,716.25; that certain progress payments having theretofore been made by said board, plaintiff on February 8, 1929, pre-

sented to said board a final audit, together with his claim for services rendered between January 24, 1929, and February 7, 1929, and amounting to \$8,701.30, the same being approved by the superintendent of the board of public utilities and by the auditor of the city; that said claim was duly approved by the board of public utilities and said approval indorsed thereon by the then mayor as president of said board and ordered paid, 50 per cent. out of water department funds and 50 per cent. out of electric light department funds, and warrants were ordered drawn; that thereafter defendant Long was, at a recall election, duly elected mayor of said city and thereafter plaintiff demanded of said defendant Long and the auditor of said city that they issue, sign and countersign these warrants and deliver same to plaintiff, but that each has refused so to do.

Defendants confine their objections to the sufficiency of this petition to three points: (1) That the board had no power to appoint an accountant; (2) that it had no power to allow a claim for such work, and (3) that such claim could not be paid from the funds of the light or water departments.

The charter of the city of Riverside in effect at the time is to be found in the 1907 statutes, page 1277. The powers of the several officers and boards, in so far as pertinent to the questions here presented, are as follows: The board of public utilities consists of the mayor and four commissioners appointed by him. It has exclusive control and management of all city-owned public utilities, including the sale and distribution of electricity, water, etc., produced therefrom; except as otherwise provided by charter regarding the city auditor his deputies and clerks, it may appoint and fix the compensation of all persons employed by said department; it shall fix annually, subject to the approval of the council, the rates to be charged for light, water, etc.; all money received by the board shall be paid over daily to the city treasurer and deposited to the credit of the electric fund; the money from said fund shall be paid out only on demands approved first by the superintendent and by the city auditor and then by vote of not less than three members of the board, which fact shall be indorsed on the demand by the mayor as president of the board; no money from this fund shall be paid for any purpose except necessary expenses of conducting the department and making improvements and additions to the plant or plants; the board shall also possess such other powers as may be necessary to carry out any of the duties prescribed.

The auditor is the general accountant and fiscal agent of the city and shall exercise superintendence over all officers and employees of the city charged with the receipt of city

revenues; he shall keep under his direct control all financial records, books and accounts of the departments, boards and officers of the city (with the exception of certain enumerated officers not material to the case at bar); monthly and annual reports shall be made by him of each department to the council; his authority over such records of each department, the manner of keeping same and the control of the deputies and clerks engaged in such work shall be paramount and not subject to the authority of the board at the head of such department; he "shall have entire charge and control of all records, books, documents and accounts relating to property and the receipts and expenditures and all accounts of purchases and sales of" the department of public utilities; he shall make a complete inventory of all property belonging to that department and keep it posted up to date; he shall accurately apportion all income and expenditures of that department so that "operating expenses, repairs, betterments, extensions, replacements, depreciation, cost of operation, power and fuel, the income from various sources and the net income and real value of the plant can always accurately be told."

The mayor is given general supervision over all departments and charged with the duty of seeing that they are honestly conducted. It shall be his duty to have the books of all departments pertaining to finances of the city audited by a competent person annually, and he may at any time investigate, through persons appointed by him, the accounts of any department. The expense therefor shall be paid out of the general fund.

The common council of the city have the power to investigate any department of the city government. The mayor and council together shall have the power to manage and control the city's finances, examine accounts against the city and allow or reject them, and to do all other acts required by the charter or incidental to any power conferred upon them.

[1] Plaintiff concedes that the board has no *express* power to employ plaintiff, but contends that such power is implied, since it is necessary to the exercise of certain powers expressly granted to the board, to wit, the exclusive management and control of all city-owned public utilities and the determination of the rates to be charged the city for street lighting. Plaintiff argues that these matters require intimate knowledge of the income of the department and the requirement for improvements, that the board certainly cannot be expected to gather this data personally, nor should it be compelled to accept and rely upon data furnished by the auditor, since he is not responsible to the board and they have no control over him, and, therefore, having the implied power to employ plaintiff to audit

the accounts of the department, the claim was properly payable from the funds of the electric and water departments.

It will be observed that, by the express mandate of the charter, the keeping of the books, accounts and records of the public utilities department has been taken out of the hands of the public utility board and placed under the supervision of the city auditor, whose control in these matters is expressly declared to be paramount. Such matters as cost finding, figuring depreciation, maintenance charges, etc., are therefore no part of the work of the board. The functions of the board of public utilities are confined to the operation, upkeep, improvement and extension of the physical properties and the fixing of rates, subject in the latter instance to the approval of the common council. To hold, therefore, that because the city auditor, whose duty it is under the charter to furnish this data, is not under the control of the board the board should not be required to accept such data from him, but instead should have the implied power to have their own audit made, would at once do violence to the clear intent of the charter. The very purpose of an audit is to get an unprejudiced report on the exact condition of affairs. The board of public utilities are charged with the duty of collecting the revenues of the public utility department. Therefore, the wisdom of the framers of the charter in placing in the hands of one over whom the board has no power or control the duty of auditing their accounts is quite apparent. Furthermore, the charter expressly provides methods by which, should the executive or legislative heads of the city desire an investigation of the conditions of the public utilities department, the same may be procured and the expense thereof charged to the general fund of the city. This itself is another clear expression of the intention of the framers of that document to put such additional investigation in the hands of the mayor and the common council.

Plaintiff argues that the activities of the board of public utilities are proprietary and not governmental in their nature, and hence that the powers of the board should not be strictly construed. Assuming, without deciding such to be the rule, yet here the charter provisions are so plain that to hold the board to have the powers asserted would at once do violence to the plan set up in the charter.

[2, 3] Plaintiff contends that on a motion to quash, the lack of power of the board to enter into such a contract cannot be questioned, but that it is a matter of proof to be shown by the defendant. In support of this contention he cites *Brown v. Board of Education*, 103 Cal. 531, 534, 535, 37 P. 503; *Morgan v. Board of Education*, 136 Cal. 245, 246, 68 P. 703, and *Doland v. Clark*, 143 Cal. 176, 76 P. 958. But in each of these cases plaintiff, instead of

applying for a writ of mandate, had sued the defendant on a contract which was presumably within the power of the defendant to make. In the case at bar, however, we are considering an application for a peremptory writ of mandate. Such form of proceeding must be predicated upon the existence of a duty on the part of defendants to perform an act concerning which they have no right to refuse (Code Civ. Proc. § 1085). The burden is, therefore, upon the plaintiff to prove the existence of such right rather than upon the defendants to disprove the same. The fact that the alternative writ is couched in the usual language, to the effect that the defendants either perform the act required or show cause before the court why they have not done so, by no means shifts the burden of proof from the shoulders of the plaintiff to those of the defendants.

The order is affirmed.

We concur: BARNARD, J.; MARKS, J.

110 Cal. App. 293

WEST COAST SECURITIES CO. v. KILBOURN.

Civ. 6978.

District Court of Appeal, First District,
Division 1, California.

Dec. 6, 1930.

Rehearing Denied Jan. 5, 1931. Hearing Denied by Supreme Court Feb. 2, 1931.

1. Jury ⇨105(1).

Where person is prejudiced against class of persons, he is not proper jurymen in case where one of that class is interested.

2. New trial ⇨42(2).

Where person prejudiced against class of persons false answers on his voir dire in case where one of that class is interested, new trial should be granted.

3. Appeal and error ⇨920(1).

In considering appeal from order based on conflicting affidavits, those in behalf of successful party are deemed to establish facts stated therein and reasonable inferences therefrom.

4. Appeal and error ⇨901, 933(1).

Presumptions are in favor of ruling on motion for new trial, and burden is on appellant to show error.

5. New trial ⇨140(3).

In action for attorney's fees, court's implied finding in denial of new trial that juror

was not prejudiced against attorney held supported.

The affidavits in support of and opposed to the motion for new trial, based on ground that one of jurors was prejudiced against attorney, were conflicting, and it appeared that the verdict was that of eleven of the jurors.

6. Jury ⇨131(4).

Counsel, in action for attorney's fees, held not unreasonably restricted in examination of jurors.

It appeared that the court first examined the juror, and then requested that counsel refrain from asking questions covering same ground, and the record did not disclose that the court refused to permit any competent questions respecting jurors' qualifications.

7. Witnesses ⇨267.

In action by assignee of attorney's fees to recover such fees, extent of cross-examination of attorney who performed services held within court's discretion.

8. Witnesses ⇨268(1).

In action by assignee of attorney's fees to recover such fees, court's discretion in permitting cross-examination of attorney rendering services held not abused.

9. Appeal and error ⇨996, 1002.

Where evidence is conflicting or subject to different inferences, conclusion of jury cannot be disturbed on appeal.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by the West Coast Securities Company against Kate Kilbourn, also known as Mrs. C. M. Kilbourn. Judgment for defendant, and plaintiff appeals.

Affirmed.

John T. Boynton and Milton T. U'Ren, both of San Francisco, for appellant.

Howard Harron, of San Francisco, for respondent.

PER CURIAM.

This action was brought by an assignee to recover for services alleged to have been rendered by an attorney, and for sums expended in connection with the employment.

The complaint alleged that the defendant and the assignor entered into an agreement providing in substance for the employment of the latter to collect a mortgage owned by defendant, it being agreed that the attorney should pay all necessary costs and expenses

and receive as compensation for his services one-half of all sums collected in excess of \$15,000, or, if the property should upon foreclosure be bid in by the parties to the agreement, and afterwards sold for a sum exceeding the above amount, the attorney should receive such excess. It was further alleged that, as the result of the attorney's services, the title to the mortgaged property became vested in the defendant, and it was then agreed that, in lieu of other compensation, the latter should pay and the attorney receive the sum of \$1,000, together with the expense previously incurred in the sum of \$205, these sums to be paid as soon as defendant procured a loan of \$6,000 upon the property, that the attorney attempted to negotiate the loan, but defendant then decided to sell the property, stating that the sum of \$7,500 was the most she could procure therefor, whereupon it was agreed that, in the event of a sale for this amount, the attorney should accept the sum of \$500 for his services. That defendant subsequently sold the property for \$12,500, but refused to pay any part of the attorney's claim.

The suit was for \$1,000 attorney's fees, less \$100 collected by the attorney from another source, and which it was alleged defendant agreed should be applied on account, and the sum of \$205, expended as above alleged—a total of \$1,105.

The defenses were in substance as follows: The execution of the agreement first alleged was admitted, but any other agreement was denied. It was alleged that defendant subsequently offered to pay the attorney \$1,000 as a fee, and such further sums, not exceeding \$250, as he proved were necessarily expended under the contract, provided he procured a loan of \$6,000 on the property; that this offer was not accepted, but later, being advised by the attorney that the contract bound her to hold the land until he procured a purchaser, she requested him to name the amount which he would accept for a cancellation thereof in the event she should sell the property, and that he agreed to accept the sum of \$1,250; that she was misled by the attorney as to the effect of the contract, as his rights thereunder had then lapsed. The alleged payment of \$100 on account was also denied; it being claimed that the amount was obtained from defendant by duress.

The action was tried by a jury, which returned a verdict for the defendant. A motion for a new trial was denied, and the plaintiff has appealed from the judgment.

As grounds for the appeal, it is contended that, due to the prejudice of a certain juror, plaintiff was denied a fair trial; that the court improperly restricted the examination of the jurors on their voir dire, and that certain questions asked by the court and counsel for the defendant with respect to the execu-

tion of the contract were erroneous and prejudicial.

Upon the examination of the jurors, the court addressed certain questions to one of the jurors, who was asked if he knew the attorney mentioned, also whether he ever had litigation with an attorney, or if the fact that the suit was being prosecuted in favor of an attorney would prejudice him in any way. These questions were answered in the negative. Thereupon the court asked the juror who is claimed to have been prejudiced whether he had heard the above questions and the answers thereto. The reply being in the affirmative, the following question was asked and answer given: "Q. If these same questions were asked you, would you give the answers heretofore given? A. Yes, sir." No questions in this connection were asked by plaintiff's counsel. According to the affidavit of one of the attorneys for the plaintiff filed in support of the motion for a new trial, the juror last mentioned stated after the trial that "he felt that all lawyers were tricksters"; that "he knew this personally and vividly because it had just happened to him. A tricky lawyer back east had cheated him out of some \$2,500." According to the affidavit, the juror also related other instances wherein he claimed attorneys had conducted themselves dishonestly, further stating that he wanted nothing to do with law or lawyers.

[1, 2] The foregoing, if true, indicated that the juror was not unprejudiced; and it has been held that, where a person is prejudiced against a class of persons, he is not a proper juror in a case where one of that class is interested (*Lawlor v. Linforth*, 72 Cal. 205, 13 P. 496; *Lombardi v. California Street Ry. Co.*, 124 Cal. 311, 57 P. 66), and, if he gives false answers on his voir dire, a new trial should be granted (*People v. Galloway*, 202 Cal. 81, 259 P. 332).

In reply to the above, however, counsel for the defendant made affidavit that he also interviewed the same juror, who stated that the matters set forth in the affidavit of plaintiff's counsel were in most particulars untrue; that what the juror said to the latter was "that there were two classes of lawyers; that he had no use for shyster lawyers, but that he had no prejudice as a juror against any lawyer recovering for any honorable and proper service, and that he correctly answered every question propounded to him as to his qualifications as a juror."

[3-5] As held in *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001, in the consideration of an appeal from an order which is based upon affidavits and which involves the decision of a question of fact, this court is bound by the same rule that controls where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the pre-

vailing party must be taken as true; and, as error is not presumed and all intendments are in favor of the action of the lower court, the affidavits in behalf of the successful party are to be deemed not only to establish the facts directly stated therein, but all facts which may be reasonably inferred from those directly stated. All presumptions are in favor of an order granting or denying a new trial, and the burden is upon appellant to make it affirmatively appear that the order complained of is erroneous. Here it appears that the verdict was that of eleven of the jurors; and we cannot say that the implied conclusion of the trial court that the juror was not prejudiced, and that his answers on his voir dire were true, is unsupported.

[6] It is further urged that the court unreasonably restricted the examination of the jurors. In this connection the court said: "It is the practice of this court for the court first to question the first juror fully, and counsel on the respective sides have the same right, but are requested not to cover the same ground covered by the court. Then we will ask each juror in turn if his or her answers would be the same to the respective questions, and I request counsel not to repeat questions." It is clear from the above that there was no unreasonable restriction upon counsel's right to examine the jurors. Nor does the record disclose that the court refused to permit any competent questions respecting their qualifications.

[7, 8] Counsel for the defendant was permitted to cross-examine the attorney at length with respect to the circumstances under which he was employed and the contract executed. The court also asked numerous questions on the same subject. The extent of such examination is within the sound discretion of the trial court (Neal v. Neal, 58 Cal. 287; Silverar v. Hansen, 77 Cal. 579, 20 P. 136), and we cannot say that there was an abuse of discretion in the present case; nor does the record reasonably support the contention that the attitude of defendant's counsel in conducting the cross-examination was such as to prejudice the jury against the witness.

[9] Plaintiff contends that the attorney's version of the transaction was strongly corroborated and should have been believed. There was however, evidence to the contrary, which, if believed by the jury, was sufficient to support their verdict. The question of the credibility of witnesses was exclusively for the jury's determination (Code Civ. Proc. § 1847); and, where the evidence is conflicting, or though there be no conflict, if the evidence is reasonably subject to different inferences, the conclusion reached by the jury cannot be disturbed on appeal. MacDermot v. Hayes, 175 Cal. 95, 170 P. 616; Whitelaw v. McGilliard, 179 Cal. 349, 176 P. 679.

The verdict was fairly sustained by the evidence, and no error is shown which would justify a reversal of the judgment.

The judgment is affirmed.

110 Cal. App. 345

GALLENTINE v. FIERRO.

Civ. 320.

District Court of Appeal, Fourth District,
California.

Dec. 10, 1930.

1. Death ☞85.

In action for injuries causing death plaintiff is limited in recovery to pecuniary loss suffered by him.

2. Evidence ☞12.

Courts take judicial notice of mortality tables in common use.

3. Death ☞99(1).

\$5,000 for death of common laborer 59 years old, earning from \$85 to \$100 per month, held not excessive.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Myrtle Gallentine against E. Fierro. From a judgment for plaintiff, defendant appeals.

Judgment modified, and, as modified, affirmed.

Bryce P. Gibbs, of Los Angeles, and Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

J. A. Chase and Leroy McCormick, both of Visalia, for respondent.

WARMER, Justice pro tem.

This case was tried without a jury. The court found in favor of the plaintiff, and judgment was entered for \$12,760. J. M. Gallentine and plaintiff were husband and wife. On the 30th day of November, 1929, while a passenger in the automobile of one George Harris, J. M. Gallentine was injured in a collision between the automobiles of the said Harris and the defendant, and as a result of said injuries the said Gallentine died. The deceased and plaintiff had been married about 35 years. Deceased was 59 years of age at the time of his death, a common laborer, earning from \$85 to \$100 per month. The sole question presented on this appeal is, Did the court err in finding that defendant had been damaged in

the sum of \$12,760, which appellant claims to be excessive? Since the filing of the briefs on appeal, the plaintiff respondent herein, has filed a consent that the judgment may be reduced from \$12,760 to \$5,000. The question therefore now presented is, Would a finding of damages in the sum of \$5,000 be excessive? In *Zibbell v. Southern Pacific Railway Co.*, 160 Cal. 237, at page 254, 116 P. 513, 520, the court says: "It has been decided by this court that the only means of discovering the existence of passion and prejudice as influencing a verdict is by comparing the amount of the verdict with the evidence before the trial court. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence."

[1-3] Again in *Diller v. Northern California Power Co.*, 162 Cal. 531, 536, 123 P. 359, 361, Ann. Cas. 1913D, 908, the Court uses the following language: "In actions for injuries causing death, the plaintiffs are, of course, limited in their recovery to the pecuniary loss suffered by them." *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 323; *Munro v. Dredging Co.*, 84 Cal. 515, 24 P. 303, 18 Am. St. Rep. 248. Under the rule announced in *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, at page 730, 158 P. 183, the courts take judicial notice of mortality tables in common use. Appellants, by using the American Experience Table of Mortality, fix the life expectancy of J. M. Gallentine, the deceased, at 14½ years, and earnestly urge that under all the facts presented the finding was excessive. In view of the consent to reduction of judgment filed herein, it would accomplish no useful purpose to determine that question. In the case at bar we cannot say that a judgment for \$5,000 under all the circumstances in the case is in any way disproportionate to the damage suffered.

The judgment will be reduced by consent of plaintiff to the sum of \$5,000 and, as so modified, is affirmed.

We concur: CARY, P. J.; MARKS, J.

110 Cal. App. 317

THOMPSON v. FIFTH & HILL BLDG. CO.
Civ. 6053.

District Court of Appeal, Second District,
Division 1, California.
Dec. 9, 1930.

1. Sales ⇨441(2).

Evidence held insufficient to show that seller expressly warranted special boiler as

adequate for buyer's building, justifying recovery of purchase price.

2. Sales ⇨273(5).

Statute setting up warranty that article ordered for particular purpose is reasonably fit therefor held inapplicable to special boiler, complying with buyer's specifications (Civ. Code, § 1770).

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action by Alfred H. Thompson against the Fifth and Hill Building Company. Judgment for plaintiff and defendant appeals.

Affirmed.

Ben S. Hunter and James Farraher, both of Los Angeles, for appellant.

Otto & Linn, Paul J. Otto, Roy A. Linn, and Roy C. Kaiser, all of Los Angeles, for respondent.

HOLLZER, Justice pro tem.

Plaintiff brought this action to recover the purchase price of a certain boiler, also certain additional equipment and for the cost of certain extra labor. Judgment was rendered against defendant in favor of plaintiff as prayed for. The defendant attacks only that portion of the judgment which held that the latter was liable for the price of said boiler.

It is admitted that the defendant gave to the plaintiff an order reading as follows:

"Fifth and Hill Building, 448 So. Hill Street,
"5th & Hill Building Company, Owner,
"Charles G. Andrews Company, Agents,
"714-719 Pacific Mutual Building,
Los Angeles,

"5-11-25

"Thompson Boiler Works, 1000 N. Broadway,
Los Angeles, Calif.

"Gentlemen: Please furnish and deliver one twenty-five horse power high pressure steam boiler, to be assembled in the kitchen room in the Pershing Square Building at Fifth and Hill Streets.

"The above boiler is to be furnished complete as shown and described, i. e., boiler drum, boiler base, doors, door springs, boiler top, five flanges riveted on boiler for wash-out openings, fitted with two-inch nipples and caps, Thompson vacuum gas burners, safety valve, steam gauge, steam gauge testing cock, steam gauge syphon, water gauge, cocks, gauge glass and rods, Thompson automatic gas regulator, valves and fittings, Boiler subject to 200 pound hydrostatic pressure test; for the sum of Nine Hundred-fifty dollars (\$950.00) complete, less fifteen per cent. (15%).

"Respectfully,

"Thomas Foss, Resident Manager."

It is also conceded that the boiler described in the above-mentioned order was delivered and installed as specified in said order, and that payment therefor has not been made.

[1] In its answer the defendant pleaded as a special defense that plaintiff warranted this boiler as being of sufficient size to care for the needs of the defendant's building, and that the boiler failed to meet those needs. This contention is virtually the only issue involved upon this appeal.

The trial court found that the allegations of said special defense were not proven. Our examination of the record convinces us that the lower court was warranted in making this finding.

The letter written by plaintiff to defendant a short time prior to giving of the order previously mentioned, and which appellant claims constituted an express warranty, related to a different boiler. Furthermore, the evidence clearly showed that the defendant's engineer examined a boiler similar to the one specified in its order, and it was only after such examination that said order was prepared and given to plaintiff.

[2] Appellant makes the further contention that if this prior letter did not constitute an express warranty then at least there was an implied warranty to the effect that this boiler would reasonably fit a particular purpose, to wit, the needs of its building. In support of this argument defendant cites section 1770 of the Civil Code, which reads as follows: "One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose."

There is no merit in this point. As observed in the case of *Bancroft v. San Francisco Tool Company*, 120 Cal. 228, 52 P. 496, 498: "This section [Civ. Code § 1770] is but the restatement of an elementary principle of law, and does not apply where the manufactured article is furnished under a contract demanding that it be made according to specific plans and specifications; for under such circumstances the purchaser selects the article, and gets exactly what he orders, and, in the absence of an express warranty, assumes the risk following such purchase. * * * 1 Pars. Cont. *586, declares the rule as follows: '* * * It [the principle of implied warranty] must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, although this be intended for a special purpose; for, if the thing is itself specifically selected and ordered, there the purchaser takes upon himself the risk of its effecting its purpose.'"

This construction of the Code section in question was reaffirmed in the decision of

Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 P. 792, 794, wherein the Supreme Court cited with approval the case of *Bancroft v. San Francisco Tool Co.*, supra, saying: "This doctrine is supported by a wealth of authority."

Similarly, in the action at bar, the defendant selected a special kind of boiler and obtained exactly what it ordered, and hence became liable for the purchase price thereof.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; YORK, J.

110 Cal. App. 265

WILLIAMS et al. v. MYERS et al.

Civ. 241.

District Court of Appeal, Fourth District,
California.

Dec. 5, 1930.

1. Appeal and error ⇨1010(1).

If evidence supporting findings is substantial, the finding will be deemed sufficiently supported.

2. Appeal and error ⇨930(1).

Evidence tending to support finding must be accepted as true with all inferences which might reasonably have been thought by trial court to lead to same conclusion.

3. Fraud ⇨58(1).

In action for fraud in exchange of land, evidence held to support finding as to representations of value, and that they were representations of fact.

4. Fraud ⇨22(1).

Parties to exchange of land held not deprived of right to rely on other party's representations of value by investigation made.

Plaintiffs conveyed land in Southern California to defendants in exchange for lands in South Dakota. Plaintiffs wrote to a bank to which they were referred by defendants regarding defendants' land, but received very indefinite information. They also wired a "Commercial Club" and received an answer, purporting to be from such club, although there was no such club. One of plaintiffs wrote defendant that they had been unable to get information about his land and was relying on his truthfulness. Defendant urged haste in consummation of trade.

5. Appeal and error ⇨1008(1).

Question whether representation of value of land was representation of fact was for trial court, whose determination was binding on appellate court.

6. Fraud ⇨22(1).

For investigation by party to exchange of land to preclude reliance on other party's representations, it must be free and untrammelled.

7. Contracts ⇨94(1).

Fraud ⇨18.

One false material representation is sufficient for action for rescission of contract or action for fraud if such that contract would not have been entered into without it.

8. Fraud ⇨18.

Representation of value of land exchanged *held* such that contract would not have been entered into without it.

9. Fraud ⇨58(4).

Evidence *held* to support finding that parties to exchange of land relied on other party's representations.

10. Appeal and error ⇨925(2).

When record shows no testimony or action of trial court relative to issue, except finding made, it must be assumed there was no proof.

11. Pleading ⇨126.

Traverse in terms of allegation *held* admission that soil was hardpan, gumbo, and adobe, and simply to deny that it was chiefly of that character.

Plaintiffs alleged lands exchanged were represented as consisting of good soil, free from hardpan, gumbo, adobe, and stones, etc. Defendants merely denied that land consisted of soil largely composed of hardpan, gumbo, or adobe, and which could not be cropped and cultivated with profit and success, and denied that more than 120 acres were worthless for cultivation or consisted of hardpan, gumbo, adobe, etc.

12. Fraud ⇨18.

Land represented to be free from hardpan, gumbo, adobe, or stones, need not be chiefly of that character to render representation false and material.

13. Trial ⇨388(4).

Admission in answer that land exchanged was hardpan, gumbo, and adobe supports judgment, and no finding is necessary.

14. Fraud ⇨18.

Representation that soil of land exchanged was free from hardpan, gumbo, adobe, and stone was material.

15. Appeal and error ⇨382(5).

Where both defendants relied upon answer filed, neither can claim on appeal that there should have been separate answers.

16. Appeal and error ⇨916(1).

Where no evidence appears in record as to allegations in effect admitted, it will be assumed trial court treated allegations as admitted.

17. Pleading ⇨36(6).

Admission in answer that land represented to contain no hardpan, gumbo, and adobe did contain soil of that character supported judgment as against defendant not shown to have made any representations.

18. Fraud ⇨49.

Answer *held* to raise no issue as to lands being of value alleged if as represented.

Complaint in action for fraud alleged that lands as represented would have been worth \$80,200. Answer denied that the lands "would have been worth, except in trade, the sum of \$80,200 had they been as represented."

19. Appeal and error ⇨679(1).

Appellants, claiming benefit of rule that allegations will be deemed sufficiently traversed when court tried issue without objection, must show by record that court did so.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by F. J. Williams and others against Roscoe A. Myers and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

R. J. Welsh, Jr., of Riverside, and Norman T. Mason, of Los Angeles, for appellants.

Sarau & Thompson, of Riverside, and Hewitt, Ford & Crump, Patrick F. Kirby, and W. Joseph Ford, all of Los Angeles, for respondents.

WARMER, Justice pro tem.

The appeal herein is from a judgment for damages in an action for fraud. The action was tried by the court sitting without a jury. The complaint charges fraud. The transaction involves an exchange of real and personal property in Riverside county, Cal., for real and personal property in the county of Corson, S. D. There are a number of specifications of

fraud pleaded in the complaint; first, as to the value of the land in South Dakota; second, that the defendants could then and there have sold the same for a greater sum than is alleged to have been fraudulently represented to be its value; third, conditions of the farmhouse and outbuildings; fourth, number of acres under cultivation, character of soil, as being free from hardpan, gumbo, adobe, and stones, etc.; fifth, productivity of the soil; sixth, number of acres actually being cultivated and as to the number of acres capable of cultivation; also, that for the purpose of deceiving plaintiffs, defendants entered into a conspiracy with one Robert H. Jackson, cashier of the Security State Bank of McIntosh, S. D., to deceive and defraud plaintiffs by representing to them a false value of the said premises. The Security State Bank was given by the defendants as a reference as to the value of said lands. The answer assumes to deny the allegations of fraud, and in addition thereto sets up a claim of fraud as against the plaintiffs as to the property they conveyed to the said defendants. An objection as to the sufficiency of the answer is urged by the plaintiffs, claiming that the answer fails to deny many of the allegations of the complaint setting forth the fraud claimed. Inasmuch as most, if not all, of the negotiations in this transaction were by mail, we will quote from some of the correspondence.

R. A. Myers wrote Williams on December 3, 1923, as follows:

"I am sending you a list of my farms for trade, and might state that all of these farms are rented for 1924, and are and have been good investments. Now you will see that it takes quite a while to get a letter down to you and one back, hence I am going to be frank and to the point, with you and am pricing my farms down to what you will get from either of the following Appraisal Boards, Miller and Miller of Watauga, S. D. and I might state that this is a small town just to the west of our town here on the Yellowstone trail, and these men had a mortgage at one time on two of these Farms, so they know the value. Also Streagel Abstract and Appraisal Co., McIntosh, S. D. Now here is the point I cannot trade these farms for inflated land in the Perris Valley as I can trade for almost anything up the Valley. I was in Perris and up to San Jacinto, and in fact spent the winter of 1921 and 22 in Southern Cal. But I will say that if your price is not inflated, this looks the best of any deal I have seen and nearer to my liken.

"Please send price, rather the personal property is Mtg. of not and rather the real estate is Mtg. If Mrtage is very large I would not be interested, as I do not care to trade of a big Mtg. I would suggest if you are interested to send me a complete inventory of personal

property and explain everything in full, and upon receipt of your next letter I will know as rather or not I will be interested and if I am I have a friend in the Bank at Los Angeles that will go at once and look over the place with you.

"My land is all clear and if they have a Mtg. on there land I can assume there Mtg. and take back the same amount, if we get together on the land I trade them, the following is the list.

"160 acre farm $2\frac{1}{2}$ miles from town on a fine main road, telephone and rural route, nice farm house all finished and good barn, good well and windmill, all fenced and 100 acres in crop each year and balance Hay and Pasture land this farm is every foot tillable, and of the best of soil. This is rented for next year, and is sure a nice place, Price—\$20,000.00.

"160 acre farm $3\frac{1}{2}$ miles from town on the Yellowstone trail, has a very fine large 10 room house, a dandy, two barns, all kinds of sheds and grainerys, three wells and windmill and tank. Fenced and 120 acres in crop each year. Balance is hay and pasture land. This is a very highly improved farm as the house could not be built at this time for less than \$7000.00. Price \$20,000.00.

"320 acre farm $3\frac{1}{2}$ miles from town 80 acre in crop each year and balance of this land is used for Hay purposes and sure get a good return each year. No buildings whatsoever. Price \$20,200.00.

"320 acre farm 4 miles from town on a good road in a fine neighborhood. Always rented 300 acres of the finest tillable land and always rented and is rented for 1924. All fenced but no buildings; a small creek cuts off one corner, and provides water for the stock the year round, and is one of the best farms I have and is always in demand. Price \$20,000.

"All of these farms lay on the finest roads we have here in Dakota, and they are without exception well located and in one of the best farming countries in the Middle West.

"Please let me know as soon as possible Mr. Williams, and if your parties really want to get out and will be fair with me, I am sure we can deal as my lands will stand up under any inspection and are worth every cent I ask, and in 1919 if I had had sense enough to sell I could have sold for much more.

"I want the Ranch just as it is all stocked and ready for me to go on too as this is just what I was looking for. Thanks for the remembering me on the deal. I am. Yours resp. R. A. Myers."

Williams wrote Myers on December 8, 1923:

"I am in receipt of yours of the 3rd inst. and note what you say as to your holdings. * * * Now the ranch fully equipped will appraise at from 120 to 125,000 I believe.

"The cattle and personal property will be about \$26,000, from a sales standpoint and would possibly cost 35,000 to replace. * * * It is not located in the Perris Valley and not to be so considered at all.

"It is in what is known as the San Jacinto or Hemet Valley where conditions are entirely different.

"I am not trying to discourage or encourage but only wish to place the facts before you as near as I can. * * *

"Unless you can put in some cash there would be no use to even bother. Cattle and personal property here is cash spot, * * * etc.

On December 10, 1923, Mr. Williams wrote Myers:

"Have talked over matters with all interested parties and unless you can raise a reasonable amt. of cash it will be impossible.

"I believe I can arrange to take in about 75,000 of your holdings on strict appraisal, no other way, as that is only way you can negotiate same courtesy of fairness on this property as I wrote you the other day. The balance must be cash and mortgage. * * *

"My advice to you is to get the first train and come out here and if it is possible to figure your way get ranch or deal signed up subject to our parties investigating yours which will all be done from here by Realty Board or others. I am of course interested and am willing to take my interest in Dak. but I will have more or less difficulty in handling others as one of interested parties requires all cash which I must arrange for. * * *

Williams again wrote Myers January 3, 1924:

"Have had a final discussion regarding offer with all interested parties. Now if your land will stand up on appraisal of bank there or other competent source I believe a deal can be made as follows:

"180 acres including all improvements, machinery, tools and equipment belonging to ranch and one or two teams of horses subject to \$12,500 3 years, to include crops on land—for your lands as per your letter free and clear."

Myers wrote Williams January 7, 1924, in part as follows:

"Your letter of the 1st of this month rec. today and am answering everything in full so there will be no misunderstanding when we close up *if we do*. * * *

"I gave you the names of two firms in my former letter to wire or write to for appraisal price, and here is another the Security State Bank of McIntosh, S. D.

"Here is what I will do subject to inspection by self or party I send: I will trade the above places for your 180 acre ranch land,

and you are to include at least 4 head of horses, one tractor in good shape and all farm machinery and milking machines, etc. * * *

"I will give warrant deed and furnish abstract showing everything clear and all taxes paid to date for my lands. Now you may wire me if expected, if you so desire, but I will consider the deal closed if you wire me as I will have to at once get the abstract Co. to make the abstracts to date which will be of great cost to me and will send all or bring them down which will cost me about 500, or more and if for any reason of yours and not mine, I will expect you to pay me damage if I come down and you don't deal. I am only telling you this so you will not misrepresent anything and we will have no trouble on the finish and will always be friends. If you wish to except and when you do if you just wire me that you except offer made by me January 7th, I will proceed to get out my deeds, come down or send them down, so the deal will go through slick as a whistle if your place is what you say. I really think you are telling the truth or I would not go to this bother. Let me know soon, as my letters will reach you the 12th and I will expect to hear from you soon after that date."

Williams wrote Myers again January 15, 1924:

"Replying to yours of the 7th inst. beg to advise we are trying to secure definite information regarding values of your lands. If same is as you state I believe a deal can be closed as follows for your lands clear. * * *

"I believe you stated you paid \$105.00 per acre for 320 or 160."

On January 19, 1924, Myers wrote Williams in part as follows:

"This offer is subject to my representative inspection. \$500.00 at the best I can do to get my abstracts up to date the taxes paid and then all of the other expenses besides.

"So you can wire if you except this offer but do not do so unless you are sure that all of you that are interested are satisfied, as I will be out a lot of money on your account and expect a compensation thereof; in case a change would be made by you when I come up to the requirements you expect of me, as per this letter.

"Now Mr. Williams I am frank and want you to be for I have a-One farms here and will not trade them for something that is not worth the money. * * *

"All I can say yet is dont wire me until you are perfectly satisfied with my farms and my proposition. But must be done before the first of Feb. as if I don't deal with you I am taking a Dairy Farm just out of the city of Minneapolis, and am only assuming \$2500.00.

"Please wire me soon after you receive this letter, which should be the 23rd or 24th, I am,

"Yours truly, R. A. Myers."

Williams on January 21, 1924, wired Myers as follows: "If you are ready can make arrangements to close deal per my letter recent date upon wire from you will hold until February First pending your examination."

On January 22, 1924, Meyers wrote Williams in part as follows: "* * * * As per your telegram of today you are simply excepting your own offer. What I want is for you to except my offer. Please do something at once. R. A. Myers."

The court found, among other things, that the statements and representations were made by said defendants as statements of fact and not as statements of opinion and were intended by the defendants to be statements of fact and not of opinion to the plaintiffs and were so understood by them. That plaintiffs relied upon and believed each and all of said statements and were thereby induced to and did enter into the exchange of properties as in plaintiff's complaint set forth, and were thereby induced to and did execute to the defendants a deed to the property located in Riverside county and conveyed to the defendants in exchange for the South Dakota property. That in representing the value of defendants' property to plaintiffs, defendants intended to and did convey to plaintiffs the information that the prices and values named by defendants were the reasonable cash market value of said properties; that the total reasonable market value of parcel No. 1 was \$5,000; that parcel No. 2 was of a total reasonable value of \$11,700; parcel No. 3 of a reasonable market value of \$5,400. The court further found that, had the property that was conveyed by the defendants to the plaintiffs herein been as represented, it would have been at all times of the reasonable market value of \$80,200. In the condition in which said properties actually were, they were not of a value in excess of \$29,500. That said lands and properties were represented by defendants to plaintiffs to be of the market value of \$80,200; that the difference between the reasonable market value of said lands and the properties as so represented and as they were in fact was \$50,700, and ordered judgment entered for that sum.

The record, by bill of exceptions, reveals the fact that the parties and the trial court proceeded with the trial on the theory that at least the allegations of the alleged false and fraudulent representations as to the value of the South Dakota property were sufficiently traversed, as both parties offered evidence on said issue and the court made its findings thereon from the evidence and

not from any admission in the pleadings upon said alleged representation as to value. Therefore, we shall assume, without deciding as to such representation, that the issue was properly joined. Defendants, appellants herein, attack the sufficiency of the evidence to support such finding.

[1, 2] The intendments are in favor of the judgment, and, if the evidence in support of the findings is substantial either with or without conflict, the finding will be deemed sufficiently supported. *Hind v. Oriental Products Co.*, 195 Cal. 655, 235 P. 438; *Hassell v. Bunge*, 167 Cal. 365, 139 P. 800; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157; *Ryder v. Bamberger*, 172 Cal. 791, 158 P. 753; 2 Cal. Jur. 879, and the cases there cited. In examining the sufficiency of the questioned finding this court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account as well all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. *Delannoy v. Quetu*, 73 Cal. App. 627, 239 P. 71; *Menotti v. Marchesi*, 63 Cal. App. 49, 218 P. 439. The evidence as to the value of said South Dakota premises is sharply conflicting, and under the above rule we are bound to accept as true that evidence which tends to support the finding, it being necessary to point out only enough of the evidence to show that the findings found support in the evidence. *Bancroft-Whitney Co. v. McHugh*, supra.

[3] Myers must have known the meaning that Williams was placing upon the language used by him, because as early as December 10, 1923, Williams, in a letter of Myers, wrote: "I believe I can arrange to take in about 75,000 of your holdings on strict appraisal, no other way," and at all times during the written negotiations between these parties it was apparent that Williams was interpreting the language of Myers to mean that the prices placed upon his property in South Dakota by Myers to mean and be the market value thereof. The entire correspondence between these parties seems to appear in the record. The language used is not the most definite and certain; however, a letter appears in the record that is definite and certain and unquestionably was received by Myers prior to the consummation of this exchange, and, while there is an objection to the letter when it was offered in evidence, such objection was properly overruled. In that letter Mercedes C. Williams, one of the parties interested in the California property offered for exchange, wrote Myers on January 28, 1924:

"I believe father has told you that we are all financially interested in the ranch—that is mother, father, my brother * * * and myself.

"We have been unable to learn anything definite as to your farms. The Realty Board, whom we expected would appraise or report on your farms, have notified us that they have no facilities in that part of the country for so doing, and since none of us have ever been in South Dakota, we are forced to rely upon your statements as to values and conditions there.

"Of course, the proper thing to do at this time, would be for father to go there and learn for himself just what the farms are worth, but unfortunately he is not in a financial position to incur the expense of such a trip. Therefore, I trust you will understand just why I am writing you at this time, and realize how we are depending upon the truthfulness of your statements, if this deal is consummated.

"In your letters to father, you place a valuation of \$80,200.00 on your farms. * * *

"You say the farms are worth every cent you are asking and that this is the fair and reasonable market value of the property for which you paid \$105.00 per acre and could have sold for more."

After the receipt of such letter there is no possibility that Mr. Myers was not advised that the Williams were relying upon his statements as to the value, price, and worth of said farm as meaning the market value.

Such evidence is sufficient to support the finding as to the representations of value, if such representations are in fact representations as to a fact and not the mere expression of an opinion. The defendants herein urge that such representations were the mere expressions of an opinion and not the statement of a fact at all.

In *Alvarez v. Brannan*, 7 Cal. 503, at page 507, 68 Am. Dec. 274, the court says:

"If a party asserts that *as true*, which he does not know to be true, it is a false representation. If he intends simply to state his belief upon information, then he should state it in that precise form, so as to apprise the other party of the true grounds upon which his statement is made. A party will always be held to make good his statement *in the form* in which he makes it. If he states a thing as true in general terms without qualification, then he is presumed to do so upon his own knowledge, or at his own peril, and must make good his assertion." This rule is cited with approval in *Giovannoni v. Bartmann*, 59 Cal. App. at page 651, 211 P. 844.

In *Crandall v. Parks*, 152 Cal. 772, 774, 93 P. 1018, the court passed upon a case wherein the plaintiff was the owner of a certain land in San Diego county and the defendant was the owner of certain land in the state of Oregon. The plaintiff never saw the land in Oregon and had no knowledge of

its value, nature, or quality, except the statements of defendant in regard thereto. The defendant knew this. An exchange of properties was effected, plaintiff being induced to consummate the same by reason of such representations as to value and ownership upon which he wholly relied. The court said on page 776 of 152 Cal., 93 P. 1018, 1019: "It is claimed that the representation as to the value of the Oregon land was nothing more than a mere expression of his own opinion as to the value on the part of the defendant, and therefore that an action will not lie on account thereof. This, however, is not the effect of a fair construction of the findings. A statement as to the value of property is not always made as a mere expression of opinion upon which the other party has no right to rely. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such, it is like any other representation of fact, and may be a fraudulent misrepresentation warranting rescission. The rule in regard to this matter is stated by Mr. Pomeroy as follows: 'Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation.' 2 Pom. Eq. Jur. § 878. He further says that the statements which most frequently come within this branch of the rule are those concerning value." See also *Harris v. Miller*, 196 Cal. 8, 235 P. 981; *Nichols v. Moore*, 181 Cal. 131, 183 P. 531; *Bonnarjee v. Pike*, 43 Cal. App. 502, 185 P. 479; *Phelps v. Grady*, 168 Cal. 73, 141 P. 926; *McKeever v. Locke-Paddon Co.*, 58 Cal. App. 51, 207 P. 1040; and *Winkler v. Jerrue*, 20 Cal. App. 555, 129 P. 804.

In *Stockton v. Hind*, 51 Cal. App. 131, at page 136, 196 P. 122, 124, the court says: "It is conceded that the general rule is that an expression of opinion or belief, if nothing more, and if so understood and intended, is not a representation of fact, and, although false, does not amount to actionable fraud. Ordinarily a person has no right to rely upon such statements, and, if he does so rely, he cannot treat them as fraudulent, either for the purpose of maintaining an action in damages for deceit, or for the purpose of rescinding the contract. Where there is any doubt as to whether or not a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is one not of law but of fact for the court or jury. 20 Cyc. 15, et seq.; *Spreckels v. Gorrill*, 152 Cal. 395, 92 P. 1011;

14 Am. & Eng. Ency. of Law, 36." See, also *Herdan v. Hanson*, 182 Cal. 538, 189 P. 440; *Dow v. Swain*, 125 Cal. 674, 58 P. 271; *Mead v. Bunn*, 32 N. Y. 275; *Palladine v. Imperial Valley Farm Lands Association*, 65 Cal. App. 727, 225 P. 291; *French v. Freeman*, 191 Cal. 579, 217 P. 515; and *Ryder v. Bamberger*, 172 Cal. 791, 158 P. 753.

[4] Defendants rely upon the rule of independent investigation. Williams wrote on January 11, 1924:

"Security State Bank, McIntosh, S. Dak.

"Gentlemen: Mr. R. A. Myers of McIntosh, requested I write you in re values of following lands and improvements (describing the South Dakota lands here in question).

"I would like to ascertain the value you place upon these lands and amounts of loan that could be had upon each parcel approximately.

"The present market value is particularly desired as well as desirability of location. * * * Kindly let me have your candid opinion," etc.

In answer thereto he received a letter from R. H. Jackson, cashier, in part as follows:

"Yours of Jan. 11th received and note contents. Regarding the R. A. Myers farms as described in your letter will say that these farms are as good a quality as in the county and on good roads from two to four miles from town. Such farms with good improvements range from \$50. to \$140. according to distance from town and class of improvements the lands might contain. These farms have always rented and I believe they are rented now. Loans could be gotten, but it would take time to work them through, and of course, loaning agencies expect the land to be occupied by the owner, have 25% under cultivation and milk cows."

Williams wired the Commercial Club of McIntosh on January 31, 1924, as follows: "With view locating there please wire collect present cash value R. A. Myers farm land."

Answer was sent from McIntosh February 1, 1924: "Party owns considerable land. Not acquainted with particular quarters. Land in vicinity all values. Unimproved twenty to thirty-five. Well improved quarters seventy-five to one hundred fifty. (Signed) Commercial Club."

The record discloses the fact that there was no Commercial Club in McIntosh. There was a Booster Club which was not active, but the said R. H. Jackson had been active therein some time before. Somehow the telegram was delivered to R. H. Jackson and he answered the same signing it "Commercial Club," without disclosing his identity. It will be noted that the letter from the bank was prior to the letter sent by Mercedes C. Williams to Myers, but that the telegrams

were subsequent in date to said letter. This constitutes, so far as the record discloses, all the investigation or inquiry made by the Williams concerning said property. Does such inquiry preclude plaintiffs from reliance upon the representation of a value alleged and found to be fraudulent? We think not. The rule is stated by Mr. Pomeroy in his work on Jurisprudence (3d Ed.) § 893 as follows:

"If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, *has recourse to the proper means of obtaining information, and actually learns the real facts*, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled." (Italics ours.)

In *Neher v. Hansen*, 12 Cal. App. 370, at pages 372, 373, 107 P. 565, the court says:

"No duty devolved upon plaintiff to make any investigation as to the truth of the statements. As said in *Calmon v. Sarraile*, 142 Cal. 638, 76 P. 486: 'Even when contracting parties are adverse to each other, either has the right to rely upon an express statement made by the other of an existing fact of which the truth is known to the other and unknown to him.' See, also, *Willey v. Clements*, 146 Cal. 91, 79 P. 850, and *Morris v. Courtney*, 120 Cal. 65, 52 P. 130, where it is said: 'And the seller cannot escape responsibility by showing that the purchaser might have ascertained that such representations were untrue.' * * *

"Conceding that plaintiff may have consulted others, or received information from others, it would not follow as a matter of law that such information was of a character to influence him in the purchase. Moreover, the giving of such an instruction would take from the jury the determination of the question as to whether or not plaintiff relied upon the representations made by defendant, and was thereby induced to buy the stock."

See, also, *Shermaster v. California Home Building Loan Co.*, 40 Cal. App. 661, 181 P. 409; *Sullivan v. Helbing*, 66 Cal. App. 478, 226 P. 803; *Troy Laundry Machinery Co. v. Drivers', etc., Co.*, 14 Cal. App. 152, 111 P. 121; *Davis v. Butler*, 154 Cal. 623, 98 P. 1047; and *Spreckels v. Gorrill*, 152 Cal. 383, 92 P. 1011.

In *Blake v. Arp*, 180 Cal. 144, at page 147, 179 P. 683, 684, the court says: "Appellant urges the fact that the evidence was insufficient to show any fraud on his part, for the reason, as he claims, that the plaintiff knew as much about the title as he did, and that therefore his statement was a mere expression of opinion, and cites in relation thereto the following cases: *Choate v. Hyde*, 129 Cal. 580, 62 P. 118, and *Rheingans v. Smith*, 161 Cal. 362, 365, Ann. Cas. 1913B, 1140, 119 P. 494. But the evidence does not support appellant's position. * * * Moreover, the evidence of plaintiff was that she was constantly lulled into inaction by the repeated assertion of defendant that he had the title, notwithstanding the allegations of the plaintiff in said suit."

In the case of *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 P. 32, the court holds that fraud is generally proved by inference from facts and circumstances and not by direct and positive proof. A single misstatement knowingly made with intent to influence another to enter into a contract will, if believed and relied upon by the other party, afford as complete a ground for relief as if it had been accompanied by a multitude of other false representations. *Davis v. Butler*, 154 Cal. 623, 98 P. 1047.

We are of the opinion that measured by the said rules the evidence is sufficient to sustain the finding that the representation as to value made by the defendants to the plaintiffs herein are representations of fact and not mere expressions of opinion. Measured by the rule that the property is far removed from the residence of the plaintiffs, and that the plaintiffs had no knowledge as to the same, we find that the property was halfway across the continent east and west and well toward the Northern boundary of the United States, while the plaintiffs resided in Southern California. Measured by the surrounding circumstances we find expressions used by the defendants in their correspondence with the plaintiffs such as "My land will stand up under any inspection," "an A-1 farm," "I am going to be frank and to the point," "wont trade for inflated value," reference to the Security State Bank, realty firm in neighboring town, Abstract & Appraisal Company, "now here is the point, I cannot trade these farms for inflated land in the Perris Valley as I can trade for almost anything up the valley," "I will say that if your price is not inflated," "fine buildings," "grand place," or words of such import, "could have sold for much more," "Now Mr. Williams I am frank and want you to be for I have a One farms here and will not trade them for something that is not worth the money," "really think you are telling the truth or wouldn't go to this bother," "let me hear soon," "wire me soon," "what I want is for you to *except* my offer," "please do something at once," and "all I can say yet is don't wire me until you are perfectly satisfied with

my farms and my proposition. But must be done before the first of February as if I don't deal with you I am taking a dairy farm just out of the city of Minneapolis and am only assuming \$2,500."

[5] Myers knew how to state a limitation in the language used because whenever he referred to an offer to Williams for the California property he said "subject to inspection by self or party I send." If Myers had the slightest doubt as to what was being understood by the parties, which we question, then the letter of Mercedes C. Williams must have dispelled that doubt, because she in unmistakable terms told him that any investigation Williams may have made had produced no results and they were relying upon his representations as to value as a fact; that they were financially unable to make the trip to examine his properties. This letter advised Myers that they were relying upon his representations, and, if they were not true, the deal could not be closed, as the Williams had their all in it. *Blake v. Arp*, supra; *French v. Freeman*, supra; *Dow v. Swain*, supra; *Herdan v. Hanson*, supra; *Crandall v. Parks*, supra. However, if there should be any possible question as to whether or not such a representation was a representation of an existing fact or not, then it was a question for the determination of the trial court. *Herdan v. Hanson*, supra; *Stockton v. Hind*, supra; *Palladine v. Imperial Valley Farm Lands Association*, supra. The trial court has determined the same adversely to the defendants herein. Such determination is binding upon this court.

In the instant case plaintiffs only made a nominal inquiry along the line of reference suggested by the defendants to them, the Security State Bank. The information received therefrom appears to us so indefinite and conditioned that no one could be reasonably charged with having acted upon it, or, to put it another way, such indefinite and conditioned information, if information it be, could not be said to preclude the presumption that plaintiffs relied upon the defendant's representation as to value. Neither could such information, if information it was, be said, as a matter of law, to wipe away the right to rely upon the representation of Myers as to value, to which he had pledged his faith. *Dow v. Swain*, page 683, of 125 Cal., 58 P. 271, supra. The evidence is undisputed that the plaintiffs had never been in South Dakota and had no information concerning it. The correspondence reveals the fact that Williams was not informed as to the true facts or any facts at all, and that Myers was continually reasserting the fact of value in his land directly or indirectly; that he (Myers) fails to comply with the rule that Williams must be given time to investigate, but rather urges plaintiffs to hurry, first by a courteous "please," then by a covert threat of loss and finally by the bald fixing of a date, February 1st, when the deal

must be closed or he would trade his property for a dairy farm near the great city of Minneapolis. The constant affirmation of value in his lands in South Dakota, lulling the plaintiffs herein to trust and confidence in his representations of value, was of itself alone sufficient to keep alive the right of plaintiffs to rely upon said representations. *Blake v. Arp*, supra.

[6, 7] The lack of information received fails to overcome the presumption of reliance on the representations of defendants. *Troy Laundry Machinery Co. v. Drivers', etc., Co.*, supra. The urge to haste contained in the evidence fails to comply with the rule of reasonable time to investigate. The telegram to a body nonexistent, answered as though by such body, by another, in its name, could not be said to be information from or for anyone, and could not constitute investigation. It at most was an inquiry directed to no one. Especially must this be true in the light of the letter of Mercedes C. Williams, positively declaring that they had been unable to get information upon which to act independently, and that they must and did rely upon the representations of the defendant Myers. In order for an investigation to preclude a person's right to rely upon the representations made, it must be a free and untrammelled investigation. 12 C. J. 821. We cannot say that such an inquiry precluded plaintiffs from relying upon such representation. On conflicting evidence the court found that such representation was false. It was material. One false representation of a material fact is sufficient either for an action for rescission of a contract or to sustain an action for damages for fraud. *Harris v. Miller*, 196 Cal. 8, 235 P. 981. The fraudulent representation must be such that the court can say that without it the contract would not have been entered into. *Craig v. Shea*, 45 Cal. App. 351, 188 P. 73, and cases there cited.

[8, 9] In the instant case the representation of value was the very essence of the inducing cause of the contract. The other representations pleaded even were included in it and support it. We have no hesitation in saying that such representation of value was of such a character that without it the contract would not have been entered into. Defendants then urge that there is no evidence to support the finding, and that plaintiffs rely upon such representations. We think such claim is devoid of any merit. Fraud is generally proved by inference from facts and circumstances and not by direct and positive proof. *Del Vecchio v. Savelli*, supra. The evidence herein was sharply conflicting, and the trial court found against the defendants. There is direct evidence which, together with the inferences from all the evidence, is abundantly sufficient to support such finding.

Plaintiffs allege, among other things, that said lands were represented as A-No. 1 farms,

well improved, consisting of good soil, level, and free from hardpan, gumbo, adobe, and stones and well adapted to the raising of the usual farm crops. The denial of the above allegations in the complaint is as follows: Deny that said tract of land consisted of soil which was largely composed of hardpan, gumbo, or adobe, and which could not be cropped and cultivated with profit and success. Deny that more than 120 acres was worthless for cultivation or consisted of hardpan, gumbo, or adobe, or was unfit for cultivation, or was worthless for any purpose except pasture, or would not in ordinary years grow good hay or grass thereon, or that said lands consisted chiefly of hardpan, gumbo, or adobe soil; deny that said soil therein consisted largely of hardpan, adobe, or blowouts or buffalo wallows. The court found that as to certain of said lands the soil thereof on the south side was poor, contained gumbo, hardpan, and undersoil. As to certain other of said lands it was poor grazing land or gumbo rock land. The appellants urge as to these allegations that the trial court in fact deemed the allegation sufficiently traversed, and such cause was tried upon such a theory; therefore the objection cannot be raised for the first time on appeal. In *Smithson v. Atchison, etc., Ry. Co.*, 174 Cal. at page 155, 162 P. 111, 114, the court said: "It is a familiar principle that, the case having been tried upon this theory without objection, neither party will be allowed to present it in this court for the first time. *Tulley v. Tranor*, 53 Cal. 274; *Horton v. Dominguez*, 68 Cal. 642, 10 P. 186; *Illinois Trust & Sav. Bank v. Pacific Ry. Co.*, 115 Cal. 285, 297, 47 P. 60; *Gervaise v. Brooks*, 156 Cal. 110, 103 P. 332."

And in the case of *Schuh v. R. H. Herron Co.*, 177 Cal. 13, 169 P. 682, 684, the following language is used: "In this case, however, the defense of contributory negligence was considered as properly pleaded throughout the trial. No objection was made at any time on the ground that it was not pleaded. A large part of the testimony on the trial was devoted to that subject, and the instructions of the court show that it was deemed a matter in issue to be submitted to the jury. Under these circumstances a defective plea cannot be made available in support of an erroneous ruling on the subject. [Citing cases.]" Also, 2 Cal. Jur. 246.

[10-14] The record discloses the fact that the trial of this cause occupied 14 days; that the bill of exceptions contains only 66 pages; that the attention of the defendants, appellants herein, was directed to a claim of insufficiency of the record to fully present the issues on appeal. The defendants' record on appeal does not show any testimony offered or rejected or any action of the trial court relative thereto except a finding made. We must therefore assume that there was no proof as to such allegation. Was any such proof neces-

sary? We think not. The reading of the allegation and the traverse thereof admits that the soil was hardpan, gumbo, and adobe, and simply denies that the said soil was largely or chiefly of such a character. No person would even claim that, if such a representation so made was false, such a condition of the soil would have to obtain to a large portion, or the soil would have to be chiefly of such a character, to make such a representation a material one. Furthermore, the complaint charges that the false representation was that the soil was free from hardpan, gumbo, adobe, and stones, and hence, if there was any hardpan, gumbo, adobe, or stones on the said lands, the truthfulness of such an allegation is admitted. While the court's finding is somewhat more limited than the allegation, no finding was necessary. *Crandall v. Parks*, supra. See, also, *First National Bank v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64. Such admission comes in all its force as an ultimate fact to support the judgment to the same degree as though uncontradicted evidence supporting the allegation had been introduced and an appropriate finding thereon made. That a representation as to land being free from hardpan, gumbo, or adobe being material, to the city bred and reared may seem questionable, but to him who has had the good fortune or ill fortune, if it be so, to have any knowledge concerning qualities of soil, the presence of hardpan, gumbo, or adobe has a distinctive significance such as to demonstrate beyond a peradventure of doubt, and almost to a mathematical certainty, the materiality of such a representation. To the farmer or one familiar with, the presence of hardpan, gumbo, or adobe depreciates greatly, if it does not condemn, the land. The words themselves in connection with farm lands declare a greatly lessened value if they do not destroy value. However, city reared and bred can find that such a representation is material. See *Stone v. McCarty*, 64 Cal. App. 158, 220 P. 690.

[15-18] Appellants next urge that there is no evidence to in any wise connect Mrs. Anna L. Myers, one of the defendants, appellants herein, with any of said representations. The defendants each chose to rely upon the answer filed in their behalf, and hence cannot now claim there is or should have been a separate answer on behalf of each. However, they claim that the trial court tried the issue herein as though it had been properly traversed. The issue as to the question of value has been so considered by us because the trial court took evidence on the question and apparently so treated it. However, in the allegation here under discussion we find no evidence, whatever, either to sustain or to disprove the allegation of the presence on said premises of hardpan, gumbo, adobe, or stones. Therefore, we must assume that the trial

court treated such allegation as an admitted fact, not only as to the defendant Roscoe A. Myers, but also as to the defendant Anna L. Myers. Such admission itself is sufficient to bind her by the judgment. Had a separate answer been filed on her behalf denying that she had made any such representations as alleged, undoubtedly there would have been evidence offered on such an issue, and the trial court would have made an appropriate finding relative thereto, or, in the absence of any evidence to establish such allegation, the trial court would have found in her favor. In the present state of the record she is by admission bound by the judgment. Appellants further urge that there is no evidence to sustain the finding that, had the land been as represented, it would have been worth \$80,200. The complaint alleges: "That had all the lands of said defendants hereinbefore described been as represented they would have been worth the sum of \$80,200. That in the condition that they were they were not worth to exceed the sum of \$6,500; that the plaintiff has been damaged thereby in the sum of \$102,000, no part of which has been paid." The answer in traversing such allegation alleges as follows: "Deny that all of the lands of the defendant would have been worth, except in trade, the sum of \$80,200 had they been as represented; deny that in the condition they were they were not worth to exceed the sum of \$6,500; deny that the plaintiffs had been damaged in the sum of \$102,000 or in any sum whatever." Such a denial raises no issue as to the alleged value of the said lands of the defendants if they had been as represented, to wit, the sum of \$80,200. *Marsters v. Lash*, 61 Cal. 622. On a conflict of evidence the court found that the property conveyed and transferred to the plaintiffs was worth the sum of \$29,500. By the admission of the pleadings the value would have been \$80,200 if the same had been as represented. Therefore, the plaintiffs were damaged in the sum of \$50,700, or the difference between the actual value of the property and the value the property would have had, had it been as represented. The record is again silent as to any action of the trial court as to receiving or rejecting any evidence in this particular. Hence all of the intendments being in favor of the judgment, we must assume that the trial court received no evidence on the subject of the allegation and relied upon the admission of the pleadings in arriving at its decision. The defendants failed to point out any different theory upon which the cause was tried.

[19] Where appellants claim the benefit of the rule that, even though the answer is insufficient to constitute a denial of the allegations of the complaint, yet, if the trial court proceeded to try the issue as though the allegations were sufficiently traversed without objection from either parties, on appeal, the al-

legations will be deemed to have been sufficiently traversed. The appellants must, by the record on appeal, show that the trial court placed such a construction on the pleadings, and that such a construction was not objected to by the parties. In the absence of such a showing in the record, the rule is of no avail, and the trial court will not be presumed to have placed such a construction on the issues raised by the pleadings unless it affirmatively so appears.

Other objections urged by the defendant are without merit in view of the holding of the principal questions here involved. For the foregoing reasons the judgment is affirmed.

We concur: MARKS, Acting P. J.; BARNARD, J.

Owner made only few visits to ranch during time men were cutting wood, and at such times he merely pointed out ridges to be cut, and measured amount of wood cut and piled to determine amount due workmen. The men worked whenever they pleased, and each man was his own boss. Owner exercised no supervision or direction whatsoever.

Certiorari by G. Provensano, employer, and the New Amsterdam Casualty Company, insurer, to review an order of the Division of Industrial Accidents and Safety of the Department of Industrial Relations of the State of California, awarding compensation to F. L. Horner, claimant.

Award annulled.

Barry J. Colding, and Theo. Hale, both of San Francisco, for petitioners.

Edward O. Allen, of San Francisco, for respondents.

SPENCE, J.

Petitioners seek annulment of an award of the Industrial Accident Commission granting compensation to respondent Horner for an injury to his eye while engaged in chopping and cording wood. The only question presented upon review is whether Horner was an employee of petitioner Provensano, or an independent contractor.

In February, 1930, Provensano entered into a written contract with Horner under which Horner agreed to cut and pile on Provensano's ranch not less than two hundred cords of wood at \$3.50 per cord. Thereafter Horner, together with his son and two other men, proceeded to the ranch and began operations under the contract. The arrangements with the three other men were made by Horner. The men furnished their own axes and wedges, and Provensano furnished the saws. Shortly after starting to cut and pile the wood under the written contract it was ascertained that there was not enough wood on the ranch to make two hundred cords. Thereupon it was agreed that the contract be canceled, Provensano telling the men "Go ahead and cut wood, I will pay you three dollars and fifty cents a cord." Thereafter Provensano paid each man for the wood cut and piled by him at the agreed rate. Provensano made only a few visits to the ranch during the entire time the men were working, on which visits he merely showed the men the ridges on which to cut and measured the amount of wood cut and piled in order to determine the amount due. The men worked whenever they pleased and engaged in hunting and fishing on several occasions. In the words of the petitioner, "Each man was his own boss." The foregoing are the material facts disclosed by the evidence, and it is conceded that "the tes-

110 Cal. App. 239

PROVENSANO et al. v. DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY OF DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA et al.

Civ. 7599.

District Court of Appeal, First District,
Division 2, California.

Dec. 5, 1930.

1. Master and servant ☞347.

Any legislative attempt to extend scope of definition of term "employee" or "independent contractor," other than constitutional definition, would be unconstitutional (Const. art. 20, § 21).

2. Master and servant ☞367.

Test in determining whether workman is employee or independent contractor is whether employer retains control regarding details of work and means of accomplishing result.

3. Master and servant ☞367.

"Independent contractor" is one who renders service in course of independent employment following employer's desires only in result of work.

[Ed. Note.—For other definitions of "Independent Contractor," see Words and Phrases.]

4. Master and servant ☞367.

Workman engaged to chop and cord wood at agreed amount per cord held "independent contractor," where owner exercised no supervision whatsoever, precluding compensation (Const. art. 20, § 21).

timony does not indicate that any supervision was attempted by Provansano, but he allowed the men to carry the work along on their own time, merely paying them for the quantity cut and piled."

Petitioners rely upon a line of authorities holding wood choppers to be independent contractors and not employees under similar circumstances. *Parsons v. Industrial Accident Commission*, 178 Cal. 394, 173 P. 585; *Fidelity & Deposit Co. v. Brush*, 176 Cal. 448, 168 P. 890; *Donlon Brothers v. Industrial Accident Commission*, 173 Cal. 250, 159 P. 715; *Valente v. Industrial Accident Commission*, 68 Cal. App. 151, 228 P. 667. Respondent concedes that there is no substantial difference between the facts in the present case and the facts in *Parsons v. Industrial Accident Commission*, *supra*, except that Provansano indicated what timber was to be cut, whereas in the case referred to the woodchopper was engaged to cut such timber as in his judgment was best suited for his purpose. We do not believe, however, that the mere indication by the owner of the timber to be cut constituted such control over the details of the work and the means by which it was to be accomplished or implied such reservation of the right of control as to make Horner an employee rather than an independent contractor.

[1-3] Respondents contend that, since the decision in *Parsons v. Industrial Accident Commission*, *supra*, "a material modification has been made respecting the criteria for determining whether an engagement is an independent contract or an agreement of employment." It has long been settled that neither section 21 of article 20 of the Constitution in its original form nor the amendment of that section in 1918 altered the accepted meaning of the terms "employee" or "independent contractor," and that any attempt by the Legislature to extend the scope of the Workmen's Compensation Act by new definitions of those terms is unconstitutional. *Fidelity & Casualty Co. v. Industrial Accident Commission*, 191 Cal. 404, 216 P. 578, 43 A. L. R. 1304; *Flickenger v. Industrial Accident Commission*, 181 Cal. 425, 184 P. 851, 19 A. L. R. 1150. Respondents, however, cite and rely upon *Hillen v. Industrial Accident Commission*, 199 Cal. 577, 250 P. 570, where an award of the commission in favor of one doing shingling at so much per thousand was affirmed. We find nothing in that case which modifies the accepted rules for determining whether a person is an employee or an independent contractor. In affirming the award the decision rests largely upon the ground that the employer could at any moment direct the details of the work and did in fact do so on occasions. In other words, there was ample evidence in that case to support the conclusion that the right of control as to the details of

the work and the means by which it was accomplished was retained by the employer. This test has always been regarded as the decisive test of the relationship. In *Moody v. Industrial Accident Commission*, 204 Cal. 668, 269 P. 542, 543, 60 A. L. R. 299, the court said: "The following definition may be regarded as a correct statement of what constitutes an independent contractor: One who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished. * * * The decisive test of the relationship is: Who has the right to direct what shall be done, and when and how it shall be done? Who has the right to general control?"

[4] There is nothing in the present case to distinguish it from the ordinary engagement of a woodchopper, chopping and cording wood at so much per cord. Ordinarily the owner of the land is interested only in the result of the work and is not concerned with the means or details by which that result is accomplished. In such cases where the work is done under an agreement to pay for the result of the work at a certain amount per cord, and there is no express understanding with respect to the right of control by the owner over the details of the work or the means by which it is accomplished, and no such understanding may be implied from the conduct of the parties, the relationship established is that of independent contractor and not that of employer and employee. Provansano was originally interested in having two hundred cords of wood chopped and corded. He entered into the written contract with Horner to accomplish that result. Under the original contract Horner was admittedly an independent contractor. The contract was canceled solely because of the shortage of timber on the ranch, and thereafter the men continued to cut such timber as was there under substantially the same arrangement as previously existed under the written contract. The time and manner of doing the work was at all times left entirely to the men themselves without any supervision or direction by Provansano. There was nothing in the original contract with Horner nor the subsequent understanding with the four men nor in the conduct of the parties from which a reasonable inference might be drawn that any right of control was reserved by Provansano over the details of the work or the means to be adopted in accomplishing the result. Under these circumstances Horner was an independent contractor and not an employee, and the commission had no jurisdiction to make the award.

The award is annulled.

We concur: NOURSE, P. J.; STURTEVANT, J.

110 Cal. App. 327

PLATT v. PLATT et al.

Civ. 4223.

District Court of Appeal, Third District,
California.

Dec. 10, 1930.

Rehearing Denied Jan. 9, 1931. Hearing De-
nied by Supreme Court Feb. 5, 1931.

1. Evidence ⇨589.

Trial court could believe plaintiff's tes-
timony on first trial of case, though her con-
tradictory testimony on second trial was cor-
roborated.

2. Deeds ⇨208(1).

Evidence that grantor placed deed in safe
deposit box, to which she and grantee had
keys, supported finding that it was not de-
livered.

Appeal from Superior Court, Los Angeles
County; Daniel Beecher, Judge.

Action by M. Lucile Platt against Harry
O. Platt and another. From an adverse judg-
ment, plaintiff appeals.

Affirmed.

H. C. Hopkins, of San Diego, and H. B.
Daniel, of Los Angeles, for appellant.

Miller & Ellis, of Los Angeles, for respond-
ents.

Mr. Presiding Justice FINCH delivered the
opinion of the court.

The plaintiff brought this action for the
cancellation of a deed which she had executed
to the defendant Harry O. Platt, who will be
referred to herein as the defendant and re-
spondent, and also demanded judgment com-
pelling him to reconvey the property de-
scribed in the deed.

In his original answer the defendant al-
leged that in September, 1918, Martha E.
Platt, the mother of the parties, conveyed
the property in suit to the plaintiff with the
understanding and agreement that, if the de-
fendant, who was then in the Navy of the
United States, "died in the service * * *
the plaintiff should have this property, but,
that if this defendant lived, that the plaintiff
would hold an undivided one-half interest in
said property in trust for this answering de-
fendant, and would convey the said interest
to this answering defendant at such a time
as he might desire to have his said share con-
veyed to him; * * * that thereafter and
on or about November, 1919, the said Martha
E. Platt died, and on or about December,
1919, the plaintiff placed the said deed of
record; * * * that on or about March 27,
1925, this answering defendant was engaged
in the business of brick contractor, and on

or about such date he was offered certain
contracts provided he could give a surety
bond to guarantee the faithful performance
of his contract; that in order to procure such
surety bond it was necessary for this answer-
ing defendant to make a showing to the
bonding company writing said bond that he
was financially responsible; that * * *
under such circumstances the plaintiff and
this answering defendant agreed that she
would deliver to him the deed referred to in
* * * the plaintiff's complaint for the pur-
pose of his putting the same of record; and it
was further understood and agreed that such
deed as to an undivided one-half interest was
to convey to this answering defendant the
undivided one-half interest in said property
theretofore held in trust for him by the plain-
tiff; * * * that thereafter, in accordance
with said agreement, he executed and placed
of record a deed to the plaintiff reconveying
to her an undivided one-half interest in the
said property."

The case has been tried twice. It appears
from the appellant's opening brief that on
the first trial judgment was entered in favor
of the plaintiff quieting her title to the land
in controversy. The defendant made a mo-
tion for a new trial, which was granted by
the trial court. Thereafter the defendant
filed an amended answer in which, in addi-
tion to the foregoing averments of the origi-
nal answer, and as a separate defense, he al-
leged that the deed from Martha E. Platt to
the plaintiff was never delivered.

The court found that Martha E. Platt
signed a deed purporting to convey the prop-
erty to the plaintiff; "that prior to the mak-
ing of said deed it was understood and agreed
between plaintiff and Martha E. Platt that
if Martha E. Platt would make a deed to said
property to plaintiff to convey title to plain-
tiff on the death of Martha E. Platt, that af-
ter the death of Martha E. Platt plaintiff
would convey to defendant Harry O. Platt a
one-half interest in said property upon his re-
quest, if he returned from the United States
Navy and survived his mother Martha E.
Platt"; but that said deed was never de-
livered by Martha E. Platt to the plaintiff.
Judgment was entered "that plaintiff M.
Lucile Platt and Harry O. Platt and their
brother Howard R. Platt is each the owner
of an undivided one-third interest in fee
simple in the * * * property, * * *
as tenants in common as heirs of their moth-
er, Martha E. Platt, deceased, subject to ad-
ministration upon the estate of said Martha
E. Platt." The plaintiff has appealed from
the judgment. The only question presented
on this appeal is whether there is sufficient
evidence to support the finding that the deed
from Martha E. Platt to the plaintiff was
never delivered.

In appellant's brief it is said: "We have never quoted one word of appellant's testimony or called the slightest attention to it. Our purpose is to forcefully demonstrate that we have made out a perfect case without a word from appellant's lips."

It may be conceded that the testimony other than that of the plaintiff makes out a good case in her behalf, but, unfortunately for her, at the first trial when no issue had been raised as to the delivery of the deed from the mother to the plaintiff, the latter gave testimony upon which the court, to a large extent, apparently based its finding at the second trial that the deed was not delivered.

In appellant's opening brief it is said: "The plaintiff was single and had been a school teacher for several years. During the year 1918, being the year the mother executed to plaintiff the deed hereinafter referred to, the plaintiff was a clerk in the War Department in Washington, and the defendant was married and in the Navy; * * * the only property owned by the mother was that transferred to plaintiff by this deed. It was the home in Los Angeles where the family resided since about 1908, and a vacant tract at Culver City owned since about 1906. In September, 1918, the mother executed a grant deed to all of said property in favor of the plaintiff; * * * it recited a consideration of love and affection and \$10. Four days after the mother's death, more than one year later, the deed was placed on record by the plaintiff."

At the second trial the plaintiff testified: "I first saw that deed in the bank box that I held in the Security Trust and Savings Bank some time in May, I believe it was, after I came back from Washington, D. C."; that prior to her mother's death she took the deed and other papers out of the safe deposit box; that "the deed, together with all the other papers were given to my mother, and she, in turn, some few days after I had brought them home. * * * handed me the deed and told me that it was the deed to the property and that I had better take it up and have a certain friend of mine, who was there at the time, have it recorded for me. This particular friend worked down in the Hall of Records, and that is why my mother mentioned having her take it down and have it recorded for me, because I had given up the bank box; * * * she had handed me two or three other papers, too, in the meantime * * * and mother handed me the deed and she says, 'Lucile, now, there is a deed to the property. Let Marie take it down and have it recorded for you, so we won't have to worry about any bank to charge, as we haven't a bank box.'"

"Q. Did you hand the deed to Marie at that time? A. No, I didn't.

"Q. What did you do with the deed? A. I held the deed and then after I had gone over the papers, went upstairs with the papers and put it away in the cedar chest with the other papers.

"Q. And did you give it to Marie to have it recorded? A. No, I didn't give it to Marie.

"Q. Where did you keep the deed during that time? A. In my cedar chest in my room, together with all the other papers.

"Q. How long was that? A. * * * It must have been June. I kept it there until, I believe it was, some time in December that I had it recorded.

"Q. Was that after your mother's death? A. After my mother died, yes."

Marie testified that on the occasion referred to the mother handed the deed to the plaintiff and told her to have Marie place it on record. There is other testimony consisting largely of statements made by the mother tending to support the respective theories of the parties.

At the first trial the plaintiff testified: "I left here in September * * * 1918 * * * it was the first part of the month, just before school started * * * my mother told me (at that time) that she intended to make out a grant deed of the place to me, for me to keep and to hold so that I would always have a home. * * *

"Q. Well, while you were away did you receive that deed? A. My mother told me (in a letter) that she had put the deed in the box. * * * I did not keep the letter * * * it was shortly after September 20th; I do not remember just the date * * * she told me that she had a deed made out, made out in my name * * * and that she had put it in our box at the Security Trust and Savings Bank, so that it would be perfectly safe; that I was to have it recorded when I needed it, when she was no longer here * * * my mother wrote the letter, as near as I can remember it, shortly after the 20th of September, when she made the deed out. * * *

"Q. Did you have a conversation with your mother on this subject-matter, that is, about the deed after you came back? A. I did * * * it occurred at home * * * my mother told me she had made the deed and she wanted me to go up to the bank and see it and see that it was all right.

"Q. Anything else stated at the time on the subject? A. That was all.

"Q. Did you have any other conversation with your mother on that subject after that? A. No, sir. I saw the deed, I came back and I told her I had seen it, yes; * * * she said that she wanted to have things left for me, she was glad to have the home left for me; that was her idea, to leave a home for me.

"Q. Did you have any other conversation or conversations with your mother on that subject-matter prior to her death? A. No, sir, no, that was satisfactory.

"Q. What did you do with it, if anything? A. I left it in the box just as my mother wished me to do.

"Q. And what did you finally do with it, if anything? A. After mother died I recorded it. * * *

"Q. Now, calling your attention to the time when your mother executed this deed, I believe you stated this morning that you and your mother had a safety deposit box at the Security Bank? A. We did. * * *

"Q. And you both had keys to that box, didn't you? A. We did.

"Q. And who put the deed in the box? A. My mother did.

"Q. Your mother put it in the box? A. She did.

"Q. Did you have a key to the box? A. Yes.

"Q. You had a key and your mother had a key. A. I had a key and my mother had a key.

"Q. And the box was a joint box which could be— A. Yes, it was.

"Q. Both parties had keys to it? A. Yes.

"Q. And it remained in that situation up to the time of your mother's death, did it? A. It did.

"Q. And after she died, did you find her key to the box? A. I do not remember what I did. I must have, though, because I changed the box afterwards. When I came back I took another box the next year when I came back. * * *

"Q. How long after your mother's death, did you go down and get the deed? A. I do not remember but it was some time in December.

"Q. Of 1919? A. Yes.

"Q. When did your mother die? A. The 18th of December.

"The Court: Did you get it the same day that you recorded it, if you recall? A. I do not recall, I probably did."

[1, 2] It was in the discretion of the trial court to believe that the plaintiff's testimony given at the first trial is true, notwithstanding there is corroboration of her contradictory testimony given at the second trial. It can-

not be held as a matter of law that the plaintiff's testimony at the first trial is insufficient to support the finding that the deed was never delivered. According to that testimony, it remained until after her mother's death in the joint safe deposit box of the mother and the plaintiff. Such evidence does not necessarily show that the mother ever surrendered her right to retake possession of the instrument.

"While delivery may be by words and acts, or both combined, and manual transmission of the deed from the grantor to the grantee is not required, it is an indispensable feature of every delivery of a deed, whether absolute or conditional, that there be a parting with the possession of it, and with all power and control over it, by the grantor, for the benefit of the grantee at the time of the delivery. The dominion over the instrument must pass from the grantor with the intent that it shall pass to the grantee, if the latter will accept it. And where the proof fails to show that the grantor did any act by which he parted with the possession of the deed for the benefit of the grantee, the question of intent becomes immaterial. In other words, delivery may be effected by any act or word manifesting an unequivocal intention to surrender the instrument so as to deprive the grantor of all authority over it or of the right of recalling it; but if it does not evidence an intention to part presently and unconditionally with the deed, there is no delivery. * * * While the rule that the grantor must part with all dominion and control over his deed does not mean that he must put it out of his physical power to procure repossession of it, nevertheless, if the deed remains within the grantor's control and is liable to be recalled, there is, according to almost unanimous authority, no delivery, notwithstanding that he has parted with its immediate possession. He must retain no right to reclaim or recall it." 8 R. C. L. 985. See, also, Devlin on Deeds (3d Ed.) 375; Stone v. Daily, 181 Cal. 571, 185 P. 665; Donahue v. Sweeney, 171 Cal. 388, 153 P. 708; Rice v. Carey, 170 Cal. 748, 151 P. 135; Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Reed v. Smith, 125 Cal. 491, 58 P. 139; Black v. Sharkey, 104 Cal. 279, 37 P. 939; Cotter v. Cotter, 92 Cal. App. 722, 268 P. 696; Elliott v. Merchants' Bank & Trust Co., 21 Cal. App. 536, 132 P. 280.

The judgment is affirmed.

110 Cal. App. 188

PEOPLE v. ALBRITTON et al.
Cr. 1984.

District Court of Appeal, Second District,
Division 1, California.

Dec. 4, 1930.

Rehearing Denied Dec. 16, 1930. Hearing De-
nied by Supreme Court Dec. 29, 1930.

1. Homicide $\Rightarrow$ 234(3).

Evidence corroborating testimony of ac-
complices *held* to sustain conviction for mur-
der committed by accomplice in unsuccessful
attempt to rob (Pen. Code, § 1111).

2. Criminal law $\Rightarrow$ 511(1).

Conviction may not be had where at-
tempted corroboration of accomplice testi-
mony rests on evidence merely creating sus-
picion of defendant's guilt (Pen. Code, § 1111).

3. Criminal law $\Rightarrow$ 511(2).

Evidence corroborating accomplice tes-
timony, to authorize conviction, need not be
absolutely convincing or complete, but is suf-
ficient if it tends to connect accused with com-
mission of offense (Pen. Code, § 1111).

4. Homicide $\Rightarrow$ 29.

Defendant was guilty of murder actual-
ly committed by codefendant while attempt-
ing to escape after abandoning attempt to
rob.

It was no defense to accused, who acted
as lookout for two codefendants, who
actually attempted to commit robbery,
that before murder was committed, con-
spiracy previously existing was aban-
doned, in that one of defendants on en-
tering premises intended to be robbed al-
most immediately retreated therefrom
and delivered his pistol to accused, and
that thereafter, when second codefendant
likewise had abandoned his intention to
commit robbery and was endeavoring to
escape he did later shoot deceased.

5. Witnesses $\Rightarrow$ 52(7).

Testimony of wife having no tendency
to convict or acquit husband pleading guilty
to murder charge *held* competent against
codefendant, since wife was not witness
"against" husband (Pen. Code, § 1322).

Pen. Code, § 1322, provides that neither
spouse is competent witness for or
against other in criminal action to which
one or both are parties, except with con-
sent of both.

[Ed. Note.—For other definitions of
"Against," see Words and Phrases.]

6. Criminal law $\Rightarrow$ 386.

Accused's identity as person making ad-
missions to witness over telephone having

been established by another witness, testi-
mony respecting such admissions *held* compe-
tent against objection of insufficient founda-
tion.

It appeared that accused first talked
over telephone with mother-in-law of wit-
ness who testified as to conversation with
accused; that witness' mother-in-law
identified voice on telephone as that of
accused; that accused expressed wish to
talk to witness who immediately was
called to the phone; that in subsequent
conversation between accused and wit-
ness' mother-in-law, accused admitted
having had previous conversation with
witness.

7. Criminal law $\Rightarrow$ 622(1).

Refusal of separate trial to defendant in
murder case *held* not abuse of discretion
(Pen. Code, § 1098).

There was no abuse of discretion be-
cause, after each of accused's codefend-
ants pleaded guilty as charged in infor-
mation, they were eliminated from trial
and thereafter defendant did have sepa-
rate trial as to charge against him.

8. Criminal law $\Rightarrow$ 1202(3).

Admitting evidence of prior conviction of
violating Harrison Narcotic Act as basis
for sentence as prior felony offender *held*
not error (Pen. Code, § 668; Harrison Nar-
cotic Act).

9. Criminal law $\Rightarrow$ 1202(3).

Admitting evidence of prior conviction of
violating federal customs statute as basis of
increasing punishment *held* error (Pen. Code,
§ 668; Jones-Miller Act).

The admission of such evidence was
error because Jones-Miller Act (42 Stat.
596, as amended) relates solely to cus-
toms laws, and California has no such
laws. Pen. Code, § 668, provides that
person who has been convicted in any
other state, government, or county of of-
fense which, if committed within this
state, would be punishable by laws of
state by imprisonment in state prison,
is punishable for any subsequent crime
committed within state as prescribed to
same extent as if prior conviction had
taken place in state court.

10. Criminal law $\Rightarrow$ 1186(4).

In murder prosecution, error in admit-
ting evidence of accused's prior conviction of
federal customs laws for increasing punish-
ment *held* not to require reversal (Pen. Code,
§ 668; Const. art. 6, § 4½; Jones-Miller Act).

The admission of such evidence was not
prejudicial because evidence, though not

amounting to demonstration of accused's guilt, was amply sufficient to authorize conviction, and in view of fact that evidence of accused's violation of Harrison Narcotic Act was legally before jury.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Theodore Franklin Albritton and another were convicted of murder and Frank M. Shiraishi was convicted of murder as prior offender, and latter alone appeals.

Affirmed.

Charles J. Orbison, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HOUSER, J.

By an information filed in the superior court, three men named respectively Albritton, Smith and Shiraishi were charged with the commission by them of the crime of murder. In the same information the defendant Shiraishi was also charged with the commission of a prior felony. Shortly following the date of the arraignment of the three defendants Shiraishi presented a motion that he be granted a trial separate from either or both of his codefendants—which motion was by the court denied. Two days after the trial of all the defendants had commenced, Albritton and Smith each withdrew his former plea of "not guilty" and in lieu thereof entered a plea of "guilty as charged in the information." The trial then proceeded as against Shiraishi only, and following his conviction of the crime of murder and the finding of the jury that therefore he had "suffered a prior conviction of a felony," he has appealed to this court from the judgment and the order entered by the superior court by which his motion for a new trial was denied.

From the evidence received on the trial of the action it would appear that the murder in question occurred following an unsuccessful attempt made by the three defendants to rob an alleged Chinese gambling establishment. Each of the defendants Albritton and Smith testified fully regarding the plan of the robbery and the preliminary arrangements which he stated had been made by the three defendants in anticipation of its commission; and which included the purchase of a police badge by Shiraishi for the use of Smith in order that he and Albritton, who also had a police badge, might pretend to be police officers at and during the time that the robbery was taking place. It also appeared that Albritton and Smith had gone to the scene of the attempted robbery and resulting murder in an automobile owned by Smith; while Shiraishi repaired thither in a Ford coupé. The testimony given by Albritton and Smith also shows that they were expected to enter the room or

rooms where several Chinese were engaged in gambling and thereupon commit the robbery—during which time Shiraishi was to remain outside and act as a "lookout." The plan of operation was but partially completed. Almost immediately after Albritton and Smith had obtained an entrance into the place where the proposed victims of the robbery were congregated, Smith apparently abandoned his former intention to commit any crime; at least he left the room by the same door at which he had entered it, at which point (according to his testimony) he encountered Shiraishi to whom he gave the police badge and a pistol which he (Smith) theretofore had had in his possession, and thereupon left the scene of the crime. Seeing that Smith was leaving the premises, Albritton also decided to make his "getaway" by a rear door; and it was while making his escape from the premises and in the course of a pistol fight between Albritton and some of the Chinese that Albritton fired the shot from his revolver which caused the death of the person for whose murder the defendant Shiraishi was on trial.

[1-3] Appellant first complains that the testimony given by the accomplices Albritton and Smith was not sufficiently corroborated.

Section 1111 of the Penal Code provides that: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. * * *"

In that regard, among other incriminatory facts which were introduced in evidence was testimony that shortly preceding the time when the crime occurred Shiraishi was seen in the immediate neighborhood of the alleged gambling establishment where the attempted robbery and subsequent murder took place; that Albritton and Shiraishi were seen together in a Ford coupé in the afternoon of the same day; that on that day Shiraishi had purchased a police badge similar in appearance to the one used by Albritton at the time the crime was committed; that on the day in question Shiraishi had borrowed from a friend of his a Ford coupé; that one or two hours after the murder had taken place Shiraishi telephoned to the wife of Albritton and told her that Albritton had been shot, and in effect that the murdered man had been shot by a Japanese or a Chinaman and said that he (Shiraishi) "was there"; that following the arrest of Shiraishi, in the upholstering of the automobile in which he had been transported from the place of his arrest to the jail, the arresting officer found a police badge which resembled the police badge which Shiraishi had purchased on the day when the crime was committed.

No useful purpose would be served by an exhaustive review of legal principles contained in the many authorities of this state which both define the word "corroboration" and re-

late to the sufficiency of evidence introduced for the purpose of corroborating testimony given by an accomplice. It may be conceded that the law does not contemplate the conviction of a person accused of the commission of a crime where the attempted corroboration of the testimony given by an accomplice rests upon such evidence as should merely create a suspicion of the guilt of the defendant on trial. On the other hand, in order that it meet the requirements of the statute, it is not imperative that the corroborating evidence be absolutely convincing, or that it be complete as to each item of evidence to which the accomplice has testified. It may be but slight and, if standing alone, entitled to but little weight; provided always that it "tend to connect the defendant with the commission of the offense." *People v. Kelly*, 69 Cal. App. 558, 570, 231 P. 767, 772, and authorities there cited.

From a consideration of the evidence adduced on the trial of the instant action in corroboration of the testimony given by the accomplices of defendant Shiraishi, it would seem manifest that it was ample not only for the purpose of satisfying the demands of section 1111 of the Penal Code, but as well to justify the jury in its apparent conclusion that the crime in question was committed with the intentional criminal consent, co-operation, and participation of the defendant Shiraishi therein. However, in the same connection, appellant presents the point "that even if there was a conspiracy or common design to commit robbery, the same was abandoned before any homicide was committed."

[4] As hereinbefore indicated, the evidence upon which appellant relies for his conclusion that before the murder was committed the conspiracy which theretofore had existed among the three defendants had been abandoned, was to the effect that almost immediately following the entrance of Albritton and Smith into the alleged gambling house Smith retreated therefrom, delivered his pistol and police badge to Shiraishi, who accepted the same, and that it was only thereafter, while Albritton likewise had abandoned his intention to commit a robbery and was endeavoring to effect his escape from the premises, that the fatal shot was fired.

That the principle for which appellant contends is untenable is decided in each of the cases of *People v. Woods*, 147 Cal. 265, 81 P. 652, 109 Am. St. Rep. 151, and *People v. Kauffman*, 152 Cal. 331, 92 P. 861, where a situation was involved similar to that presented in the instant case. See, also, *People v. Boss* (Cal. Sup.) 290 P. 881; *People v. Dowell*, 204 Cal. 109, 266 P. 807; and, generally, authorities cited in 13 Cal. Jur. 600.

[5] It is urged by appellant that the trial court committed prejudicial error in that, over the objection of defendant Shiraishi, the

wife of defendant Albritton was permitted to testify to certain material facts within her knowledge.

In part, section 1322 of the Penal Code provides that: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both. * * *"

The record herein shows that the wife voluntarily and willingly testified as a witness in the case, and that her husband expressly consented that she do so. But even had the husband objected, it is difficult to perceive how the testimony given by the wife would have been affected by the terms of the statute. In substance, the provision of section 1322 is that the wife is not a competent witness "against" the husband. Manifestly, the primary purpose of the statute is not to afford protection to third persons, but only to preserve inviolate the confidence which by legal sanction exists between a husband and a wife. Before the time at which the wife gave her testimony the husband had pleaded "guilty as charged in the information." He was no longer a defendant on trial. As far as having a tendency either to convict or to acquit her husband of the charge preferred against him, the testimony of the wife was of no effect. In the language of the statute, the wife was not a witness "against" the husband. In section 392, volume 1, Wharton's Criminal Evidence, appears the statement: "* * * Where, also, a married defendant has pleaded guilty, or is entirely removed from the record, whether by verdict pronounced in his favor or by a previous conviction, his wife may testify either for or against any other persons who may be parties to the record, and the mere hope that, by testifying against a prisoner, a wife may procure the pardon of her husband who has been previously convicted of another crime will not affect her competency, though it may shake her credit. * * *"

To the effect that where it appears that the testimony of the wife will not injure the husband she may be a competent witness against an accomplice, see section 306, Underhill on Evidence; also the following authorities: *United States v. Addatte*, 6 Blatchf. 76, Fed. Cas. No. 14,422; *Powell v. State*, 58 Ala. 362; *Commonwealth v. Manson*, 2 Ashm. (Pa.) 31; *Moffit v. State*, 2 Humph. (Tenn.) 99, 36 Am. Dec. 301; *Blackburn v. Commonwealth*, 12 Bush (Ky.) 181.

In the instant case the testimony given by the wife occupied the same position as though the husband was not a party either to the particular action or to any other action arising out of the same alleged facts. Although in certain circumstances (not here present) it is possible that persons other than the husband might claim the benefit of the rule which forbids the wife to testify against the husband (as to which situation no opinion is intended

to be expressed herein), an examination of the statute fails to disclose language which will bear the construction that, in the circumstances here present, the appellant was entitled to have the testimony given by the wife excluded from consideration by the jury.

[6] A part of the testimony given by the wife of defendant Albritton consisted of certain admissions made to her by defendant Shiraishi in a conversation which took place over the telephone—to which testimony defendant Shiraishi objected on the ground that a sufficient foundation had not been laid for its introduction in evidence. It appeared that Shiraishi had first talked with the mother of Albritton; that the mother identified the voice at the telephone as that of Shiraishi; and that he expressed a wish to talk to the wife, who immediately was called to the telephone. Furthermore, that in a subsequent conversation between Shiraishi and the mother, he admitted having had the previous conversation with the wife. The identity of defendant Shiraishi having been thus established, it follows that his objection to the introduction in evidence of the testimony in question was not well taken.

[7] Appellant also specifies alleged prejudicial error in that the trial court denied his motion for a trial separate and apart from either of his codefendants. By the terms of section 1098 of the Penal Code, the granting of such a motion rests within the discretion of the trial court. Since no abuse of such discretion is shown to have existed, or to have influenced the trial court in its decision in the matter, it is apparent that the point urged by appellant is without merit. Besides, since after each of appellant's codefendants pleaded "guilty as charged in the information" they were eliminated from the trial, it would follow that at least thereafter the defendant Shiraishi did have a separate trial as to the charge which was preferred against him.

[8] Finally, it is contended by appellant that the trial court erred "in permitting the district attorney to plead and prove alleged prior convictions of the defendant Frank Shiraishi."

That part of the information herein which related to the charge that before the filing of such information defendant had been convicted of a felony, is as follows: "That before the commission of the offense hereinabove set forth in this information, said defendant, Frank M. Shiraishi, was, in the United States District Court, Southern Division, Southern District of California, convicted of the crime of violation of Harrison Narcotic Act of December 17, 1914, as amended February 24, 1919, and Jones-Miller Act of February 9, 1909, as amended January 17, 1914, and as amended May 26, 1922, a felony. * * *

In the case of *People v. Bigelow*, 94 Cal. App. 28, 270 P. 460, it was held that a conviction

under the "Harrison Narcotic Act" constituted a felony which, on being pleaded and proved, authorized the trial court to impose a sentence as for one who "theretofore had been convicted of a felony." Therefore, as far as concerned the introduction of evidence which tended to prove the prior conviction of defendant Shiraishi of a violation of the so-called "Harrison Narcotic Act" (38 Stat. 785, as amended), no error was committed by the trial court.

[9, 10] But as relates to the conviction of defendant Shiraishi of a violation of the "Jones-Miller Act" (42 Stat. 596, as amended) a different situation is presented.

By the provisions of section 668 of the Penal Code: "Every person who has been convicted in any other state, government, or country, of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed in sections 644, 666 and 667, and to the same extent as if such prior conviction had taken place in a court of this state."

The objections of defendant on the trial of the action, as well as on this appeal, are directed solely to the fact that the "Jones-Miller Act" relates to custom laws and that "we have no custom laws whatsoever in California." In substance, the point urged by appellant is that because there are no custom laws in this state no authority existed for either pleading or proving the prior conviction of defendant of a violation of the custom laws of the United States, and that the record of such conviction was introduced in evidence "for the purpose of degrading and debasing defendant in the eyes of the jury."

Since no authority is cited by respondent by which may be justified in law the introduction in evidence of a judgment of conviction of a defendant for an offense not denounced by the statutes of this state, and since it is manifest that the natural effect of the introduction in evidence of such a record necessarily would be to create a prejudice in the "mind" of the jury against the defendant, it would follow that the point presented by appellant is well taken. However, the mere fact that error was committed by the lower court in the course of the trial is not all that is required. Before a judgment may be set aside, or a new trial may be granted, it is necessary that "after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Section 41½, art. 6, Const.

Considering the evidence adduced on the trial of the action, this court is impressed with the correctness and justice of the verdict returned by the jury. Although the evidence did not amount to a demonstration of the

guilt of the defendant Shiraishi, it would be difficult to understand how any verdict other than that the defendant was "guilty as charged in the information" could have been rightly returned. Nor, when the fact that the prior conviction of the defendant on a charge of having violated the "Harrison Narcotic Act" was legally before the jury is kept in mind, is it possible to more than conjecture that another and different conviction of the defendant for a violation of the custom laws of the United States would produce any effect on the jury as far as influencing it in any way in the rendition of its verdict was concerned. By the judgment of conviction on the "Harrison Narcotic Act" count, he was already so "degraded and debased" that a similar judgment under another count in the same action (even though for a different offense) could not have resulted in such prejudice to the defendant as to make the error present a situation where this court should be convinced that it "resulted in a miscarriage of justice."

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

110 Cal. App. 538

MEYERS v. LASKER et al.

Civ. 4220.

District Court of Appeal, Third District,
California.

Dec. 18, 1930.

1. Corporations ⇨123(17).

Maker's complaint against payee and others held to state cause of action for conversion of stock pledged as collateral security for note, notwithstanding maker's willingness to allow credit for amount of note.

Complaint in question showed that stock was converted before note was due, and that no demand for payment was made or notice given to maker.

2. Corporations ⇨123(17).

Before bringing trover for conversion of stock pledged as collateral security for note, maker was not required to tender payment of note.

Maker was not seeking to recover possession of pledged stock, as in replevin, but was suing for damages for wrongful appropriation by pledgees. It was alleged further, on information and belief, that part of proceeds from sale of stock was applied to payment of note, and that note had been returned to maker fully satisfied.

3. Pledges ⇨11.

That pledgor deposited pledge with pledgee holding jointly with others did not invalidate pledge (Civ. Code, §§ 2993, 2995).

Civ. Code, § 2993, contemplates that, by consent of parties, pledge may be placed in custody of third person to hold as trustee who, in view of section 2995, is termed a pledge holder, and is bound to enforce pledge.

4. Pledges ⇨26.

Third persons in whose custody pledge is deposited jointly, being joint pledge holders, are bound to enforce terms of pledge (Civ. Code §§ 2993, 2995).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Laura M. Meyers against A. I. Lasker and others. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Charles A. Sunderlin, of Los Angeles, for appellant.

Newman, Haas & Schwartz and Fredericks, Hanna & Morton, all of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the Court.

This is a suit for conversion of corporation stock. A demurrer to the second amended complaint was sustained without leave to amend. A judgment was thereupon entered, from which the plaintiff has appealed.

The second amended complaint alleges that the Lasker Finance Corporation took over the business and assets of the A. I. Lasker Company, a corporation, in October, 1925; that the plaintiff was the owner and holder of 316 shares of the capital stock of the A. I. Lasker Company, of the reasonable market value of \$37,500; that, on November 1, 1925, for a valuable consideration, the plaintiff executed and delivered to the defendant Rust & Co. his promissory note for the sum of \$19,640, payable one year from the date thereof, with interest at the rate of 7 per cent. per annum, payable at maturity; "that on or about the date aforesaid, the plaintiff delivered to the defendants Rust & Co., Nat Cordish, * * * and the Mutual Motors Incorporated of Delaware, * * * with her endorsement, stock certificates for the aforesaid described stock, as collateral security and as a pledge for the payment of plaintiff's promissory note, * * * on the agreement * * * [with said defendants] that the said stock would be held by the aforesaid defendants as collateral and a pledge for the payment of the said promissory note, and as a

part thereof, and not otherwise, and that the said stock would not be sold or otherwise disposed of, and would return the said stock to the plaintiff in the event that plaintiff's said promissory note was paid or released. That thereupon and immediately thereafter, and before the said promissory note of the plaintiff was due or payable, and without any demand for payment, and without the knowledge or consent of the plaintiff, the said defendants * * * converted the said stock and the whole thereof; that the said defendants * * * did thereupon and immediately thereafter sell and deliver the said stock to the defendants A. I. Lasker and the Lasker Finance Corporation with full knowledge and notice by the said defendants A. I. Lasker and the Lasker Finance Corporation of the interest of the plaintiff in and to and ownership of the said stock. * * * That the defendants A. I. Lasker and Lasker Finance Corporation were not, and never have been the holders or owners of plaintiff's said promissory note. * * * That the said stock, at the time it was converted by the said defendants, to-wit, on or about the 18th day of December, 1925, was of the reasonable and market value of thirty-seven thousand five hundred (\$37,500.00) dollars." Whereupon the plaintiff prays judgment for \$17,860, the alleged difference between the value of the stock and the amount due upon her promissory note.

[1] The second amended complaint states a perfectly good cause of action for conversion of the stock. The plaintiff might well have omitted all reference to her assumption that the stock was prematurely sold and applied to the payment of her note and that the holder of the note was entitled to credit for the amount of that instrument. The allegations specifically show that the note was not due at the time of the conversion. In spite of plaintiff's willingness to credit the holder of the note with the amount represented thereby, the complaint, nevertheless, states a good cause of action for conversion.

[2] The respondents confuse this action of trover with one of replevin when they defend the judgment by declaring that the pledgor is bound to make proper tender of payment of the note before she may demand a return of the pledge. This is not a suit to recover the possession of the pledge. It is a suit for damages for the wrongful appropriation of the pledge by the pledgees thereof. The debt was not due when the stock was appropriated. It was alleged, however, on information and belief, that a portion of the proceeds from the sale of the stock was applied to the payment of the note in full, and that the note had been returned to the plaintiff fully satisfied. Certainly a tender of the amount of a note which had been fully paid and discharged would not

be a condition precedent to the maintenance of a suit in trover.

There is no merit in the respondents' assertion that the complaint does not allege the acts constituting the conversion, or that the stock was sold prior to the maturity of the note. The complaint specifically alleges the wrongful sale of the stock by the pledgees before the maturity of the note. This was a violation of the terms of the pledge, and constituted a conversion of the stock.

[3,4] Nor is there a defect as to the validity of the pledge merely because the stock was deposited with the payee of the note jointly with other individuals to hold as security for the payment of the debt. Indeed, by consent of the debtor and creditor, the pledge may be placed in the custody of a third person to hold as a trustee to secure the payment of the debt. Section 2993, Civ. Code. Under such circumstances, this trustee is termed a pledge holder, and is in duty bound to enforce the terms of the pledge. Section 2995, Civ. Code; 21 Cal. Jur. 307, sec. 17; Perry v. Parrott, 135 Cal. 238, 67 P. 144. On principle, the same obligation rests upon joint pledge holders to see that the pledge is fulfilled. The demurrer does not raise the question as to an uncertainty of the relationship of the joint pledge holders.

We are of the opinion the second amended complaint states a cause of action for conversion and that the court erred in sustaining the demurrer.

The judgment is reversed. The court is directed to overrule the demurrer and permit the defendants to answer.

110 Cal. App. 303

McCOMB v. ATCHISON, T. & S. F. RY. CO.
Civ. 7222.

District Court of Appeal, First District,
Division 1, California.

Dec. 9, 1930.

Rehearing Denied Jan. 8, 1931. Hearing Denied by Supreme Court Feb. 5, 1931.

1. Master and servant ⇨278(18).

Evidence held to sustain finding of railroad's negligence in switching freight cars against cars between which switchman was working.

2. Appeal and error ⇨1002.

Findings of jury on conflicting evidence cannot be disturbed.

3. Master and servant ⇨278(18).

Switchman's testimony as to practice to give warning to employees in respect to

switching movements was sufficient of itself to support finding to that effect.

4. Customs and usages ☞19(3).

Testimony of one witness, if believed by jury, is sufficient to prove custom or usage.

5. Master and servant ☞137(6).

Failure to give warning to switchman before switching freight cars against cars between which switchman was working constituted negligence.

Although there was nothing unusually hazardous or unsafe in connection with the work being done, it was shown that switchman was instructed when employment commenced that, under conditions such as those under which he was then working, he would receive warnings of movements of cars unless a tab or lineup was furnished, and also that warnings were usual under such circumstances.

6. Evidence ☞481(3), 490.

Injured switchman's testimony as to force with which cars were struck and distance moved by impact of other cars was competent.

Although it was admitted that switchman was severely injured and suffering great pain, so that consequently he would not be in condition to make accurate observations, nevertheless such facts went to the weight and not to competency of testimony, and question of credit to be given thereto was for jury.

7. Master and servant ☞288(3).

Whether railroad switchman assumed risk of danger in going between cars to couple air hose held for jury.

8. Master and servant ☞231(1).

Employee, in position of danger, has right to presume that master will exercise ordinary care to prevent anything being done which will increase danger incident to employment.

9. Master and servant ☞243(4).

Switchman's failure to observe rules of railroad, observance of which was impractical, was no defense to action for injuries.

In addition to testimony to effect that observance of rule of railroad requiring employees on or about cars or trains in yard to place thereon a blue light at night as a warning was impractical, there was other testimony that no such lights were provided or used in yards and that requirement had never been enforced or observed.

10. Master and servant ☞240(6).

Complaint of railroad switchman of existing conditions was unnecessary in order to avail himself of promise to warn him of danger where there had been theretofore no occasion for complaint.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Frank P. McComb against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant.

John J. McMahon, of Los Angeles, and James F. Brennan and P. J. Murphy, both of San Francisco, for respondent.

PER CURIAM.

The respondent, Frank P. McComb, was a switchman in the employ of appellant, the Atchison, Topeka & Santa Fé Railway Company, a corporation. In the course of switching operations at the Richmond yards of the company near San Francisco, and while freight cars were being switched by the engine crew of which respondent was a member, he went between the cars to couple the air hose. While so doing six other freight cars were switched against the cars between which respondent was working, causing them to move. As the result the trucks of one of the cars ran over respondent's left leg, necessitating its amputation.

Respondent alleged that his injuries were caused by appellant's negligence. The latter denied negligence and pleaded as defenses respondent's contributory negligence and assumption of risk.

A jury having returned a verdict in favor of respondent, appellant moved for a new trial, which was denied, and it has appealed from the judgment.

Appellant contends that the evidence is insufficient to justify the verdict, and that the trial court erred in denying its motions for a nonsuit, a directed verdict, and a new trial.

[1] Respondent was injured at about 10:45 p. m. on May 4, 1927. He was working under the orders of a foreman, who also directed the movements of the locomotive which was shunting the cars. Respondent testified that on this occasion he was ordered to couple the air hose on a designated number of cars, and that while making such couplings it was impossible to observe the switching movements in the railroad yard. He also testified in substance that the foreman had previously

told him that when performing this character of work he would receive what railway employees call a tab or lineup, which indicates the tracks upon which cars are to be placed and the order in which they are to be moved; and that otherwise he would be warned before the cars were moved. He further testified that it was the practice to give warning under such circumstances unless a tab or lineup was furnished; that he received none, and, following his instructions, proceeded to make the couplings, when without warning the six cars mentioned were shunted against those between which he was working, with force sufficient to move them for a considerable distance; that the impact threw him upon the rails and that his injuries followed. The foreman denied that he agreed to furnish a tab or lineup, or that he agreed to warn respondent. He, with other employees of appellant, also testified that it was not customary to furnish a lineup or give warnings, and, further, that the cars were not shunted violently as claimed by respondent.

[2] The testimony as to the conditions in the railroad yard and what was said and done previous to the accident was voluminous, and a review thereof will serve no useful purpose. It will be sufficient to say that the evidence, though conflicting, was amply sufficient to support plaintiff's version of the affair. The jury believed, and were justified in believing, his testimony, and their findings thereon cannot be disturbed.

[3, 4] Nor can the contention be sustained that the plaintiff's testimony that it was the practice in the Richmond yard to give warning to employees unless a tab or lineup was furnished was insufficient to support a finding to that effect. The rule is well established that the testimony of one witness, if believed by the jury, is sufficient to prove a custom or usage. *Robinson v. U. S.*, 13 Wall. (80 U. S.) 363, 366, 20 L. Ed. 653; *Partridge v. Forsyth*, 29 Ala. 203; *Jones v. Herrick*, 141 Iowa, 615, 118 N. W. 444; *Vail v. Rice*, 5 N. Y. 155, 157; *Gleason v. Metropolitan St. Ry. Co.*, 99 App. Div. 209, 90 N. Y. S. 1025, 1026.

In *Jones v. Hoey*, 128 Mass. 585, the court said: " * * * There can be no doubt, at the present day, that the circumstance that but one witness testifies to a usage is important only as bearing upon the credibility and satisfactoriness of his testimony in point of fact, and does not affect its competency or its insufficiency as matter of law." The same rule was followed in *McDonough v. Boston Elevated Ry. Co.*, 191 Mass. 509, 78 N. E. 141. As stated by Dean Wigmore in his work on Evidence, § 2053: "The view has been occasionally advanced that a single witness is insufficient to prove the existence of a custom or usage. * * * This rule would today

probably not be recognized by any court except by express statute."

[5] While, as urged by appellant, there was nothing unusually hazardous or unsafe in connection with the work done in the railroad yard, it being shown that the plaintiff was instructed when his employment commenced that under the conditions described above he would receive warnings of the movements of cars unless a tab or lineup was furnished, and also that warnings were usual under such circumstances, he had a right to assume that a warning would be given (39 Cor. Jur., Master and Servant, § 573, p. 458, and cases cited); and a failure to give such warning by those in charge of the work constituted negligence (39 Cor. Jur., Master and Servant, sec. 575, p. 459; *Missouri, etc., Ry. Co. v. Dereberry* [Tex. Civ. App.] 167 S. W. 30; *St. Louis, etc., R. Co. v. Dupree*, 84 Ark. 377, 105 S. W. 878, 120 Am. St. Rep. 74; *Hogan v. Crane Co.*, 259 Ill. 47, 102 N. E. 215; *Russell v. Chicago, etc., R. Co.*, 160 Iowa, 503, 141 N. W. 1077; *Winkler v. St. Louis Terminal, etc., Ass'n*, 206 Mo. 224, 227 S. W. 625; *Grijnuk v. McAdoo*, 95 N. J. Law, 256, 113 A. 920; *Pinckney v. Atlantic, etc., Ry. Co.*, 92 S. C. 528, 75 S. E. 964; *Atchison, etc., Ry. Co. v. Mills*, 49 Tex. Civ. App. 349, 108 S. W. 480; *Southern Ry. Co. v. Darnell's Adm'x*, 114 Va. 312, 76 S. E. 291; *Holman v. St. Louis-San Francisco R. Co.*, 312 Mo. 342, 278 S. W. 1000).

[6] It is further contended that plaintiff's testimony as to the force with which the cars were struck and the distance they were moved by the impact was incompetent. This claim is based upon the admitted fact that plaintiff was severely injured and suffering great pain; and it is urged that he was consequently not in a condition to make accurate observations. These facts went to the weight and not to the competency of his testimony, and the question of the credit to be given thereto was for the jury. *Shimoda v. Bundy*, 24 Cal. App. 675, 142 P. 109.

[7, 8] It is also claimed that plaintiff assumed the risk of the dangers attending upon his work; that those dangers were known and appreciated by him, and that he assumed the risk thereof, notwithstanding any assurances given him by the foreman. While plaintiff knew and appreciated the dangers of his position in case cars were switched without warning, nevertheless, in view of the facts and under the circumstances above stated, he had the right to rely upon a warning being given; and, so far as appears, he was not lacking in due care for his own safety. An employee who places himself in a position of danger does not thereby necessarily assume the risk of injury from the want of care of his employer. He has the right to act upon the presumption that the

master will exercise ordinary care in the conduct of his business to prevent anything being done which will increase the danger incident to the employment (*Morgan v. J. W. Robinson Co.*, 157 Cal. 348, 107 P. 695); and the question whether he assumed the risk was one for the jury (*Hennesey v. Bingham*, 125 Cal. 627, 58 P. 200; *Morgan v. J. W. Robinson Co.*, supra).

[9] It is also urged by defendant in the same connection that plaintiff failed to observe a rule of the company requiring employees on or about cars or trains in the yard to place thereon a blue light at night as a warning to advise other employees that such work is being done; or, if the light be omitted, to advise enginemen and the crew that the cars were not to be moved until the completion of the work. According to the plaintiff—and in this he was corroborated by the yardmaster—no such lights were provided or used in the yard; and the requirement that the other employees be advised had never been enforced or observed. The yardmaster also testified in substance that the observance of the rule was impractical. Under such circumstances a failure to observe a rule of the company is no defense to an action by an employee. *St. Louis, etc., Ry. Co. v. Caraway*, 77 Ark. 405, 91 S. W. 749; *Fluhrer v. Lake Shore, etc., Ry. Co.*, 124 Mich. 482, 83 N. W. 149; *Finnegan v. Mo. Pac. Ry. Co.*, 261 Mo. 481, 169 S. W. 969; *Cincinnati, etc., Ry. Co. v. Lovell's Adm'r*, 141 Ky. 249, 132 S. W. 569, 47 L. R. A. (N. S.) 909; *Canon v. Chicago, etc., Ry. Co.*, 101 Iowa, 613, 70 N. W. 755; *Young v. Lusk*, 263 Mo. 625, 187 S. W. 849; *Anable v. N. Y. Central, etc., R. R. Co.*, 138 App. Div. 380, 122 N. Y. S. 713.

[10] There is no merit in the further contention that, in order to avail himself of the promise, express or implied, to warn him of danger, he must have made a complaint of existing conditions and continued in his employment in reliance upon his employer's assurances. In the present case there was no occasion for complaint prior to the accident, as there was no reason for plaintiff to assume that his employer would fail to give warning of the approach of danger.

Lastly, it is charged that, there being a failure to prove actionable negligence, the verdict of the jury was contrary to law, and that the court erred in denying defendant's motions for a nonsuit, a directed verdict, and a new trial. We are satisfied for the reasons stated that the facts show actionable negligence on the part of the defendant; that the conclusions of the jury were fully sustained; and that the several motions by defendant were properly denied.

The judgment is affirmed.

In re WHITWORTH'S ESTATE.

WHITWORTH et al. v. OLIVAS et al.
Civ. 7557.

District Court of Appeal, Second District,
Division 1, California.
Dec. 18, 1930.

1. Wills ☞31.

There is no rule of law prescribing average capacity for testamentary act.

2. Wills ☞50.

Testator is of "sound and disposing mind and memory" if he has sufficient mental capacity to understand nature of act, to understand and recollect nature and situation of property, and to remember and understand relations to persons having claims upon bounty.

[Ed. Note.—For other definitions of "Sound Mind and Memory," see Words and Phrases.]

3. Wills ☞52(1).

[Presumption is person executing] will was competent to make will, and burden rests upon contestants to prove otherwise.

4. Wills ☞324(2).

In will contest, evidence of testator's mental incapacity to make will held insufficient to require submission to jury.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Proceedings by Robert G. Whitworth and others against M. J. Olivas, executor of the estate of Arthur Whitworth, deceased, and others, by which the probate of the last will of Arthur Whitworth, deceased, was contested. From a judgment of nonsuit, contestants appeal.

Affirmed.

C. L. Kilgore and Duke Stone, both of Los Angeles, for appellants.

Byron J. Walters and Ralph K. Pierson, both of Los Angeles, for respondents.

HOUSER, J.

This is an appeal from a judgment of nonsuit in a proceeding by which the probate of the last will of the deceased, Arthur Whitworth, was contested.

The only matter in controversy between the litigants herein relates to whether the evidence introduced on the trial of the contest was sufficient to require the submission to the jury of the question of the mental capacity of the testator to make a will.

The substance of the evidence adduced on the hearing of the contest was that the testator was "feeble minded, * * * weak minded; * * * an immature individual; * * * of unsound mind; * * * silly; * * * had the mentality of a boy not over ten years"; he had "a silly expression on his face; acted like a half-wit." That as a boy, although he had attended school for a period of "seven or eight terms," he could read very little; "could not read very good." He read the "Hollywood News"; could not spell and could only write his name. He would answer questions, but he could not carry on a connected conversation; "his answers would be incomplete and meaningless and vague." He was "easily peeved, without cause." That his hands were deformed; "one hand just like a chicken foot;" "he was born with part of his fingers and thumb off; some of his fingers were webbed together; * * * one hand the thumb was off right here, and his first two fingers, and on the other hand he had the little finger and this finger and the thumb, but the thumb was flat." He would meet a stranger and look at him with a kind of grin. He did light work about the ranch, such as feeding the horses and cows; he was not capable of doing heavy work. "He would pitch hay into the horse manger, but never went out into the field to pitch hay. * * * He could drive two horses along very well, but he could not handle more than that; he did not know how to take hold of a six-horse team and plow. He worked in the hay crop during the hay season. * * * He stayed around the place and worked on the ranch in general, like we all did, took care of the barn, took care of the stock, the horses." That for a period of about ten years next preceding his decease he lived with a man named Olivas, where he had a chicken ranch, and also "watched cattle." When he visited either of his brothers, he would say, "I will have to get back to Olivas to take care of the chickens"; or, if he were to remain overnight at the home of either of his brothers, if he so chose, he would sleep in the barn, although he might have occupied a bed in the house. At the time when he started going with Olivas ("as a guess") his estate might have been worth thirty or forty thousand dollars in mortgages and lots; but at the time of his death he was worth between five and six thousand dollars. Although at that time he had \$140 in cash, only bread and coffee were found in the place where he had lived. Sometimes one of his brothers would give him \$10 or \$15 or \$20. That he was incapable of attending to his own business; although he "carried a bank account and checked against it when he needed money." He also negotiated "a deal for the job of painting the ranch house." He had some money out at interest. He also owned and managed other properties. That before the Great War one of his broth-

ers, who was an attorney at law, cared for his business interests for him; that he had some cattle, and if he needed a little money and some one came along and offered him any price, "he would be willing to sell it at a sacrifice"; that he would give his money away. "He gave a barber lady enough money to buy a ranch." When an application for letters of guardianship was made for his person and estate, "he stated that if we had a guardian appointed he would kill himself." On occasions when he "went anywhere into town," on his return, if one of his brothers were to inquire where he had been, he would answer, "Huh, what do you want to know for?" And if his brother were to reply that he did not wish to see him throw his money away, he would say, "What is it to you? It ain't your money." When another brother of the testator would try to ask him about his business affairs, he "never got very far with it." The testator would not answer the questions, but would tell him "it was none of his business."

From the foregoing summary of the salient points of the evidence introduced on the hearing of the contest, it may be deduced that the testator was not possessed of the average amount of human intelligence; or, as expressed by one of the witnesses, "he was a feeble minded, or a weak minded, individual," who, perhaps unsuccessfully, attended to his own personal and business affairs.

In its facts the case of *Howell v. Taylor*, 50 N. J. Eq. 428, 26 A. 566, 567, presented a situation somewhat resembling that in the instant case. Therein it unquestionably appeared that the testator was weak-minded. "He could read and write his name, and, at times converse with some show of intelligence. He also could work in the garden, and aid in harvesting and perform household errands. As to the extent of his capacity to do errands the witnesses differ. Some say that he would indicate that for which he was sent by a single word, or would deliver a slip of paper upon which the name of the article was written, while others testify that he possessed sufficient intelligence to be able fully to state what he wanted, and to pay for that which he obtained. It is also testified that sometimes he would sit listlessly for hours, mumbling and laughing to himself. His expression was vacant; yet, as one witness, a clergyman, says, there was more intelligence than idiocy in it. His articulation was indistinct, and could scarcely be understood by one unaccustomed to it. He rarely answered when spoken to, except by a monosyllable, but his answers were correct. He was docile, never rebellious, and so well behaved that he ate with the family, and remained clean and decently dressed. The income from his estate was usually paid to some member of the Taylor family, upon his signing a receipt for it; yet it is in evidence

that at times he had and kept possession of sums of money himself, and discreetly disbursed them. It was not affirmatively and clearly proved that he ever asked or knew about his estate, or that he was able to recollect his kindred, but, at the same time, *it was not shown that he was without that knowledge and recollection.* By inference it may be gathered that he had some comprehension of his property, and some remembrance of his relatives, who were numerous. He certainly could remember the Taylors and his obligation to them. The order of his intelligence was undoubtedly low; yet it is impossible to say that under favorable circumstances, existing at the very moment of making the will, he did not possess that 'moderate' capacity which is recognized by the court of errors and appeals in *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 A. 690 [14 Am. St. Rep. 706], as sufficient to validate such a paper."

Other cases where the imbecility of the testator was the issue involved in a contest of his will, and in which a low degree of mentality was shown to have been present, but in each of which the will was upheld, are: *Errickson v. Fields*, 30 N. J. Eq. 634; *Hoban v. Piquette*, 52 Mich. 346, 17 N. W. 797; *St. Joseph's Convent of Mercy v. Garner*, 66 Ark. 623, 53 S. W. 298; *Bennett v. Bennett*, 50 N. J. Eq. 439, 26 A. 573; *Bannatyne v. Bannatyne*, 14 Eng. L. & Eq. 581.

[1, 2] In all the cases in which the question of the soundness of mind of the testator is involved the inquiry is limited to a determination of whether at the time of the execution of the will the testator was possessed of testamentary capacity. Nor is such capacity dependable upon a fixed standard of mentality in the testator; not even such as might be rated as an average is demanded. As is remarked in *Hoban v. Piquette*, 52 Mich. 361, 17 N. W. 797, 804: "There is no rule of law which prescribes average capacity for a testamentary act; if there were it would disabie a large portion of every community—perhaps one-half of it." The rule in California, which has been frequently announced by the courts of this state, is: "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. *Estate of Motz* [136 Cal. 558, 69 P. 294], su-

pra; *Estate of Dole*, 147 Cal. 188, 81 P. 534; *Estate of Huston*, 163 Cal. 166, 124 P. 852; *Estate of De Laveaga*, 165 Cal. 607, 133 P. 307; *Estate of Casarotti*, 184 Cal. 73, 192 P. 1085." *Estate of Sexton*, 199 Cal. 759, 764, 251 P. 778, 780.

[3] In the contest of a will where the issue presented involves the testamentary capacity of the testator, the outstanding presumption is that the person who executed the will was sane and competent to make such an instrument, and the burden rests upon the contestants to prove otherwise. *Estate of Perkins*, 195 Cal. 699, 703, 235 P. 45, and authorities there cited.

[4] It would serve no useful purpose to herein consider the conduct, act by act, of the testator, or to attempt a comparison of his intellect with that of either a brilliant or an average mind. The primary questions which are to be given consideration are: Was he possessed of that mentality which enabled him to understand the nature and situation of his property; to remember and to understand his relations to those persons who would be the natural objects of his bounty; and did he realize the nature of the act which he was performing? But of at least equal importance with the determination of such facts is the solution of the further inquiry as to whether the contestants sustained the burden which was cast upon them to prove the negative of such facts. A search of the record herein discloses evidence from which it is clearly inferable that at no time was the testator failing in his knowledge with reference to the nature, situation, or extent of his property. Nor is there the least indication that he was not entirely cognizant of the existence of those persons who, on the death of the testator, ordinarily would be expected to share in his estate. He knew them; had business relations with them; and at all times engaged in friendly social intercourse with them. Far from carrying the burden of showing to the contrary, the evidence introduced by the contestants affirms the legal testamentary capacity of the testator by establishing facts vitally opposed to the ultimate conclusion necessary to a decision of the testator's incompetency. In such circumstances, no error was committed by the trial court in its order by which the motion for nonsuit was granted. (See text and authorities cited in 26 Cal. Jur. 764 et seq.; also Suppl. to same, at p. 1581.)

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

**FIRST NAT. TRUST & SAVINGS BANK OF
SAN DIEGO v. INDUSTRIAL ACCIDENT
COMMISSION et al. ***
Civ. 459.

District Court of Appeal, Fourth District,
California.

Dec. 10, 1930.

Rehearing Denied Jan. 5, 1931. Hearing Grant-
ed by Supreme Court Feb. 5, 1931.

1. Partnership ⇨63.

In California, partnership is not usually considered as legal entity.

2. Insurance ⇨146(3).

In case of ambiguity, policy should be strictly construed against insurer who prepared it.

3. Partnership ⇨264.

Transfer of interest of any one partner dissolves partnership, no matter how many remain.

4. Insurance ⇨328(9).

Code provision that transfer of interest by one of "several" partners to others does not avoid insurance applies though there are but two partners (Civ. Code, § 2557).

Civ. Code, § 2557, provides that a transfer of interest by one of "several" partners, joint owners, or owners in common, who are jointly insured, to others, does not avoid insurance, notwithstanding agreement that insurance shall cease upon alienation of thing insured. While word "several" sometimes means more than two, it also means different and separate and is often used to designate a number greater than one.

[Ed. Note.—For other definitions of "Several," see Words and Phrases.]

5. Insurance ⇨311½.

Provision that transfer of partner's interest to others does not avoid insurance, being remedial, should be liberally construed.

6. Insurance ⇨332¼.

Transfer of interest of one of two insured partners to remaining partner held not to avoid workmen's compensation policy (Civ. Code, § 2557).

7. Insurance ⇨332¼.

Provisions of workmen's compensation policy that liability shall not be affected by employer's death held applicable, where death occurred prior to employee's injury.

8. Insurance ⇨392(8).

Insurer held not estopped, by reason of having sent bill for premium after injury, to

deny liability on workmen's compensation policy; record not showing knowledge of facts allegedly constituting defense, or agency of person having knowledge.

9. Insurance ⇨435.

Compensation insurer of bank, as bank, held not liable for injuries sustained by employee in business operated by bank as executor.

Proceedings under the Workmen's Compensation Act by Mabelle Bojens and others, widow and dependent children, for the death of Rinehard Bojens, employee, opposed by the First National Trust & Savings Bank of San Diego, as executor of the estate of Charles Williams Hascall, deceased, employer, the Occidental Indemnity Company, insurer, and others. To review an award of the Industrial Accident Commission in favor of claimants and against employer, dismissing proceedings as to insurer and others, employer petitions for writ of review.

Award annulled and matter referred to Commission for further order consistent with opinion.

James G. Pfanstiel and Eugene Daney, both of San Diego, for petitioner.

Edward O. Allen, of San Francisco, and F. Britton McConnell and Jennings & Belcher, all of Los Angeles, for respondents.

BARNARD, J.

This is a petition for a writ of review, seeking to annul an award made by the Industrial Accident Commission.

Charles Hascall and S. W. Powell, as co-partners, were conducting a wholesale and retail cigar store in the city of San Diego. On December 28, 1928, the respondent Occidental Indemnity Company issued to them a standard form workmen's compensation policy, covering the employees of said business from that date until December 28, 1929. About May 1, 1929, Hascall purchased the partnership interest of Powell in said business, and thereafter, until his death, continued to conduct the business under the same name of Hascall & Powell, with no change in the manner of conducting the business, or in the nature of the employment of one Rinehard Bojens, who had been an employee of the partnership. On September 27, 1929, the said Hascall died, and the First National Trust & Savings Bank of San Diego, a corporation, was appointed executor of his estate. The executor continued to operate the cigar store to the end that it might be sold as a going concern. One of the employees of the cigar store was made manager thereof by the executor, at an increased salary, and the other employees, including Bojens, were continued at the same work and at the same salary as be-

fore. On November 15, 1929, the said Rinehard Bojens, in the regular course of his employment in said cigar business, received injuries which resulted in blood poisoning and caused his death on January 18, 1930. Shortly after November 15, 1929, one Robert E. Holmes, through whom the Occidental policy was procured, was notified of the injury. After making some investigation, Holmes referred the matter to the respondent Occidental Indemnity Company, which company on December 30, 1929, wrote to an adjuster in San Diego, requesting him to make further investigation, which he did. It is admitted that Holmes knew that Hascall had purchased the partnership interest of Powell shortly after that transaction occurred and also knew that he was continuing the business as sole owner thereof. Also, that Holmes knew of the death of Hascall within a few days after it occurred, and prior to the date Bojens was injured. On December 27, 1929, respondent Occidental Indemnity Company issued a statement, addressed to Holmes, calling for an additional premium, based upon the wages actually paid by the business during the entire policy year, including the period during which the business was operated by Hascall alone and also the period during which the business was operated by the executor. The amount of this additional premium was paid by the executor to Holmes on January 6, 1930. It also appears that upon the expiration of the policy year on December 28, 1929, the policy was renewed for another year. The First National Trust & Savings Bank of San Diego carried a workmen's compensation policy with the respondent the Fidelity & Casualty Company of New York, which policy was written for the benefit of all of the employees of the bank, as set forth in said policy. After a hearing, with various continuances, the respondent Industrial Accident Commission made an award in the amount of \$5,000 in favor of the dependent wife and children of Bojens, and found that the First National Trust & Savings Bank of San Diego, executor of the estate of Charles Williams Hascall, deceased, was the employer of the said Bojens at the time of his injury, and that said employer was not insured. An order was also made dismissing the proceedings as to the First National Trust & Savings Bank individually, as to the Fidelity & Casualty Company of New York, a corporation, and as to Occidental Indemnity Company, a corporation. A petition for a rehearing was later denied by the Industrial Accident Commission.

It is conceded by all parties that the dependent wife and children of Bojens are entitled to the award made, the only question raised being as to who should pay the same. It is also conceded that the insurance policy issued by the Occidental Indemnity Company was in full force and effect at the time of the injury, unless the same had been avoided either by the transfer of the interest of S. W.

Powell to Charles Hascall, or by his subsequent death and the continuance of the business by his executor. In behalf of the respondents, it is urged that in the policy referred to the Occidental Indemnity Company insured a particular entity, namely, the partnership of Hascall & Powell, and that at the time of his fatal injuries Bojens was not the employee of this entity, but was the employee of the trust company in its capacity as executor; it being urged that the employer, within the meaning of the policy, was twice changed after the policy was issued.

[1, 2] Item 1 of the declarations in this policy reads as follows:

"Name of this Employer Charles Hascall and S. W. Powell, d. b. a. Hascall & Powell

"P. O. Address

1072-4th Street, San Diego, California.
Street City or Town

"For the purpose of serving notice, as in the policy provided, this Employer agrees that this address may be considered as both the residence and business address of this Employer or any representative upon whom notice may be served.

"Individual, co-partnership, corporation or estate? Co-partnership."

It will be noted that under "Name of this Employer," there are set forth two names, who are described as "doing business as Hascall & Powell." In paragraph 1 (a) of the policy the company agrees with this employer to pay to any person entitled thereto under the Workmen's Compensation Law the entire amount of any sum due. It will be noted that the policy, in naming the employer, names two individuals who are not even described as a copartnership. It does not specify that the partnership, as an entity, is named as the employer. While a little further down there appears a description as a copartnership, this is not included under the name of the employer. Not only does the policy fail to specify that the employer insured is a copartnership, as an entity, but in this state a partnership is not usually considered a legal entity. 20 Cal. Jur. 680; *People v. Maljan*, 34 Cal. App. 384, 167 P. 547; *Woodward v. McAdam*, 101 Cal. 439, 35 P. 1016. The point relied upon by respondents as freeing the Occidental Indemnity Company from liability under this policy is a most technical one. If we are to be extremely technical in interpreting this policy, it would seem that, strictly speaking, in naming the employer, this policy has insured two individuals, Charles Hascall and S. W. Powell, while they are doing business as Hascall & Powell. In other words, they are each insured while doing business under that firm name. While one of them dropped out of the business, the other continued to run the same business in the same manner and in the same name, so that not even such an increase of risk could be claimed, as might have occurred if a new per-

sonality had been brought into the business. Strictly interpreted, the policy insured either Charles Hascall or S. W. Powell while doing business as Hascall & Powell. If an ambiguity exists, an insurance policy should be strictly construed against the insurer who prepared it. *Welch v. British American, etc., Co.*, 148 Cal. 223, 82 P. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396. Had this insurance company desired to insure only this copartnership as an entity, it could have been easily so designated in naming the employer.

[3-6] In any event, we feel that section 2557 of the Civil Code applies. This section reads as follows: "A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured."

That section applies to all kinds of insurance. Civ. Code, § 2534. Respondents insist that this section does not apply, but should be interpreted in connection with the entire Code, particularly in connection with the provisions with respect to dissolution of copartnerships. It is urged that by these latter provisions, a transfer from one of only two partners to the other, effects a dissolution of the partnership, and that section 2557 was meant to apply only when there are more than two partners, and where the partnership would not be dissolved by the transfer of the interest of one to the others remaining. If that were the case, section 2557 would have no meaning in respect to partnerships because, by the law of partnership, the transfer of the interest of any one partner dissolves the partnership, no matter how many partners remain. It is also urged that the word "several" in section 2557 means more than two. While that is one meaning of the word, there are also other meanings, such as, different and separate. The word is often used to designate a number greater than one. The section refers not only to partners, but to joint owners or owners in common. And in speaking of such owners, no reason appears why the beneficent provisions of the section should be limited to cases where more than two are involved. It seems to us that the object and purpose of the section is to provide for a perfectly natural and just situation, and that it was intended to apply to such a transfer by one of two or more such parties. The section is unquestionably remedial, and for the benefit of the insured, and as such, should be liberally construed. This section of the Civil Code was a part of this insurance contract. *General Acc., etc., Corp. v. Indus. Acc. Comm.*, 196 Cal. 179, 237 P. 33. We are therefore of the opinion that the transfer of the interest of S. W. Powell in this business to Charles Hascall did not avoid this policy and that Charles Hascall continued as the employer named in the policy up to his death.

Cal.Rep. 292-294 P.—55

[7] Among the conditions of the policy in question, section D reads as follows: "The obligations of paragraph one (a) foregoing are hereby declared to be the direct obligations and promises of the Company to any injured employee covered hereby, or, in the event of his death, to his dependents; and to each such employee or such dependent the Company is hereby made directly and primarily liable under said obligations and promises. This contract is made for the benefit of such employees or such dependents and is enforceable against the Company, by any such employee or such dependent in his name or on his behalf, at any time and in any manner permitted by law, whether claims or proceedings are brought against the Company alone or jointly with this Employer. If the law of any state in which the policy is applicable provides for the enforcement of the rights of such employees or such dependents by any commission, board or other state agency for the benefit of such employees or such dependents, then the provisions of such law are made a part hereof, as respects any matter subject thereto, as fully as if written herein. The obligations and promises of the Company as set forth in this paragraph shall not be affected by the failure of this Employer to do or refrain from doing any act required by the policy; nor by any default of this Employer after the accident in the payment of premiums or in the giving of any notice required by the policy or otherwise; nor by the death, insolvency, bankruptcy, legal incapacity or inability of this Employer, nor by any proceeding against him as a result of which the conduct of this Employer's business may be and continue to be in charge of an executor, administrator, receiver, trustee, assignee, or other person."

Charles Hascall being, up to the time of his death, the employer of Bojens, the section of the policy just quoted not only makes the insurance company directly and primarily liable to Bojens for the obligations of paragraph 1 (a) thereof, which was to pay the amount due to his dependents under the Workmen's Compensation Law, but the last sentence of the paragraph quoted provides that this obligation and promise of the company shall not be affected by the death of this employer, nor by any proceedings as a result of which this employer's business should continue in charge of an executor. It is argued by the respondent Occidental Indemnity Company that this provision only applies and refers to a death of an employer, and the administration of his estate, taking place after the injury to the employee. We think this position cannot be maintained. Such an interpretation would make the clause meaningless, as the liability of the insurance company would, in the absence of this provision in the policy, become fixed at the date of an injury occurring during the life of the employer, and would not be affected by his later death. Moreover, the poli-

cy specifically refers to "after the accident" in the second clause preceding this one, but makes no such reference in the clause in question. We conclude, therefore, that under the law and the provisions of this particular policy, it was still in force at the date of the injury to Bojens, and that respondent Occidental Indemnity Company was responsible for the payment of the award. It follows, therefore, that the finding of the commission that the employer was uninsured at the time of the injury is not supported by the evidence.

[8] An attempt is made by petitioner to establish that respondent Occidental Indemnity Company is estopped to deny its liability by reason of having sent out a bill for an additional premium, after the date of the injury to Bojens. While the record shows that Holmes, through whom the policy was originally secured, had knowledge of the transfer of Powell's interest in the business to Hascall, and later of the death of Hascall, the record fails to show that Holmes was an agent of the Occidental Indemnity Company and nothing appears in the record to definitely show knowledge upon the part of the insurance company itself, prior to December 30, 1929.

[9] In reference to the respondent the Fidelity & Casualty Company of New York, the terms of its policy show that it had insured

the First National Trust & Savings Bank of San Diego in its capacity as a bank, but that it had not insured such bank while acting in the capacity of an executor, and, as such, running an independent business.

The equities are with the petitioner in this proceeding. While Holmes testified that he was a broker, and he was not clearly shown to have been the agent of this insurance company, the general situation was one that might easily mislead an employer. The insurance company received its premium, the risk was not increased, the executor paid the additional premium covering the entire year, and the policy was renewed at its expiration. Holmes having been informed of the changes, it was a natural thing to rely on the policy as continuing. While the knowledge of Holmes was not definitely fastened upon the company, the circumstances are such as to further justify the rule that a contract should be strictly interpreted against the party who drew it.

For the reasons set forth, the award of the Industrial Accident Commission is annulled, and the matter is referred to said commission for a further order, consistent with the views herein expressed.

We concur: CARY, P. J.; MARKS, J.

Code Civ. Proc. § 378 provides that all persons may be joined in one action as plaintiffs who have interest in subject of action or in whom any right to relief in respect to or arising out of same "transaction" is alleged to exist, where, if such persons brought separate actions, any question of law or fact would arise which is common to all parties to action.

[Ed. Note.—For other definitions of "Transaction," see Words and Phrases.]

2. Action ⚡50(3).

There was no misjoinder because all persons riding in automobile colliding with defendant's automobile united in one action for injuries (Code Civ. Proc. § 378).

3. Justices of the peace ⚡43(1).

Word "case" in statute respecting justice court's jurisdiction means state of facts constituting cause of action submitted for judicial decision and is synonymous with "cause of action" in contradistinction to action itself (Code Civ. Proc. § 112).

Code Civ. Proc. § 112 gave justices' court jurisdiction in all "cases" at law in which demand in controversy amounted to \$1,000 or less.

[Ed. Note.—For other definitions of "Case" and "Cause of Action," see Words and Phrases.]

4. Justices of the peace ⚡44(9).

Where none of plaintiffs suing for personal injuries made demand for more than \$1,000, but total of demands was \$3,950, and amounts awarded totaled \$1,140, justice court had jurisdiction (Code Civ. Proc. §§ 112, 378).

The five separate cases joined did not combine to form a new "case" within meaning of Code Civ. Proc. § 112, giving justices' court jurisdiction in all "cases" at law in which demand in controversy amounted to \$1,000 or less, because they were united in comprehensive complaint for purposes of trial under section 378, permitting joinder of persons as plaintiffs.

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COLLA et al. v. CARMICHAEL U-DRIVE AUTOS, Inc., et al.
Civ. 38.

Appellate Department, Superior Court, City and County of San Francisco, California.
Dec. 10, 1930.

1. Action ⚡50(3).

Term "transaction" in statute respecting joinder of persons as plaintiffs includes in its meaning tortious or delictual doings (Code Civ. Proc. § 378).

Appeal from Justices' Court, City and County of San Francisco; I. Harris, Justice of the Peace.

Action by Thomas Colla and others against Carmichael U-Drive Autos, Inc., and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, and B. P. Gibbs, of Los Angeles, for appellant Carmichael U-Drive Autos, Inc.

Heller, Ehrman, White & McAuliffe, of San Francisco, for appellant Richard Sheldon.

John J. McMahon, of Los Angeles, for respondents.

JOHNSON, P. J.

This action was begun in San Francisco in the justice's court on September 26, 1929, at which time the statute gave that court jurisdiction in all cases at law in which the demand in controversy amounted to \$1,000 or less (Code of Civil Procedure, § 112). Judgment was rendered in favor of plaintiffs on June 13, 1930, before the merger of the justices' court into the present municipal court, which became effective on July 1, 1930.

The defendants attack the judgment solely on the ground that there was a misjoinder of the parties plaintiff, and that the amount of the demands in controversy, exceeding \$1,000 in the aggregate, deprived the justices' court of jurisdiction.

The action grew out of a collision between an automobile driven by the plaintiff Thomas Evola and another automobile driven by the defendant Sheldon, and hired by him from his codefendant. The plaintiffs Colla, Montalbano, Silva, and Jennie Evola were riding with Thomas Evola as his guests; and the plaintiffs having suffered personal injury by reason of the collision, which they attributed to the negligence of the defendant Sheldon, they joined in one complaint for recovery of their several damages.

The complaint is in five counts, setting forth distinctively the respective causes of action of the five plaintiffs, with a statement in each count of the damage sustained by the individual in whose behalf the claim is made. And the prayer of the complaint is not for the gross damages of all the plaintiffs, but asks a separate award to each for the damage suffered individually in accordance with the averments of the several counts.

Thus Colla sought recovery of \$1,000; Thomas Evola of \$900; Montalbano of \$750; Silva of \$500; and Jennie Evola of \$800. These amounts aggregate \$3,950.

After hearing the evidence the trial court gave a judgment for plaintiffs, awarding Colla \$140; Thomas Evola \$224; Montalbano \$60; Silva \$168; and Jennie Evola \$548; these amounts totaling \$1,140.

If the awards sought by the complaint as a whole had not exceeded \$1,000, there could scarcely be a dispute over the right of the plaintiffs, all injured in the same collision, to join in one action.

[1] Section 378 of the Code of Civil Procedure provides: "All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transac-

tions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action; * * * and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled."

This section corresponds with section 209 of the Civil Practice Act of New York, which was itself borrowed from the English Rules of Court.

The term "transaction" as here used is not limited in meaning to a commercial negotiation or contract, but includes tortious or delictual doings as well. In Bliss on Code Pleading, § 125, the word is said to embrace "any occurrence between parties that may become the foundation of an action"; and in *Glide v. Kayser*, 142 Cal. 419, 420, 76 P. 50, the Supreme Court recognized that the word is comprehensive in meaning, and, as used in section 442 of the Code of Civil Procedure, might permit a cross-complaint in an action founded on tort. The broad scope of the term is exhibited in the definition taken from the law dictionaries and adopted in *Scarborough v. Smith*, 18 Kan. 406, which is in these words: "Whatever may be done by one person which affects another's rights, and out of which a cause of action may arise" is a "transaction."

[2] We conclude, therefore, that the collision of the two automobiles was a transaction, out of which arose questions of law and of fact common to all the injured plaintiffs. Hence, there was no misjoinder because they united in one action instead of instituting five separate actions.

Speaking of the corresponding provision of the New York Practice Act, the Court of Appeals in *Akely v. Kinnicutt*, 238 N. Y. 466, 144 N. E. 682, 683, said: "Its purpose is to lessen the delay and expense of litigation by permitting the claims of different plaintiffs to be decided in one action instead of many, when, although legally separate and distinct, they nevertheless so involve common questions, and spring out of identical or related transactions, that their common trial may be had with fairness to the different parties." See, also, *S. L. & Co. v. Bock*, 118 Misc. Rep. 756, 194 N. Y. S. 773, and *Metropolitan Cas. Ins. Co. v. Lehigh Valley Ry. Co.*, 94 N. J. Law, 236, 109 A. 743.

The more serious question is that of jurisdiction.

The amount in controversy is usually determined for jurisdictional purposes by the ad damnum clause of the complaint. 7 Cal. Jur. 692. In this instance, as has already been remarked, the complaint prayed for separate awards to the respective plaintiffs, each of

whom set the damages individually claimed at not more than \$1,000.

The court's jurisdiction extended to "all cases at law in which the demand * * * amounts to one thousand dollars or less." Must we then treat the entire complaint as a statement of a single "case" rather than of several "cases" incorporated, in the interest of administrative efficiency, in a formal presentation of the causes of the several complainants in one instrument for the purpose of a joint trial upon common questions of law and of fact?

In solving this question, it should be borne in mind that section 378 and other related sections of the Code of Civil Procedure were adopted in 1927 for the very purpose of lessening delays, bettering procedure, and expediting the final disposition of controversies. *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 19, 276 P. 1017. These plaintiffs might have brought five separate actions; and actions so brought might have been consolidated for trial. On the other hand, if begun at intervals, they might have taken the time of five judges to hear repetition of substantially the same evidence with perhaps confusing results. It is assuredly far more sensible and expeditious, and far less expensive to the litigants, to determine the merits of the entire controversy upon a single set of pleadings and at one hearing. The defendants say that this ought not to have been done because the demands in the aggregate exceeded \$1,000. We are of the opinion however that the five separate "cases" did not combine to form a new "case" because they were united in a comprehensive complaint for purposes of trial.

[3] The word "case," as used in law, is defined in the Standard Dictionary as "a state of facts constituting a cause of action submitted for judicial decision." And in *Calderwood v. Peyser*, 42 Cal. 110, 115, it is said that: "A case is a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice." The term is to be treated then as synonymous with "cause of action," in contradistinction to the action itself.

In the complaint filed, each "case" or cause of action preserved its identity, and each plaintiff prayed for and obtained a segregated award based on the damages individually proved. The code section contemplates of course an action single in form, but with each "case" or demand retaining its distinctive identity as though pleaded in an independent action. No plaintiff is interested in the entire complaint. The interest of each is in his own "case" or cause of action; and the complaint as a whole is merely a series of "cases" embodied in one document.

The institution of a joint action thus amounts to an election to consolidate at the outset several causes of action for trial in-

stead of bringing several actions based on common grounds, and then having them consolidated later.

Such is the prevailing, though not unanimous, construction given to the corresponding section of the New York Practice Act.

In *Dilworth v. Yellow Taxi Corp.*, 127 Misc. Rep. 543, 216 N. Y. S. 513, 515, five plaintiffs, as here, joined in an action in the Municipal Court to recover damages for personal injuries. The cause of each plaintiff was separately stated with demand for an individual award; but, because the aggregate of the amounts prayed exceeded the jurisdictional limit of \$1,000, the Municipal Court denied the plaintiff's motion to set the case for trial. This order was reversed on appeal to the Appellate Term of the Supreme Court, where it was held that the several causes of action did not merge into a new and single cause, but that each retained its identity; and that "the joinder does not lose to either the plaintiffs or the defendants the rights or privileges which each would have had if separate actions had been brought." The defendant then appealed from the decision of the Appellate Term to the Appellate Division, Second Department, which, with two of the five judges dissenting, reversed the decision of the Appellate Term in a memorandum, stating: "There was only one action and but one summons, and the amount demanded in that summons exceeded \$1,000. The Municipal Court, therefore, was without jurisdiction." *Dilworth v. Yellow Taxi Corp.*, 220 App. Div. 772, 221 N. Y. S. 813. It is to be noted here that the Municipal Court was established before the adoption of section 209 of the Practice Act.

This ruling was followed by the City Court of New York in *Weis v. Richartz*, 130 Misc. Rep. 583, 224 N. Y. S. 416, where father and minor son joined in a complaint embodying two causes of action, one for injury to the son, the other for recompense to the father for loss of the son's services and for cost of medical care. In that case the complaint, instead of praying for separate awards, demanded damages in the gross amount of \$4,000. This amount being beyond the jurisdictional limit of \$3,000, the court ruled in accordance with the final decision in the *Dilworth Case* and dismissed the complaint.

These cases were, however, distinguished in *Dobrikin v. Union Ry. Co.*, 130 Misc. Rep. 796, 225 N. Y. S. 376, 377, which came to a hearing shortly afterwards in the City Court of New York. In that case, husband and wife joined in a complaint containing two causes of action; one on behalf of the wife for personal injuries, the other on behalf of the husband for loss of service and medical expense. Each plaintiff demanded a separate award of \$3,000. The court, there asserting its jurisdiction, said: "I further believe that this court must entertain jurisdiction of a case,

where several parties are joined in a complaint as plaintiffs, because of common questions of fact or law involved, where each plaintiff separately states his cause of action and demands separate judgment, in an amount not exceeding \$3,000, although the aggregate demand * * * would be in excess of \$3,000." And the court expressed the view that, inasmuch as the act establishing the City Court was passed after the adoption of section 209 of the Practice Act, it was to be presumed that the word "complaint," as used in the creative statute, was meant to be applied, in case of joinder of plaintiffs under section 209, not to all the causes of action collectively but to the several causes distributively.

The court further declared that it did not feel bound by the Dilworth decision, since in that case the Appellate Division had been dealing with the definition of the word "complaint" as applied to the Municipal Court in a statute adopted before the enactment of the Practice Act. Upon this point the court said: "When the Legislature used the word 'complaint' then, it had the ordinary meaning then in use. But when the Legislature and the people used the word 'complaint,' after the enactment of section 209, Civil Practice Act, it had the natural and ordinary meaning that it should have, in the light of the modernizing of the law of procedure."

As to the case of *Weis v. Richartz*, 130 Misc. Rep. 583, 224 N. Y. S. 416, the court pointed out that the test of jurisdiction was the sum demanded, and that the two plaintiffs joining in that action, though separately alleging their respective damages, had demanded judgment, not separately, but jointly in the sum of \$4,000.

The question of jurisdiction was again presented in *Spetler v. Jogel Realty Co.*, 224 App. Div. 612, 231 N. Y. S. 517. This case likewise arose in the City Court; and three plaintiffs who had all been injured in the same accident joined in a complaint in four counts with a separate demand of \$3,000 upon each count.

Upon a judgment for specific sums in favor of the plaintiffs severally, the defendant took an appeal to the Appellate Term of the Supreme Court, which, following the memorandum decision of the Appellate Division, Second Department, in the *Dilworth Case*, reversed the judgment for want of jurisdiction in the City Court. The plaintiffs then prosecuted an appeal to the Appellate Division, First Department, which, instead of accepting the ruling of the Second Department in the *Dilworth Case*, unanimously approved and followed the opinion rendered in the City Court itself in *Dobrikin v. Union Ry. Co.*, 130 Misc. Rep. 796, 225 N. Y. S. 376, and accordingly reversed the determination of the Appellate Term and affirmed the judgment of the City Court.

Thereafter, in *Sirov v. Bernard Greenwood Co.*, 134 Misc. Rep. 836, 236 N. Y. S. 588, upon a motion in the Municipal Court to dismiss for lack of jurisdiction, that court elected to govern itself by the decision of the First Department of the Appellate Division in the *Spetler Case* in preference to the earlier decision of the Second Department in the *Dilworth Case*; and the motion to dismiss was therefore denied.

[4] Under our own statute, we are not confronted with the technical meaning to be ascribed to the word "complaint." The jurisdiction of our justices' and likewise our municipal courts extends to "cases" in which the demand does not exceed a specified maximum; and, when there is a joinder under section 378 of the Code of Civil Procedure, we are of the view that the "case" of each plaintiff is his individual cause of action and demand. And though the aggregate of the amounts demanded by the plaintiffs severally exceeds the jurisdictional maximum of a single "case," yet if the individual demands are each within the prescribed monetary limit, no constitutional or statutory inhibition bars the plaintiffs from enjoyment of the privileges accorded by the Code section. This view finds confirmation under a different situation in *Winrod v. Wolters*, 141 Cal. 399, 74 P. 1037, 1038. That was an action instituted in the Superior Court by several laborers, each having an individual claim of less than \$300. At that time actions on contract in which the demand did not amount to \$300 had to be brought in the justices' court. Judgment in the Superior Court having gone in favor of the plaintiffs in their joint action, the defendants moved to quash the writ of execution issued upon the judgment. That motion having been granted, the plaintiffs appealed to the Supreme Court. Upon that appeal the order quashing the execution was affirmed, the court saying: "The complaint in this action shows affirmatively that no plaintiff has a claim against the corporation defendant equal to or greater than \$300. It also shows that plaintiffs had no joint interest in the aggregate of their claims, but that each had a separate claim, and was entitled only to a separate judgment against the corporation for the amount of his claim. The court, therefore, had no power to enter the joint judgment that it did enter, and the several claims each being less than \$300, no jurisdiction of the subject-matter of the action. The judgment was therefore void on the face of the record, and the execution likewise void."

At the time when the present action was brought, the plaintiffs had the right to avail themselves of the advantages given by section 378 of the Code of Civil Procedure, and the jurisdiction of the justices' court had been extended to cases involving as much as \$1,000. Since none of the plaintiffs made demand for

more than \$1,000, the justices' court, under the ruling in *Winrod v. Wolters*, supra, was the only court in which plaintiffs could seek their remedy; and if action had been begun in the Superior Court, any judgment there rendered in favor of plaintiffs would have been void on its face and hence uncollectible.

We conclude therefore that the judgment is not subject to attack on jurisdictional grounds; and, there being sufficient evidence in its support, the judgment is affirmed.

We concur: CABANISS, J.; GOODELL, J.

211 Cal. 202

PRETZER v. CALIFORNIA TRANSIT CO.
L. A. 12440.

Supreme Court of California.

Dec. 29, 1930.

Rehearing Denied Jan. 26, 1931.

1. Automobiles ⇨244(36).

Evidence showed that bus driver's negligence proximately caused collision with approaching automobile when bus turned out to pass another vehicle.

2. Appeal and error ⇨1068(3).

Instructions regarding negligence, contributory negligence, and proximate cause of automobile collision, if erroneous, were harmless, where evidence established defendant's negligence as sole cause.

3. Damages ⇨99.

In personal injury action, value of cotton crop being grown under plaintiff's supervision was improper measure of damages (Const. art. 6, § 4½).

The evidence showed that at the time of the automobile collision, wherein plaintiff received the injuries for which he sought recovery in the present action, he had been employed to superintend 1,000 acres of growing cotton, and had also been raising 2,500 acres of cotton on his own account, his duties consisting solely of superintending the work. He was permitted to testify that if he had not been injured he would have caused his crop to be irrigated; that the cotton had consequently suffered from a lack of water; and that if a normal crop had been produced it would have been worth about \$200,000.

4. Damages ⇨214.

Instruction that injured plaintiff should minimize damages, and could not recover for

failure to return to work when reasonably able, was improperly refused.

Plaintiff testified that he did not return to the performance of his duties for almost eight months after the automobile accident in which he had been injured, but there was evidence that he was able to perform part of his duties within five weeks, and that he had almost entirely recovered at the end of three months.

5. Damages ⇨32.

Plaintiff sustaining fractured arm, necessitating reduction by fluoroscopy and encasing arm and torso in plaster cast for five weeks, could recover for pain and suffering.

6. Appeal and error ⇨1178(6).

Court of Appeal can reverse judgment and remand for new trial solely upon issue of damages (Const. art. 6, § 4½)

In Bank.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Jack Pretzer against the California Transit Company. From a judgment for plaintiff, defendant appeals.

See, also, 283 P. 361.

Reversed in part and remanded, with directions.

For opinion of District Court of Appeal herewith adopted, see 288 P. 805.

Young & Young and De Forrest Home, both of Los Angeles, Wakefield & Hansen, of Fresno, and Lasher B. Gallagher, of San Francisco, for appellant.

Theodore M. Stuart, of Fresno, for respondent.

PER CURIAM.

After a careful reconsideration of this cause, we are pleased to adopt the following opinion of Mr. Acting Presiding Justice Marks of the Fourth Appellate District, as the opinion of this court in bank herein:

[1] On August 11, 1928, respondent was riding with his son, Ed Pretzer, his wife, and a Mrs. Margaret McCarthy, in a Ford sedan, traveling east on White's Bridge road, a county road running in a general easterly and westerly direction in the county of Fresno, state of California. At a place on the road about one and a half miles westerly from the city limits of the city of Fresno, the Ford sedan, which was being driven by Ed Pretzer, came into collision with a motor-driven passenger stage belonging to appellant, and being operated by its servant. Respondent was injured in the accident and was awarded

damages in the sum of \$12,000 after a trial before a jury.

According to the evidence the passenger stage was traveling west on the White's Bridge road. Preceding it was a bakery truck traveling in the same direction. When the Ford sedan, occupied by respondent and his party, had approached the bakery truck so that only between thirty-five and sixty feet intervened between these two vehicles, the stage of appellant swung to the left from behind the bakery truck and directly in the path of the Ford sedan. When Ed Pretzer saw the stage in front of him on the south half of the highway he immediately applied his brakes and swung his car slightly to the left and then to the right, hoping to avoid a collision. The stage driver did the same thing and finally drove toward his left side of the road, so that at the time of the collision the stage was headed in a southwesterly direction with its front wheels off the south edge of the pavement and with part of the body of the stage and its rear wheels on the south half of the pavement. The Ford hit the stage back of its center on its right-hand side, tearing the right fenders and right running board from the sedan. Respondent was sitting in the right front seat of the Ford with the window in the door open and his right elbow protruding outside the car. The force of the collision broke respondent's right arm between the elbow and the shoulder and lacerated the skin and flesh on the arm and hand. He also received a superficial scalp wound and was rendered unconscious for a few hours. Neither of the vehicles involved in the accident was traveling at an excessive rate of speed. With the exception of the driver of the stage, all of the witnesses testifying, including passengers in the stage, described the collision as we have here set it forth.

The stage driver testified that when he attempted to pass the bakery truck the Ford sedan was at least fifteen hundred feet down the road and in front of the truck; that the bakery truck increased its speed, and that the stage and the truck proceeded side by side for about two hundred feet when he saw that a collision was imminent and attempted to drive the stage off the pavement and to the south side of the road. As we have observed, the testimony of this witness stands entirely alone. It is not consistent. His estimate of the speed of the Ford sedan was that it was traveling only slightly faster than the bakery truck and the stage. If, as this witness testified, the bakery truck and the stage traveling side by side only covered two hundred feet, it would have been impossible for the Ford, traveling at the rate of speed fixed by the stage driver, to have covered the remaining thirteen hundred feet and reached the scene of the accident in the length of time that the

other two vehicles were traversing the two hundred feet side by side.

While appellant sets forth many assignments of error upon which it relies for a reversal of the judgment, these assignments fall into two general classes: First, those concerning contributory negligence on the part of respondent and his son, the driver of the sedan, and, second, those concerning the size of the verdict by which respondent was awarded damages in the sum of \$12,000.

The errors complained of concerning the alleged contributory negligence of respondent and his son relate principally to instructions given by the court, and other instructions proposed by appellant and refused by the court. Some of the instructions given and complained of are inartistic and might have been improved upon. However, the jury was correctly instructed upon the question of negligence, contributory negligence, and proximate cause. The evidence in this case so conclusively shows negligence on the part of the driver of appellant's stage, and that this negligence was the sole and proximate cause of the injury unaffected by any act or omission of either respondent or his son, that the jury could do nothing else than conclude that appellant was solely responsible for the injury to respondent.

[2] The record fails to disclose any suggestion of contributory negligence on the part of either respondent or his son, therefore we conclude that if there were any errors in the instructions given or refused by the court on the question of negligence, contributory negligence and proximate cause of the injury they were harmless and not prejudicial and are not grounds for a reversal of the judgment, as any verdict that did not fix responsibility for the accident upon appellant because of the negligence of its servant would have been contrary to the evidence.

Upon the question of errors of the court affecting the amount of damages awarded to respondent, we are confronted with a more difficult problem. The amount of \$12,000 is large considering the injuries of respondent.

Respondent was taken to a hospital in the city of Fresno, where his broken arm was set and his other injuries dressed. On the day following the accident his physician discovered that the broken bones in the arm had slipped, requiring that it be reset. Respondent was then taken to the office of his physician in the city of Madera and the fracture was again reduced by the aid of the fluoroscope. The arm was placed in a position at right angles to the body with the forearm extended to the front and held in position upon an ordinary hardware bracket. The entire arm and body from below the waist to the neck were encased in a plaster cast, which was not removed for about five weeks. This

means of reducing a fracture was painful and undoubtedly caused respondent considerable suffering. However, respondent was not confined to his bed after the second reduction of the fracture. He walked from the doctor's office and was taken to the home of his sister in an automobile. He visited the doctor's office on frequent occasions during the ensuing two weeks, walking up and down a flight of stairs to and from the office. About two weeks after the accident he returned to his home at Knights Landing, near Sacramento, Cal., returning two or three times during the next three weeks to consult his physician, after which time the cast was removed and he was discharged from the care of his physician.

At the trial, which took place about eight months after the accident, respondent's physician testified that there was a slight impairment in the rotation of respondent's right arm, but that this would disappear within about a year from the time of the injury. No claim of any permanent injuries to respondent was made.

[3] At the time of the accident respondent was engaged in farming thirty-five hundred acres of cotton near Knights Landing in Sacramento county, Cal. He was employed by the California Cotton Credits Corporation to superintend one thousand acres of growing cotton at a salary of \$400 per month. Respondent was raising twenty-five hundred acres of cotton on his own account. His duties consisted solely of superintending the work of growing these crops and in directing the efforts of laborers employed to do the actual work upon them. There is evidence that the reasonable value of such services was the sum of \$1,000 per month. Respondent was totally disabled for five weeks, and according to the testimony was partially disabled for several weeks longer. After the lapse of the first several weeks he might have resumed the duties of superintending the growing of his cotton crop. He was not reemployed by the California Cotton Credits Corporation, which stopped his wages on the day of the accident.

Over appellant's objection, respondent was permitted to testify that in the event of his not being injured he would have had his cotton crop irrigated during this time of his total disability, but that on account of the injuries this irrigation did not take place and the crop suffered from a lack of water. Over like objection he was permitted to testify that if a normal crop were produced on thirty-five hundred acres of land under the conditions existing in 1928, such crop would have amounted to about three-fourths of a bale per acre and would have had a total value of about \$200,000. Upon what theory this evidence was admitted does not appear from the rec-

ord. One thousand acres of the cotton belonged to the California Cotton Credits Corporation and not to him. The value of the crop on this land made no difference to him financially. He was receiving a salary of \$400 per month for superintending its growing. If the crop had been a total failure the loss would have fallen on the corporation and not on respondent.

The value of the crops grown under the supervision of respondent was no proper measure of the damages suffered by him as a result of his injuries, as he superintended the growing of the crops and employed laborers to do the actual work of caring for them. As the Supreme Court said in the case of Lombardi v. California Street Railway Co., 124 Cal. 311, 57 P. 66, 69:

"The loss of profits in conducting a business involving the labor of others is not a necessary consequence of personal injury to the plaintiff. The extent of his recovery upon this ground would be what his services were worth in the conduct of such a business as he was engaged in."

To the same effect are the cases of Walsh v. New York C. & H. R. R. Co., 204 N. Y. 58, 97 N. E. 408, 37 L. R. A. (N. S.) 1137, and Lo Schiavo v. Northern Ohio T. & L. Co., 106 Ohio St. 61, 138 N. E. 372, 27 A. L. R. 424.

Respondent introduced evidence that the reasonable value of his services was the sum of \$1,000 per month. The evidence as to the value of the cotton crop was dangerous because it might tend to lead the jury to believe that the actual damage to respondent was not only the loss of the reasonable value of his services, but also a very material injury to the valuable crops. Whether or not the crop actually produced was a normal one does not appear. Appellant proposed an instruction intended to attempt to cure this error, which instruction was refused by the court. It should have been given.

[4] Respondent testified that he did not return to work and to the performance of his duties for almost eight months after his injury. There is a strong inference from the evidence that he was able to perform part of his duties as soon as the cast was removed. His attending physician testified that he was able to attend to his duties three months after the injury. Appellant proposed the following instruction, which was refused by the court:

"The plaintiff is under a duty to minimize his damages in every way that he can reasonably do so, and when he was reasonably able to return to his work, whether he did so return at that time or not is immaterial, and his damage for loss of time in attending his crop would terminate at that time."

This instruction should have been given. The rule is well stated in 8 California Jurisprudence, 782, as follows:

"It is the duty of one who knows he is threatened with detriment, either in person, property or business, through another's breach of contract or tort, to do all that he reasonably can to prevent or minimize the damage, and if he negligently fails to do this, he cannot recover for what he might have prevented."

It was held in *Baker v. Borello*, 136 Cal. 160, 68 P. 591, 593, as follows:

"A party injured by the tort of another must not, by his negligence or willfulness, allow the damages to be unnecessarily enhanced; and, if he does so, he cannot recover for the increased loss."

[5] Respondent was totally disabled for five weeks after his injury. He was partially disabled for several weeks thereafter. He suffered more pain than would follow from a fractured arm that could be reduced in the ordinary way and is entitled to compensation for pain and suffering. The damages awarded were large for the injuries suffered, and we cannot say that the errors we have pointed out did not directly tend to increase the amount of the verdict. We cannot hold, therefore, that these errors were not preju-

dicial to appellant on the question of the amount of the damages awarded. Under the circumstances of this case these particular errors affecting the amount of the verdict cannot be disregarded under the provisions of section 4½ of article 6 of the Constitution of California.

[6] As we have seen, the record before us leaves no doubt in our minds that the negligence of the driver of appellant's stage was the sole and proximate cause of the injury to respondent. No good cause appears to set aside the verdict in so far as it fixes upon appellant liability for the accident. This court can reverse the judgment and remand the cause to the lower court for a new trial solely upon the issue of the amount of damages. *Morris v. Standard Oil Co.*, 188 Cal. 468, 205 P. 1073; *Livesey v. Stock* (Cal. Sup.) 281 P. 70; *Davis v. Renton* (Cal. App.) 278 P. 442.

The judgment is therefore reversed, and the cause is remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to render judgment in favor of the respondent for the amount of damages so found upon a determination of that issue.

211 Cal. 129

MITCHELL v. DUNN et al.
L. A. 11875.Supreme Court of California.
Dec. 15, 1930.**1. Trusts ⇨102(2).**

Evidence showed realty was purchased by incompetent's guardian with trust funds, not personal funds, warranting imposition of trust.

2. Evidence ⇨589.

In action to impress trust on property allegedly purchased with trust funds, court is not bound by trustee's testimony, when circumstances create suspicion.

3. Trusts ⇨372(1).

When trustee has partially dissipated trust fund, and later deposits personal funds, strong presumption arises trustee intended to restore trust fund.

4. Trusts ⇨372(1).

Presumption that trustee's withdrawals from commingled personal and trust funds are personal moneys held inapplicable to defeat cestui's recovery.

Presumption in question is based on theory that trustee acts honestly and not dishonestly, and is nothing more than a fiction created to assist cestui, not to injure him.

5. Trusts ⇨354.

Cestui cannot follow trust funds, unless tracing them into specific property; trustee's possession of trust funds and purchase of property being insufficient.

6. Trusts ⇨352.

In tracing trust funds into specific property, necessary degree of identification is less, as between cestui and trustee, than it is between insolvent trustee and creditors.

7. Trusts ⇨352.

When trustor's money can be traced into particular fund or deposit, although mingled with other money, beneficiary may enforce trust.

8. Trusts ⇨354.

Incompetent ward held entitled to impress trust on specific realty purchased by guardian with money from fund containing personal and trust moneys; remaining moneys being subsequently dissipated.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Arthur Anderson Mitchell, an incompetent, by Iva J. Angier, his guardian, against Ethel Williams Dunn and husband. Judgment for plaintiff, and defendants appeal.

Affirmed.

Nat A. Rosenstein and Emmett A. Tompkins, both of Los Angeles, for appellants.

Iva J. Angier and Anne O'Keefe, of Los Angeles, for respondent.

WASTE, C. J.

This action was brought by the present guardian of Arthur Anderson Mitchell, an incompetent, for the purpose of impressing a trust on certain specific real property now in the possession of defendants, on the theory that the same had been purchased by the defendants with funds belonging to the plaintiff during a period of time when the defendant Ethel Williams Dunn was the duly appointed and acting guardian of the incompetent plaintiff.

The facts leading up to the controversy are as follows: Defendant Ethel Williams Dunn is a sister of the incompetent, who, while in the service of the United States during the World War, was charged, together with other negro soldiers, with a criminal assault. He was adjudged insane, and was sent to an asylum in Chester, Ill. Later, through the efforts of the defendant sister, he was transferred to an asylum in Southern California. On October 2, 1919, defendant was appointed guardian of the estate and person of her brother, and acted as such until October 14, 1927.

During the period that defendant acted as guardian, considerable money came into her possession belonging to the incompetent, such sums being derived from war risk insurance and government compensation. During a considerable portion of this time defendant had two accounts with the Citizens' National Bank of Los Angeles, one a personal account and one a guardianship account. It appears, however, that she made no attempt to keep her personal and trust funds separate. On November 3, 1924, she purchased the real property which is the subject of this litigation, paying therefor, it is admitted, with a \$3,900 check drawn on the guardianship account. The property was recorded by defendant in her own name, and immediately homesteaded. This property will be referred to as the Jefferson street property. Plaintiff contends that the \$3,900 was trust money; defendant contends it was her personal money. In order to fully understand the contentions of the parties, the origin of the money in the guardianship account must be traced.

From the time of her appointment as guardian, in 1919, until December, 1924, defendant

had rendered no accounting of her trust.' On December 10, 1924, her first account was approved by the court; it being found as of that date that defendant was in possession of \$5,452.98 belonging to the estate of plaintiff. Most of this money had come into her possession before November 3, 1924, the date on which the Jefferson street property was purchased, so that it can be safely said that on that date defendant should have had in her possession over \$5,000 of trust funds. The two bank accounts, introduced in evidence, disclose that early in June, 1924, only \$2 was on deposit in the guardianship account and slightly over \$500 in the personal account of defendant, sums far less than the amount then supposedly in her possession belonging to plaintiff. No evidence was introduced by either party in reference to what had happened to the trust funds, but the inference is clear that the trust funds had been dissipated by defendant. On August 8, 1924, defendant deposited in the guardianship account the sum of \$9,200, making a balance as of that date of \$9,302 in that account. The origin of this \$9,200 was traced by defendant as follows: In 1920 defendant had purchased a piece of real property in her own name, which will hereafter be referred to as the Kohler street property. Defendant testified, and no reason appears for doubting the fact, that the down payment on this property was made from her own funds, being \$1,415 she had received as an allotment from the government on behalf of her husband, a soldier with the United States Army in France. For a period of years defendant made payments on this Kohler street property. Whether trust funds were used for this purpose is not clear, defendant testifying that the payments were made from her earnings and from rents received from the Kohler street property, an apartment house. Plaintiff offered no evidence on this point. In June, 1924, defendant sold the Kohler street property for cash, receiving \$9,267 net on the deal. This money she first deposited in her personal account, and, on August 8, 1924, withdrew the same from that account and deposited \$9,200 in the guardianship account and purchased the Jefferson street property, which is involved in this suit. As set forth supra, on December 10, 1924, defendant should have had \$5,452.98 belonging to the estate of plaintiff. On that date there was exactly \$5,452.98 on deposit in the guardianship account.

Defendant continued to act as guardian until October of 1927, and during that period evidently dissipated the entire remainder of the fund. On October 14, 1927, upon petition of the regional attorney of the United States Veterans' Bureau, defendant was removed as guardian for mismanagement of the estate and Iva J. Angier was substituted in her place. On the final accounting, the court found that defendant should have in her

possession \$4,742.17 belonging to the estate of her brother. No part of this sum has ever been turned over to the present guardian. Upon this state of facts, defendant contends that the Jefferson street property was purchased with personal funds, while plaintiff, with equal vigor, contends that the property was purchased with trust funds. The trial court found that the \$3,967, the exact amount paid for the Jefferson street property, was trust money, and not the personal money of defendant, and decreed that the plaintiff was the equitable owner of the Jefferson street property; that defendant holds the legal title in trust for plaintiff; that the homestead declared thereon was null and void; and that defendant should deed the property to plaintiff.

On this appeal defendant-appellant contends that the evidence above summarized clearly shows that the entire \$9,200 deposited in the trust account was money belonging to her separate estate, and that therefore the \$3,900 drawn therefrom for the purchase of the Jefferson street property was from her separate estate, and not from the trust estate. Appellant also contends that, even if the \$9,200 be treated as composed of both separate and trust funds, the particular \$3,900 must be considered as separate money, for the reason that, after withdrawing the same, there still remained in the guardianship account an amount equal to the sum held in trust. In this connection, appellant strongly relies on the presumption that, where a trustee commingles trust and personal funds, and then withdraws part of the fund, it will be presumed that the withdrawals were from the personal funds of the trustee, and that the balance constitutes the trust funds, citing such cases as *Elizalde v. Elizalde*, 137 Cal. 634, 641, 66 P. 369, 70 P. 861, and *People v. California Safe Deposit, etc., Co.*, 175 Cal. 756, 760, 167 P. 388, L. R. A. 1918A, 1151.

[1-3] The contention of appellant that the evidence shows that she bought the Jefferson street property with her separate funds is entirely without merit. It appears that before the \$9,200 was deposited in the trust account the appellant had entirely dissipated the trust estate. When she withdrew the money from her personal account and deposited it in the guardianship account, she undoubtedly did so with the intent of replacing the trust funds that she had dissipated. It is true that appellant testified that the transfer was made to prevent her then husband from making claim thereon, but in such cases the trial court is not bound by the testimony of the trustee when the circumstances are such as to cast suspicion thereon. After making the deposit above mentioned, appellant clearly treated the guardianship account as composed of trust funds. In the accounting of December 10, 1924, the court allowed \$200 at-

torney's fees and an \$800 fee to the guardian. On December 10, 1924, \$200 was withdrawn from the guardianship account, and on December 11, \$800 was withdrawn, undoubtedly to pay the above two items. This clearly shows an intent on the part of appellant to treat the funds deposited by her from her personal account as replacements of the trust funds, and is entirely incompatible with the idea that at all times she intended to treat the fund so transferred as belonging to her personal estate. Moreover, when a trust fund has been partially dissipated by the trustee, and later the trustee deposits in the depleted account personal funds, there is a strong presumption that it was the trustee's intention in making such deposits to make the trust fund whole. *Garst v. Canfield*, 44 R. I. 220, 116 A. 482.

From the above reasoning it follows that the guardianship account, containing, as it did, over \$9,300, must be deemed to have been composed of about \$5,400 trust moneys and about \$3,900 personal moneys, when, on November 3, 1924, \$3,900 was withdrawn therefrom to purchase the property in dispute. The only question left to determine was whether the sum withdrawn was from the trust funds or from the personal funds of appellant. If the presumption that withdrawals must be deemed to have been from the personal part of the commingled fund applies to such a case, it is clear that no trust can be enforced against the Jefferson street property.

[4] We are of the opinion that the presumption mentioned has no application to a case such as this: The presumption is nothing more than a fiction created to assist the cestui, not to injure him. It was created to assist cestuis in following the trust property, not to hinder them. The basis of the presumption is that it will be presumed that a trustee acts honestly, and not dishonestly. In *People v. California Safe Deposit, etc., Co.*, supra, at page 760, of 175 Cal., 167 P. 388, 389, the presumption is explained as follows: "The argument is based upon the well-settled rule that, if a trustee mingles his own funds with the trust fund, and thereafter draws from time to time from the commingled mass, 'it will be presumed that the moneys so drawn were from his own portion of the fund, rather than from the moneys held by him in trust.' [Citing several cases.] Various expressions have been used in defining the nature of the rule. In some of the cases, as pointed out by the appellant, it has been said that equity will 'attribute' the withdrawals to the trustee's private account. In others, as in the *Elizalde Case*, above cited, it is said that the trustee will be 'presumed' to have drawn his own money. In one case (*Crawford County Commissioners v. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. [N. S.] 1100) the doctrine is explained as resting

upon a 'fiction.' But, whatever name be given to it, the rule originates in and rests upon the underlying presumption 'that a person is innocent of crime or wrong.'"

[5-7] In the case just quoted from, the trust arose by virtue of the trustee acquiring money of the plaintiff by fraud. The court held the presumption above mentioned had no application to such a case, because the trustee, having acted fraudulently in acquiring the money, cannot thereafter be presumed to have been acting honestly and rightfully. The same reasoning applies to the present case. The appellant herein wrongfully dissipated the trust funds in her possession and then replaced the funds wrongfully taken. Then, after purchasing the real property herein involved, appellant dissipated the entire fund. Can appellant, after having been guilty of such conduct over a period of years, come before the court and contend that, because it must be presumed she acted rightfully on November 3, 1924, the only tangible property purchased from the fund and still remaining in her possession must be presumed to have been purchased with personal funds, and that all the money that was dissipated by her must be presumed to have been trust funds? To state the proposition is to refute it. In fact, if we are to presume the appellant acted rightfully, it would be far more consonant with such a presumption to say that the property purchased was purchased with trust funds, and the money dissipated was personal funds. At any rate, the presumption in reference to withdrawals, in a contest between the cestui and trustee, based, as it is, on a theory of rightdoing, cannot be indulged in to defeat the cestui's right of recovery when all the evidence shows a consistent course of conduct amounting to wrongdoing. To permit the presumption to be used for that purpose would be to permit its use as a shield for wrongdoing, and that we are not inclined to do. The Supreme Court of Tennessee, in *American Surety Co. v. Grace*, 151 Tenn. 575, 271 S. W. 739, at page 742, after stating the presumption under consideration, had the following to say about its application: "* * * The rule stated is but a fiction of law. It was invented to aid in the pursuit and recovery of a trust fund. * * * It would destroy the whole purpose of this fiction if it were employed to obstruct a beneficiary seeking to follow a trust fund, and to protect an unfaithful trustee. * * *" The reasoning of that case appeals to us as applicable here. We are aware of the rule that a cestui cannot follow trust funds unless he can trace them into the specific property involved. It does not suffice merely to show possession of trust funds by the trustee and the purchase of the property; it is clear that the identity of the funds must be traced. *Estate of Arms*, 186 Cal. 554, 199 P. 1053; *Wood-*

side v. Hewel, 109 Cal. 481, 42 P. 152. However, the degree of identification in an action between the cestui and the trustee is far less than in a case where the trustee is insolvent and the rights of creditors are involved. Whatever confusion may have existed in this regard in the decisions of this state was entirely set at rest by the case of Noble v. Noble, 198 Cal. 129, 248 P. 439, 43 A. L. R. 1235. That case held that in a contest between the cestui and the administrator of a deceased defaulting trustee, where the trustee had commingled trust and personal funds, the cestui had a special lien on the entire estate of the deceased solvent trustee, even though the trust funds could not be traced into any definite property. The court very carefully distinguished the cases involving the rights of creditors, and held that a different rule applied in such cases. The rule is now settled in this state that, when the money of the trustor can be traced into a particular fund, or deposit, though it be mingled with other money, the beneficiary may enforce the trust. Newport v. Hatton, 195 Cal. 132, 150, 231 P. 987.

[8] In the case at bar, the plaintiff has sufficiently traced the trust funds. The specific piece of property involved was purchased with money taken from a fund containing trust moneys. All other moneys were dissipated. The law will not permit the trustee to say that the only permanent investment made with moneys from the fund was with personal funds, and that the dissipated funds belonged to the cestui. Under such circumstances it must be held that the property was purchased with trust funds, and that defendant holds the title in trust for plaintiff.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

211 Cal. 118

MacDONALD v. INDUSTRIAL ACCIDENT COMMISSION et al.
L. A. 12449.

Supreme Court of California.

Dec. 13, 1930.

Rehearing Denied Jan. 12, 1931.

1. Master and servant ⇨414.

Whether compensation claimant is totally disabled and bedridden, within statute extending time for filing claim, is question of fact (Deering's Gen. Laws 1923, Act 4749, § 11(c)).

2. Master and servant ⇨403.

Compensation claimant has burden of proving he was totally disabled and bedridden within statute extending time for claims (Deering's Gen. Laws 1923, Act 4749, § 11(c)).

3. Master and servant ⇨398.

Compensation claimant, if able to get up and walk, is not "bedridden" within statute extending time for filing claim (Deering's Gen. Laws 1923, Act 4749, § 11(c)).

[Ed. Note.—For other definitions of "Confined to Bed," see Words and Phrases.]

4. Master and servant ⇨398.

Compensation claimant is "totally disabled and bedridden" within statute extending time for claims, only if unable to take steps to file claim, as by correspondence, or through agent (Deering's Gen. Laws 1923, Act 4749, § 11(c)).

[Ed. Note.—For other definitions of "Totally Disabled," see Words and Phrases.]

5. Master and servant ⇨405 (1).

Evidence held insufficient to show compensation claimant was totally disabled and bedridden within statute extending time for claims (Deering's Gen. Laws 1923, Act 4749, § 11(c)).

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Dora Lee MacDonald, claimant, opposed by the Battle Creek Food Company, employer, and the American Mutual Liability Company, of Boston, Mass., insurer. To review an order of the Industrial Accident Commission dismissing the application for compensation, claimant brings certiorari.

Order affirmed.

Edwin J. Miller, of Los Angeles, for petitioner.

Edward O. Allen, of San Francisco, and Willis I. Morrison, of Los Angeles, for respondents.

LANGDON, J.

This is a petition by an employee for review of an order of the Industrial Accident Commission dismissing an application for compensation.

Petitioner was employed as a traveling demonstrator of food products by the Battle Creek Food Company. She solicited orders in various cities and towns in California and several other western states. On October 2, 1928, she was in Billings, Mont., and had lunch

there at a small cafeteria. On her way out she slipped and fell to the floor, suffering a fracture of the hip. She was taken to a hospital, and remained there under treatments for three months.

A claim for compensation was filed on October 1, 1929, and a hearing was had thereon, in which several issues were presented to the commission. With respect to the question whether the injury arose in the course of her employment, petitioner testified that she intended to make a demonstration and was waiting to interview the manager. The evidence on this point is not entirely satisfactory, and the commission in its findings ignored this and other issues, resting its order on the sole ground that the application was barred by the statute of limitations.

The Workmen's Compensation Act requires that a claim for compensation must be filed within six months from the date of the injury, but makes certain exceptions to this requirement. The one relied upon here reads as follows: "Provided, further, that the provisions of this section shall not apply to an employee who is totally disabled and bedridden as a result of his injury, during the continuance of such condition or until the expiration of six months thereafter." Workmen's Compensation Act, § 11(c), Deering's General Laws, Act 4749, p. 1721. It is petitioner's contention that she was "totally disabled and bedridden" within the meaning of the statute, from the time of her injury up to a period less than six months before filing her application with the commission. Since the application was filed on October 1, 1929, this contention must fall unless it be shown that petitioner was bedridden until about April 1, 1929.

[1-4] Whether a person is in this condition is a question of fact, and the burden is upon the applicant to bring himself within the statutory exception. *Rose v. Petaluma & Santa Rosa Railway Co.*, 64 Cal. App. 213, 221 P. 406. If the employee is able to get up and walk, he is obviously not bedridden, even though his injury causes him considerable pain and a good portion of his time is spent in bed. See *Francisco v. Industrial Accident Commission*, 192 Cal. 635, 221 P. 373; 27 Cal. Jur. 466, § 137. Construing the provision in the light of its purpose, it would seem that an injured employee is to be considered "totally disabled and bedridden" only if he is in such

a condition as to be unable to take steps to file his claim for compensation, bearing in mind that such a claim may be made by correspondence or through an agent.

[5] The major part of the evidence before the commission came from petitioner herself. It appears that she was injured on October 2, 1928, and remained in the hospital at Billings for three months, until January 2, 1929. Upon her discharge from the hospital she came by train to San Francisco. She was as yet unable to walk and was accompanied by a woman who assisted her. She remained in San Francisco until about July 19, 1929, staying at the home of a friend. At about this date she left for Los Angeles, where she resided with her sister. With respect to the period prior to April, 1929, she testified that she was unable to dress or get up out of bed, and that she was "absolutely unable to do a thing." On cross-examination, however, she admitted that during January and February she was able to get up on crutches to go to the bathroom and to the kitchen; that she took a good part of her meals in the kitchen; that she spent much of her time out of bed, with her shoes on, sitting in the kitchen with her friend and members of the family. A copy of petitioner's "Progress Record" in the hospital at Billings was introduced as her own exhibit, and in it we find the following remarks: "Cast Removed—Patient about on crutches and Recovering. * * * Discharged on Dec. 31 - 1928 Condition Excellent."

The record contains various contradictory statements by petitioner, but irrespective of the effect of these as tending to discredit her as a witness, the evidence which she herself gave is sufficient to sustain the conclusion of the commission that she was not "totally disabled and bedridden" within the meaning of the statute. Despite her serious condition, it can hardly be said that she was physically or mentally unable to make her claim, the necessity of which she was fully aware shortly after the injury occurred. We have no alternative but to conclude with the commission that the claim was barred.

The order dismissing the application is therefore affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

211 Cal. 137

GALE et al. v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.
L. A. 12438.

Supreme Court of California.

Dec. 23, 1930.

1. Master and servant ⇨405(2).

Evidence on issue whether pilot killed in airplane accident was in oil company's employ *held* in such conflict as to justify commission's decision no employment existed, notwithstanding statutory presumption (St. 1917, p. 835, § 8(b)).

2. Master and servant ⇨417(7).

Supreme Court cannot disturb Industrial Accident Commission's finding on conflicting evidence on issue of employment.

In Bank.

Proceeding under the Workmen's Compensation Act by Willella Gale and others, as widow and minor children of Kenneth W. Gale, deceased, opposed by Mark M. Campbell, the Richfield Oil Company, and another, alleged employers, and the Maryland Casualty Company, insurance carrier. A decision of the Industrial Accident Commission denying an award was affirmed by the Court of Appeals by denial of writ of review, and petitioners apply for hearing to Supreme Court.

Affirmed.

Herlihy & Herlihy, E. Herbert Herlihy, and F. George Herlihy, all of Los Angeles, for petitioners.

Edward O. Allen, of San Francisco, for respondents.

RICHARDS, J.

The petitioners, who are the widow and minor children of Kenneth W. Gale, deceased, applied to the Industrial Accident Commission for an award against Mark M. Campbell, Richfield Oil Company, Kinner Airplane & Motor Corporation, and Maryland Casualty Company, a corporation, alleging that Kenneth W. Gale, an airplane pilot, had been killed in an airplane accident at Mines Field, Los Angeles, on September 5, 1929, while engaged in flying an airplane under employment by the respondents in said application. Hearings were had thereon, at the conclusion of which the commission made its findings and decision denying said application upon the ground that the evidence did not establish that Kenneth W. Gale was the employee of the respondents Richfield Oil Company, Mark M. Campbell, or Kinner Airplane & Motor Corporation, and that the proceeding was not, therefore, within the jurisdiction of the commission. A petition for rehearing was presented and denied; whereupon the petitioners

applied for a writ of review to the District Court of Appeal in and for the Second Appellate District, Division Two, which application was therein denied without an opinion; whereupon the petitioners applied for a hearing before this court, which was granted, and the matter has, upon the record presented before the Industrial Accident Commission, been submitted for decision.

[1] We adopt the statement of the evidence summarized by the petitioners, from which it appears that the facts of the case are substantially as follows: Kenneth W. Gale, an airplane pilot, was killed in an airplane accident at Mines Field, Los Angeles, upon the date above stated, leaving as his dependents the petitioners herein. The respondent Mark M. Campbell was a designer and builder of airplanes, and in the summer of 1929 had constructed an airplane which he believed capable of establishing new aeronautic records, and, being in the need of financial assistance to attempt flights which might produce such records, he went to the Richfield Oil Company for aid. He there interviewed Mr. Dudley Steel, an official of that company, setting forth what he claimed to be the merits of his airplane, stating that he needed money to pay pilot's wages and other expenses. He was then informed by Steel that, if the airplane and pilot met with his approval, the Richfield Oil Company would give Campbell the assistance required. A written agreement was entered into between the Richfield Oil Company and Campbell, wherein the latter agreed that he would use the products of the Richfield Oil Company, delivery of which he accepted, for the purpose of making an attempt to break the existing altitude record in a Campbell supersport monoplane, and for such other test flights prior to said attempt as might be deemed necessary. He further agreed that in consideration of the delivery to him of such products he would allow said company the privilege of using his name or testimony for advertising in whatever manner the said company might see fit to employ, and that he would use no other fuel or lubricant than those of the Richfield Oil Company in connection with any record breaking flight he might attempt within the period of six months from the date of said agreement. Nothing was said therein as to the employment or payment of any pilot by or on behalf of the Richfield Oil Company. Upon executing this agreement, Campbell was introduced to one Petrie, who was an assistant to Steel, and, because of the fact that Steel was about to leave for the East, the matter was turned over to Petrie, with the understanding that the airplane and the pilot employed to fly it must meet with the approval of the Richfield Oil Company. Objection was made to a certain pilot whom Campbell contemplated em-

ploying; whereupon the latter sought for another pilot and was introduced to Kenneth W. Gale on or about August 17, 1929, at which time and after ascertaining his qualifications Campbell told Gale that he was to be employed to fly the airplane, and, when Gale inquired about his pay, Campbell told him that he (Gale) would have to look to the Richfield Oil Company for his pay. The matter of possible wages was discussed, and Gale was informed that he must make his arrangements with the Richfield Oil Company as to the amount of wages to be paid. Gale thereupon left Campbell for the avowed purpose of speaking to Petrie about his compensation, and later returned to Campbell and told him that he had made a contract with the Richfield Oil Company. Thereafter the airplane was hauled to Mines Field by the Richfield Oil Company and the name "Richfield Oil Company" was painted on both sides of the airplane in large letters. Several test flights were made, some of which were viewed by Mr. Petrie, who told Campbell that the pilot and the airplane were all right, or words to that effect. Thereafter two attempts were made to break the altitude record, the results of which do not appear to have been shown. An attempt was then made by Gale to break a speed record, and a course was laid out therefor under the supervision of Petrie. It was while attempting this flight that the accident occurred which resulted in the wreck of the airplane and the death of Kenneth W. Gale, the pilot.

Upon the hearing before the commission, certain witnesses testified that Gale had told them that he was to be paid pilot's wages by the Richfield Oil Company for every hour that he spent in the airplane, and, in addition to such wages, he was to receive prize money or a bonus if he established new records. Other witnesses, among them the respondent Campbell, testified that they were present and heard Petrie promise to get Gale \$100 expense money pending the return of the Richfield official (presumably Steel) from the East; but the record shows that Gale was killed before the date upon which Petrie was to procure and pay said sum. Upon the hearing before the commission, both Steel and Petrie appeared as witnesses for the respondent Richfield Oil Company and categorically and positively denied that Gale had ever been employed by the Richfield Oil Company, or that any contract or understanding had ever been entered into with him consummating such employment. It was admitted, however, by Steel that he had told Campbell that the Richfield Oil Company might pay a bonus to the pilot if a record were established. The foregoing is a fair summary of the evidence

educated at the hearing before the commission and upon which it based its findings and decision denying the petitioners an award. It is not seriously contended by the petitioners that they are entitled to an award either against Campbell or any other of the respondents herein than the Richfield Oil Company.

[2] It must be conceded that the preponderance of the evidence before the commission would seem to be in favor of upholding the petitioners' contention, and it must also be conceded that to the weight of such evidence there is to be added the statutory presumption of employment created by section 8(b) of the Workmen's Compensation Act (St. 1917, p. 835), which reads as follows: "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act." It must also be conceded that the effect of this presumption, taken in connection with the evidence offered on behalf of the petitioners herein, would be that of casting upon the respondents in said proceeding the burden of affirmatively overcoming the said presumption. But, when this much is conceded, it must further be admitted that the commission was, under the terms of the Constitution and of the Workmen's Compensation Act, invested with the full and exclusive jurisdiction of determining whether or not, in the presence of conflicting evidence in any proceeding before it, this presumption had been overcome, and whether or not, in the presence of such conflicting evidence, it had been sufficiently established that the relation of employer and employee existed between the deceased and the respondents at the time of the occurrence of the casualty which resulted in the former's death. We are constrained to hold that the positive denial on the part of the officials of the Richfield Oil Company to the effect that no understanding or agreement for the employment of Gale had ever been entered into by or on behalf of the Richfield Oil Company created such a material conflict in the evidence relating to his said employment as would have sufficed to justify the findings and decision of the commission to the effect that no such employment existed, and to have therefore compelled the conclusion that this court has no authority to overthrow the findings and decision of the commission in that regard.

The order of the commission denying the petitioners relief in this proceeding is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

211 Cal. 176

**NARVER v. CALIFORNIA STATE LIFE
INS. CO.****L. A. 11806.**

Supreme Court of California.

Dec. 29, 1930.

1. Insurance ⇨146(3).

Ambiguous provisions in life policy, capable of two constructions, should be construed most favorably to insured.

2. Insurance ⇨146(3).

Insurer cannot defeat ambiguous policy by construction, if reasonable construction upholding insurance can be had without doing violence to language used and parties' clear intention.

3. Insurance ⇨150.

Indorsement or rider on life policy, relating to short-term premium until beginning of first policy year, *held* not policy separate from main policy.

Indorsement provided, in substance, that in consideration of payment in advance of a short-term premium, insurer agrees to pay amount insured if death of insured shall occur before February 28, 1928, which is beginning of first policy year.

4. Insurance ⇨150.

Indorsements on insurance policy form part of insurance contract, and policy with indorsements and riders thereon must be construed together.

5. Insurance ⇨186(5).

Insured's note, given and accepted as payment of premiums under life policy, *held* to constitute "payment."

[Ed. Note.—For other definitions of "Payment," see Words and Phrases.]

6. Insurance ⇨445(3).

Under ambiguous terms of life policy, application, premium receipt, and indorsement considered as whole, policy *held* effective on November 28, 1927, warranting recovery where insured committed suicide more than year thereafter.

Suicide clause in life policy provided that in case of suicide committed while sane or insane, within one year from effective date, recovery should be limited to total amount of premium paid. Various recitals in policy showed effective date to be February 28, 1928; that policy and application therefore should constitute entire contract between parties. Application provided that effective date should be determined by payment of premium with ap-

plication. Receipt for first premium delivered on October 25, 1927, recited that insurance shall take effect and be in force from day of approval at home office if premium is fully paid with application, or upon manual delivery of policy to applicant during lifetime, and good health and full payment of premium thereon if premium has not been paid with application. Short-term indorsement in consideration of additional premium made policy effective from November 28 to February 28, 1928, following, and recited that latter date should be beginning of first policy year. Policy was issued on November 28, 1927, and delivered on or about December 1st. Insured committed suicide on December 10, 1928.

In Bank.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Emma S. Narver against the California State Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

For opinion of District Court of Appeal herewith adopted, see 287 P. 107.

C. E. McLaughlin, C. P. McLaughlin, and McLaughlin & McLaughlin, all of Sacramento, for appellant.

Eugene U. Blalock, of Los Angeles, for respondent.

PER CURIAM.

After further consideration of the opinion in this case, written by Justice Marks of the Fourth Appellate District and concurred in by Justice Barnard and Justice Pro Tem. Owen, we are of the opinion that it correctly disposes of the questions of law presented by the facts of said case, and we approve and adopt the same as the opinion of this court.

Said opinion is as follows:

Respondent is the widow of Chester Narver and the beneficiary named in an insurance policy issued by appellant on his life.

On October 28, 1927, the deceased made his application to appellant for a policy of insurance upon his life in the sum of \$5,000, and on the same day executed his promissory note to appellant in the sum of \$176.95 in payment of the premiums to accrue under said policy until February 28, 1929. The promissory note was subsequently paid. The deceased took his medical examination and the policy was issued by appellant on the 28th day of November, 1927, and delivered to deceased on or about December 1st of the same year.

The insurance policy contained the following paragraph: "This policy is incontestable after one year if all premiums shall have been duly paid, except as to provisions and conditions relating to any double indemnity or total and permanent disability benefits which may be issued in connection herewith. In case of suicide of the insured, committed while sane or insane, within one year from the date hereof, the limit of recovery hereunder shall be the total amount of the premium paid."

Above the signature of the president and secretary of the insurance company on the policy appears the following: "In witness whereof, California State Life Insurance Company has caused this policy to be signed by its President and its Secretary of Sacramento, California, this twenty-eighth day of February, 1928. Which is the date of this policy."

The policy further provided that: "This policy and the application therefor (a copy of which application is attached hereto when issued) constitute the entire contract between the parties hereto."

Attached to and made a part of the policy under this clause was the application for insurance, in which the following appears: "I further agree that the effective date of any policy which may be issued hereon shall be determined as follows: (a) If the premium be fully paid with this application, such policy shall take effect at twelve o'clock noon of the day upon which this application is approved by the company at the home office."

In the report of the medical examiner, a copy of which was attached to the policy, there appears the following: "I have verified each of the foregoing answers on this page and on the first page hereof and adopt them as my own, and warrant that they are full, complete and literally true answers to the questions against which they are written. I further agree that if during the first year following the date of any policy issued hereon I commit suicide, whether sane or insane, the only liability under any policy issued thereon shall be for a fixed sum equal to the actual cash premium paid to the company on said policy."

On October 25, 1927, there was delivered to the insured a receipt, the material parts of which were as follows:

"178248

October 25, 1927.

"Received of Chester Narver One Hundred Seventy-Six and 95/100 Dollars in full for fifteen months the first annual premium on Five Thousand dollars insurance. Counter-signed by Harvey Stewart. Agent."

"The insurance shall take effect and be in force: (a) At twelve o'clock noon of the date of approval at the home office of the Company, if the premium be fully paid with the

application; (b) Upon manual delivery of the policy to the applicant during his lifetime and good health and full payment of the premium thereon, if such premium has not been paid with the application."

"California State Life Insurance Company. J. R. Kruse, President. Do not detach this receipt except for delivery to applicant for full settlement of premium. This is the only form of receipt authorized by the company to be given to an applicant for a premium collected when the application is taken. California State Life Insurance Company. Sacramento, California."

Attached to the policy of insurance as an indorsement or rider was the following:

"November 28, 1927.

"In consideration of the payment in advance of a Short Term Premium of Twelve and 60/100 Dollars, California State Life Insurance Company agrees, subject to the provisions of this policy and the application therefor, to pay the amount insured hereunder if the death of the insured shall occur prior to February 28, 1928, which is the beginning of the first policy year. Double indemnity and Total Disability Benefits, if either thereof be stipulated in this policy, are not included herein, and neither shall be effective until noon of the date herein stated, and then only if the premium for the first policy be fully paid.

"[Signed] Arthur Luddy, Asst. Secretary."

Insured committed suicide on December 10, 1928. Proofs of his death were made and delivered to appellant, and demand was made upon it by respondent for the sum of \$5,000, which payment was refused. On January 3, 1929, appellant tendered to respondent the sum of \$164.35, which was the amount of the premium on the policy of insurance for the year commencing February 28, 1928.

Respondent brought this action to recover on the policy of insurance, and, after a trial in the court below, without a jury, the court found all facts in her favor and rendered judgment against appellant for the principal sum of \$5,000.

Appellant presents two grounds upon which it asks this court to reverse the judgment of the trial court. The first is that, as it maintains there were two policies of insurance issued to deceased, one being a short-term policy commencing on November 28, 1927, and ending on February 28, 1928, the premium for which was \$12.60, and the other a twenty-year nonparticipating policy commencing on February 28, 1928, the premium being \$164.35, payable annually on the 28th day of each February. The second ground upon which the reversal is asked is a corollary of the first, namely: That since the policy of insurance in effect on December 10, 1928, did not become operative until Febru-

ary 28, 1928, one year had not elapsed at the time of the suicide of the insured, and that, therefore, the principal sum of \$5,000 could not be collected, but that only the annual premium paid, \$164.35, was recoverable. The exact questions presented upon this appeal do not seem to have been decided in California.

[1, 2] It is a well-recognized rule of law that if any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one which is most favorable to the insured and which will give life, force, and effect to the policy should be adopted. The insurance company, having prepared the policy and all documents used in connection with its issuance, should not be heard to put such a construction upon an ambiguity, caused by it, as will defeat the policy and take from the beneficiary the very purpose and object of the insurance, if a reasonable construction upholding the insurance can be had that does no violence to the language used and the clear intention of the parties. *Pacific Heating & Ventilating Co. v. Williamsburg, etc., Co.*, 158 Cal. 367, 111 P. 4; *Welch v. British American Assurance Co.*, 148 Cal. 223, 82 P. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396; *Witherow v. United American Insurance Co. of Pennsylvania* (Cal. App.) 251 P. 668. With this rule in mind, we will proceed to a consideration of the contract of insurance involved in this appeal.

[3, 4] Appellant contends that the indorsement, or rider, on the main policy of insurance, which put in effect the insurance from November 28, 1927, to February 28, 1928, was a policy of insurance complete in itself and a contract separate and distinct from the main policy. With this we cannot agree. Taken by itself, this indorsement means nothing. Of itself, it is not a contract in any sense of the word. By its terms it refers to the main policy and the application therefor, and, except as specifically excepted in the indorsement, it put the provisions of the policy into force and effect. Indorsements on an insurance policy form a part of the insurance contract (25 Cyc. of Law and Procedure, 743), and the policy of insurance with the indorsements and riders thereon must be construed together as a whole. *Sharp v. Scottish Union National Ins. Co.*, 136 Cal. 542, 69 P. 253, 615.

[5, 6] Considering the policy of insurance as a whole, we find a most obvious and patent ambiguity as to its date. The closing paragraph of the main policy gives February 28, 1928, as its date. The application for the insurance, of which there was only one, and which was made a part of the contract of insurance, contains the direct statement that "if the premium be fully paid with this application such policy shall take effect at

twelve o'clock noon of the day upon which this application is approved by the Company at its home office." The application was approved and the policy actually issued on November 28, 1927. It was registered with the insurance department of the state of California on November 29, 1927, and delivered to deceased two days later. His note was given and accepted as payment of the premium and was therefore a payment of them. *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 P. 186, 61 P. 99. The receipt given to the insured by the company contained language identical with that in the application as to when the policy should take effect. From these documents the insured was justified in assuming that his policy of insurance became effective at noon on November 28, 1927. Why the date of February 28, 1928, was used at the close of the policy is not entirely clear. It is not an unreasonable conclusion, in fact it is entirely probable, that it was inserted for the convenience of the parties to fix the due date of the future annual premiums.

We therefore conclude that the policy of insurance was made operative and put in effect by the short-term insurance rider and under all the terms of the policy the date of this instrument became the date of the policy. We are aided in reaching this conclusion by four decisions from other jurisdictions, namely, *Krebs v. Philadelphia Life Ins. Co.*, 249 Pa. 330, 95 A. 91, Ann. Cas. 1917D, 1184; *Jefferson Standard Life Ins. Co. v. Wilson* (C. C. A.) 260 F. 593; *Fox v. New York Life Ins. Co.*, 211 Ill. App. 406, and *American National Insurance Co. v. Thompson* (Tex. Civ. App.) 186 S. W. 254. The first two of these cases present facts identical with the one we are considering, and the other two, very similar facts. In the case of *Krebs v. Philadelphia Standard Life Ins. Co.*, supra, the policy of insurance was issued upon application of the insured on July 19, 1913. It was dated on October 1, 1913. An indorsement providing for short-term insurance from August 1 to October 1, 1913, was placed upon the policy when issued. The policy was delivered prior to August 1, 1913, and the insured committed suicide on August 24, 1914. It contained a provision that "self destruction, while sane or insane, within one year from the date hereof, is not a risk assumed by the company under this policy," which, in effect, is similar to the language used in the policy issued by appellant.

The Supreme Court of Pennsylvania was of the opinion that if the date of the policy was to be considered as the date appearing on the main instrument, there would be no liability under its terms, the suicide of the insured having occurred within one year from that date, but that if its date were to be taken as the date of the short-term insurance indorsement, the liability of the company would be

fixed. The court held that the short-term insurance indorsement did not constitute an insurance policy in itself, and that therefore, it incorporated in its provisions enough of the terms of the main policy to make it a complete contract of insurance. It having incorporated the provisions of this contract it must be held to have incorporated all of them not expressly excepted, as the company could not be permitted to select, as included, the portions favorable to it and reject the others. The court held that there was but one contract of insurance which was in effect on the date of the short-term insurance indorsement, and that as there was an ambiguity in the policy itself, such ambiguity must be construed against the company and in favor of the insured, and affirmed the judgment of the trial court against the insurer.

In the case before us it would have been a simple matter for the appellant to have used such language in the several documents constituting the contract of insurance, so that there would have been no question of its meaning. The company did not do so, and it cannot complain because the trial court, following the usual rule of construction, resolved such ambiguities against it and in favor of the insured.

Judgment affirmed.

peachment purposes, was peculiarly for trial court.

5. Appeal and error ⇨1010(1).

Finding of fraud will be sustained on appeal, if there is evidence supporting one material fraudulent representation, though evidence fails as to all others.

6. Corporations ⇨121(5).

Evidence of fraudulent representations *held* sufficient to defeat action on note for mining stock.

7. Contracts ⇨1.

A person will not be heard to repudiate his act in executing written instrument, except on valid and satisfactory grounds.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by G. Weissbaum against Gertrude Eibeshutz, formerly Gertrude Studzinski, who filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Affirmed.

Manson & Allan, of San Francisco, for appellant.

Leon E. Morris and Edward M. Jaffa, both of San Francisco, for respondent.

SEAWELL, J.

This action was brought to enforce payment on an overdue promissory note in the sum of \$2,500 made by defendant to the order of plaintiff. Defendant, while admitting the execution, delivery, and nonpayment of the note, by way of answer and cross-complaint, alleged in defense that no consideration had been given for the note, and that its execution and delivery had been secured through the fraud of plaintiff, the circumstances of which will more completely be set forth later in this opinion. On the issue thus formed the case proceeded to trial before the court sitting without a jury, a jury having been waived. As is usual in such fraud cases, during the course of the trial two diametrically opposed stories were narrated by the opposing parties, only one of which could be true. The trial judge believed the story of defendant, and accordingly made its findings of fact and conclusions of law in her favor. From the judgment entered thereon plaintiff prosecutes this appeal. The main ground of the appeal is that the findings are not supported by the evidence.

[1, 2] It is too well settled to require citation of authority that, if the findings of the trial court are supported by any substantial evidence not inherently improbable, they will

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WEISSBAUM v. EIBESHUTZ. S. F. 10819.

Supreme Court of California.
Dec. 24, 1930.

1. Appeal and error ⇨1010(1).

Trial court's findings, supported by any substantial evidence not inherently improbable, will not be disturbed on appeal.

2. Appeal and error ⇨1012(1).

Weight of evidence is for trial court, whose findings cannot be disturbed on appeal, unless evidence is wholly lacking as matter of law.

3. Witnesses ⇨392(1).

Abandoned answer and cross-complaint, not stating defense set forth in amended answer, *held* admissible for impeachment purposes in action on note.

4. Appeal and error ⇨1012(1).

Weight of abandoned answer and cross-complaint, introduced in evidence for im-

not be disturbed on appeal. We are of the view that the findings in this case may, by a liberal indulgence of the rule, be held to be supported by the evidence. Much of appellant's arguments go to the weight of the evidence, but that was a matter for the trial court and not an appellate court, and we cannot disturb its findings unless, as a matter of law, the evidence is wholly lacking in that respect. Each party was the chief witness in his or her own behalf, with but slight corroborating evidence of a conclusive character sustaining either.

The story, largely as told by respondent, was that in 1920 she was a widow, deriving her sole income from a valuable apartment house inherited from her former husband. She testified that she possessed little or no business experience. She was acquainted with one B. J. Klarman, president of the Morning Star Mining Company, who, it appears, was closely associated with appellant in various deals. Klarman tried without success to sell some stock in the mine to respondent. In April of 1920 Klarman introduced appellant to respondent, and from that time on appellant was a very frequent visitor. He, almost immediately, tried to sell her some Morning Star stock, but she refused to buy. After ingratiating himself into respondent's good graces, appellant tried in various ways to secure control of respondent's property. On one occasion appellant asked respondent to place all of her valuables in his safe deposit box; on other occasions he wanted her to put her real property in his name; and on still another occasion he importuned respondent to place her automobile in his name, all of which respondent refused to do.

After being unsuccessful in interesting respondent in the Morning Star mine, appellant, as related by respondent, then told her that he was very much interested in the company, and was installing machinery in its mine; that he was in on the ground floor; that he wanted to buy some capital stock in said company, but could not have it issued to him directly at that time; that for various reasons he did not want it known that he was the owner of said stock; and for those reasons he asked respondent to take it in her name for him. This she agreed to do.

On the morning of June 1, 1920, appellant called at respondent's residence and delivered to her his check for \$2,500, with which to purchase for him 500 shares of the Morning Star stock. Respondent suggested that appellant should have a receipt for the money, and started to prepare one, but appellant handed her a blank form of note, representing it to be a receipt. Respondent could write without glasses, but could not read. Not having her glasses with her, she signed and delivered the document, believing that it was a receipt. Respondent had never in her life borrowed

money, nor had she ever seen or signed a promissory note before. Appellant and respondent then proceeded immediately to the office of the Morning Star Mining Company, where respondent asked for and received appellant's stock, the certificate being made in respondent's name. It appears that the corporation at that time had no treasury stock available for sale, and in all probability the stock purchased was the stock of Klarman. Respondent then placed the stock in her safe deposit box. She frequently offered to return this stock to appellant if he would return her "signature," but appellant kept putting her off from time to time. Appellant then attempted to secure respondent's consent to marriage, but respondent refused all such offers. Finally appellant threatened that, unless respondent married him, he would sue on the note. Finally, in April of 1922, shortly before respondent was married to her present husband, appellant made his first demand for payment. Until then respondent did not know she had signed a note, nor had appellant referred to it as such.

Respondent at all times has held the 500 shares of stock in question for appellant and has been and now is willing to deliver the same to appellant upon return to her of the document which she signed on June 1, 1920.

Based on this testimony, the trial court found that respondent signed the note under the belief that it was a receipt; that there was no consideration for the note; that the agreement was that respondent was to use the \$2,500 to buy stock for appellant and hold the same in trust for him; that the consent of said respondent to the execution of the note was secured by fraud in the manner set forth, *supra*.

[3, 4] Appellant stresses the fact that in the original answer and cross-complaint the defense of fraud based on the idea that the alleged note was a receipt was not set forth, nor did respondent mention this fact on the taking of her deposition. The record shows that this theory was first set forth in the amended answer filed about eleven days before trial. Appellant contends that these facts conclusively prove the receipt theory to be false, and, therefore, the entire story of respondent must fall. In this we cannot agree. The appellant introduced the original pleadings into evidence for impeachment purposes, and this he had a right to do. *Williams v. Seiglitz*, 186 Cal. 767, 200 P. 635. In that case it was directly held that an abandoned pleading may be used for impeachment purposes by showing prior inconsistent statements. The trial judge admitted such pleadings in evidence for the above purposes, but, after hearing all the evidence and observing the demeanor and character of the witnesses and parties, he credited the story set forth in the amended answer. The question as to the

weight to be given to the impeaching testimony was one peculiarly within the province of the trial court, and its determination under the circumstances cannot be disturbed.

[5] Moreover, even if there were any merit in appellant's contention in this regard, which there is not, it would avail him but little. The rule is well settled that, in regard to a finding of fraud, such finding will be sustained if there is evidence supporting one material fraudulent representation, even though the evidence fails as to all others. In *Beeman v. Richardson*, 185 Cal. 280, 281, 196 P. 774, 775, Mr. Justice Olney stated the rule as follows: "As to the finding of fraudulent representations, it is not necessary to detail all the representations which are alleged and found to have been made, and the evidence concerning each. If the finding is sustained as to one material fraudulent representation, it is enough."

[6, 7] Discarding the receipt theory, the evidence of the other material fraudulent representations sufficient to defeat the action on the note is ample.

This case presents an unusual state of facts. It is not one in which the rules appropriate in ordinary business affairs can be inflexibly applied, as there was seemingly involved in the relations of the parties an affair of the heart, and the relations of the parties, especially it would seem on the part of appellant, indicate a matrimonial expectancy. If the parties had been dealing with each other at arm's length, it may be that the trial court would have looked with less favor upon the defenses interposed by respondent. Evidence was also adduced which tended to give color to the theory that appellant and Mr. Klarman, president of the mining company, were in collusion in a plan to unload stock of the mining company upon the respondent, and the appellant made matrimonial overtures to respondent the better to accomplish a mercenary purpose. The conduct of either party is not easily understood, tested by any of the standards which are ordinarily applied in arriving at the true state of mind of the parties whose action is the subject of investigation.

Appellant bears down strongly upon the inconsistent position in which respondent is placed by her own acts. The signing of the promissory note and the making of a copy thereof by filling in the blank spaces of a copy of a printed form furnished by appellant, which respondent testified she believed to be a receipt for the stock delivered to her by ap-

pellant, and the insertion by her of the omitted day of the execution of the note and also the omitted word "days" after "ninety," and the further fact that, while on a visit to an eastern state, she wrote to appellant and asked him if he thought she would be able to sell her Gold Star stock (being the stock in suit) when she returned home, and, if so, she would be very glad, were the most serious inconsistencies which confronted the respondent in presenting her defense. A person will not be heard to repudiate his or her act in executing a written instrument except upon valid and satisfactory grounds. It is urged here that respondent has furnished no satisfactory reason or grounds upon which she can be released from her voluntary act. That a fiduciary relation existed between the parties in the form of an incipient love affair is not denied by the appellant, and it was testified by the respondent that she had confidence in the appellant and accepted much that he said without question. She offered as an explanation of her letter to him that the stock had been given to her to keep for appellant, as had other stock before, and that she unwittingly referred to it as her stock because it was in her possession. On the other hand, the conduct of the appellant in his dealings with respondent is not readily explainable. Respondent had had no business experience with the value of stocks, a field into which she had been bidden to enter by appellant—and the stock in the instant case does not appear to have had any substantial value—while appellant is shown to have had at least a contact with the president of said mining company and a mining stock experience. As to the credibility of the president of the mining company and appellant, it may be said in passing that the reputation of each was made an issue at the trial and weighed by the trial court.

Undoubtedly the evidence would have sustained a judgment for appellant had such a judgment been rendered, but the trial court, who was in close touch with the parties to the action, while we are far removed, saw the justice of the case on the side of respondent. Her explanation as to the promissory note and letter transaction evidently gained the credence of the trial court. No other assignments of error require special treatment.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

CARLSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 4199.

District Court of Appeal, Third District,
California.

Dec. 12, 1930.

Rehearing Denied Jan. 9, 1931. Hearing Grant-
ed by Supreme Court Feb. 9, 1931.**1. Master and servant ⇨397.**

Industrial Accident Commission has no jurisdiction unless relationship of master and servant exists between interested parties (Deering's Gen. Laws 1923, Act 4749, § 6).

2. Master and servant ⇨361.

In compensation proceeding, relationship between deceased and defendant held to be that of lessee and lessor, not servant and master (Deering's Gen. Laws 1923, Act 4749, § 6).

The formal document creating the relationship reserved to lessor authority to direct and control manner of cultivating orchards and harvesting fruit, and prohibited deceased from incumbering fruit, thus indicating an employment or cropping contract; but these reservations were made because of lessor's membership in marketing association. Although the customary term "demise" was not used, the equivalent terms "lease" and "farm-let" necessarily implied conveyance of property. The tenant held the absolute right of possession of the demised premises, was required to hire farm hands and pay for their services, and agreement was for term of five years.

[Ed. Note.—For other definitions of "Lease," see Words and Phrases.]

3. Landlord and tenant ⇨20.

"Lease" is conveyance of lands or tenements for term less than that possessed by owner in consideration of rent or compensation in payment for use of premises.

4. Landlord and tenant ⇨127.

Lessee's actual right of possession is necessary incident to valid lease.

5. Landlord and tenant ⇨5(1).

Existence of relationship of landlord and tenant is primarily fact question to be determined from intent of parties, ascertained from construction of entire instrument creating tenancy.

Fact that instrument is termed lease is not controlling, nor is clause giving owner supervision and control of method of farming. Every essential covenant of the instrument should be considered with

the document as a whole to ascertain the intent of the parties.

6. Landlord and tenant ⇨323.

There is clear distinction between lease and "cropping contract."

"Cropping contract" is mere agreement to employ one to cultivate land and produce crop on shares, cropper having neither title nor right of possession and being mere servant or employee.

[Ed. Note.—For other definitions of "Cropping Agreement or Contract," see Words and Phrases.]

7. Landlord and tenant ⇨323.

Even though landlord reserves all title to crops as security for payment of rent, terms of agreement may still characterize it as lease where tenant is given absolute possession.

Certiorari to Industrial Accident Commission.

Application by Addie Carlson and the Columbia Casualty Company for certiorari to review an order of the Industrial Accident Commission awarding compensation to Belle Cecelia Rodgers and Belle Agnes Rodgers for the death of Manuel Rodgers.

Award annulled.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for petitioners.

E. O. Allen and G. C. Faulkner, both of San Francisco, and Orin J. Lowell, of Auburn, for respondents.

R. L. THOMPSON, J.

This is a writ of certiorari to review an award of damages in the sum of \$5,150 by the Industrial Accident Commission on account of the death of Manuel Rodgers.

February 13, 1930, Manuel Rodgers was engaged in blasting out trees with dynamite on the farm owned by the petitioner Addie Carlson at Newcastle. Rodgers was killed as a result of a premature explosion. He left surviving him a wife and daughter. Both were wholly dependent upon him. The commission found that he died from injuries sustained in the course of his employment as foreman of the ranch. An award of \$5,150 damages was found against both Addie Carlson and her surety, the Columbia Casualty Company.

The petitioners claim that the deceased was engaged as the lessee of Addie Carlson at the time of the accident. The sole question which is involved in this proceeding is whether the deceased was occupied as an employee or as a lessee of Addie Carlson at the time he sustained the injuries from which he died.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 2 P.(2d) 151.

[1] The Industrial Accident Commission has no jurisdiction to adjust compensation for accidents or death except when the relationship of master and servant or employer and employee exists between the interested parties. Section 6, Workmen's Compensation, Insurance and Safety Act, St. 1917, p. 831, and amendments, Deering's Gen. Laws of 1923, p. 1714, Act 4749; 27 Cal. Jur. 275, § 18.

[2] The relationship of the parties, upon which liability in the present matter depends, must be determined by a construction of the document which was executed by them regarding the operation of the fruit ranch belonging to the petitioner Addie Carlson. This indenture was executed October 1, 1929. It purports to be a five-year lease of the farm to Manuel Rodgers in consideration of an equal division of the net proceeds of the sales of the products of the farm. Mrs. Carlson owned a forty-acre fruit ranch near Newcastle. She lived in San Francisco. She was a member of a fruit marketing association and was under contract to deliver to this association all the fruit from this ranch in standard condition suitable for shipment to Eastern markets. She therefore reserved, by the terms of this lease, the right to supervise the cultivation and picking of the crops, and required the fruit to be delivered to this marketing association for sale. One-half of the net proceeds of the sales was retained by Mrs. Carlson in lieu of rent for the premises.

This indenture contained the following provisions:

"This agreement made * * * this first day of October, 1929, by and between Mrs. Addie Carlson, the party of the first part, and Manuel Rodgers, the party of the second part * * *

"Witneseth: That in consideration of the covenants and agreements herein contained, to be kept and performed by the party of the second part, the said Mrs. Addie Carlson does hereby lease and farm-let unto the said Manuel Rodgers, for a term of five (5) years * * * [here follows the description of the ranch in question].

"The terms of this lease are such that the party of the second part is to perform at his own cost and expense, all of the labor and work necessary for the successful carrying on of the premises leased hereby such as plowing, cultivating; * * * that all work of every description shall be done under the supervision of the party of the first part, her agent or representative, and in strict accordance with her wishes, ideas, and instructions, and the different lines of work must be carried out in their proper time and season, as directed by the party of the first part.

"The party of the second part agrees that he will occupy and work the premises leased herewith, and that he will not let in whole

or in part, the premises leased hereby, without first getting the written consent of the party of the first part. * * *

"The party of the second part agrees that he will furnish and employ a sufficient number of * * * farm-hands to do in proper time and season all of the work required on the premises; that he will keep in good repair all of the ditches and fences, and will not commit waste or suffer waste to be committed. * * *

"The party of the second part is prohibited from borrowing any money, or placing a lien against the fruit growing, or to be grown on the said premises. * * *

"All of the fruits produced upon the premises leased hereby during the life of this lease must be picked and packed in fit condition for eastern shipment, and according to the standardization rules and delivered to the Newcastle Fruit Growers' Association at its shipping house in Newcastle for the account of and in the name of the party of the first part. * * *

"The party of the second part agrees to carry and pay for at his own sole cost and expense, accident and liability insurance. * * *

"* * * Should the party of the second part fail to comply with any of the terms of this lease * * * the party of the first part may then at her option terminate this lease, and the party of the second part agrees he will then quietly give up possession. * * * In case of sale, the party of the first part reserves the right to cancel this lease. * * *

"The party of the first part is to have the right of ingress and egress, * * * to any and all of the orchard and buildings. * * *

"Now, therefore, in consideration of the covenants and agreements herein contained, the contracting parties hereto, do hereby agree that the net proceeds from the sale of all fruits from the premises leased hereby, shall be equally divided between the party of the first part and the party of the second part, after first deducting the expense * * * [of materials, boxing and shipping the fruit], the party of the first part hereby agreeing to account for and pay to the party of the second part his proportion of the net proceeds. * * *

"Nothing herein contained shall constitute the parties hereto partners. * * *

We are cited to no authority where a document so formal, respecting all the necessary elements of a lease, has been held to constitute merely an agreement of employment or a cropping contract. Such a construction would seem to violate the evident intention of the contracting parties.

[3, 4] We are constrained to hold that the foregoing indenture is a lease and not a mere

agreement of employment. It contains all the essential elements of a lease. A lease is a conveyance of lands or tenements for a term less than that which is possessed by the owner, in consideration of rent or compensation in payment for the use of the premises. The actual right of possession of the premises on the part of the lessee is a necessary incident to a valid lease. 2 Bouv. Law Dict. p. 1887; 16 R. C. L. 530, § 2; 1 Tiffany on Landlord & Tenant, p. 159, § 16; 1 Tiffany on Real Property (2d Ed.) p. 124, § 49.

[5] The existence of the relationship of landlord and tenant is primarily a question of fact to be determined from the intent of the contracting parties to be ascertained from a construction of the entire instrument creating the tenancy. Walls v. Preston, 25 Cal. 59, 63; 1 Tiffany on Landlord & Tenant, 160, § 18. The fact that the instrument is termed a lease does not necessarily determine the nature of the instrument. Stockton S. & L. Soc. v. Purvis, 112 Cal. 236, 44 P. 561, 53 Am. St. Rep. 210. Nor does a clause which gives the owner supervision and control of the method of farming necessarily characterize the instrument as an agreement of employment or as a cropping contract. Every essential covenant of the instrument should be considered with the document as a whole to ascertain the intent of the parties.

[6] There is a clear distinction between a lease and a cropping contract. The latter is a mere agreement to employ one to cultivate the land and produce a crop on shares. The cropper has neither title nor right of possession of the land. Neither has he any title to the crop until the division is made. He is a mere servant or employee. On the contrary, an agreement with one to cultivate the land and produce a crop, even though the owner retains absolute title to the crop, may create a relationship of landlord and tenant. This relationship must be determined by ascertaining the intent of the parties. When the agreement is in writing the intent of the parties must be determined by construing the instrument as a whole. 1 Underhill on Landlord & Tenant, 308, § 219. On page 309 of the authority last cited, it is said: "It is sometimes difficult to determine whether a person who cultivates the land of another on shares is a tenant. * * * Much depends upon the wording of the contract between the parties. Each case must be decided upon the special terms of the agreement. * * * If there is an indication that the parties intend that the occupant shall have a right to the possession of the farm and full power of controlling and using it for farming purposes as though it were his own, the contract is a lease. * * * The circumstance that the lease contained the terms 'lease, demise and let,' is a strong fact to show that the instrument is a lease. * * * The parties may expressly provide

that the title to the crop shall remain in either of them until division."

In the present case the reservation of the authority to direct and control the manner of cultivating the orchards and harvesting the fruit by the owner; the covenant prohibiting the deceased from encumbering the fruit; the fact that all fruit was to be delivered to the marketing association for sale, for the credit of Mrs. Carlson, and that she was to pay the deceased one-half of the net proceeds of sales as his share of the profits, are circumstances which tend to indicate an employment or a cropping contract. 1 Tiffany on Real Property, 122, § 48. However, we believe these provisions are accounted for from the fact that Mrs. Carlson was under a membership contract to deliver the fruit from that ranch to the marketing association for sale, and that this fruit had to be delivered in standard marketing condition for eastern shipment. These provisions were inserted in the lease to prevent a breach of her membership contract with the Newcastle Fruit Growers' Association.

On the contrary, this indenture contains many provisions which indicate that it was intended as a lease and not as a mere agreement of employment. The instrument was repeatedly designated as a lease. The term "employment" is not used. A specific conveyance of the premises upon which the fruit was produced was made to the deceased. The document provides that "Mrs. Addie Carlson does hereby *lease and farm-let* [the ranch] unto the said Manuel Rodgers." While it is true the customary term "demise" which is found in most leases is omitted from the indenture, the equivalent terms "lease" and "farm-let" are used. These terms necessarily imply a conveyance of the property. McAlesster v. Landers, 70 Cal. 79, 11 P. 505; 16 R. C. L. 530, §§ 2, 3; Words and Phrases, First Series, vol. 5, p. 4043; 2 Bouv. Law Dict. p. 1887. A definite tenure of five years is provided for. The lessee is given the exclusive occupancy of the premises, except that the owner reserves the usual license of ingress to make repairs and supervise the cultivation of the orchard. The lease provides that "the party of the second part agrees that he will occupy and work the premises leased herewith." The deceased and his family actually did take and retain possession of the demised premises. By the terms of this instrument he was assured peaceable and quiet possession. The very leasing and delivery of possession of the premises implies the right to quiet enjoyment of the property even though the specific covenant to that effect is omitted. 1 Tiffany on Landlord & Tenant, p. 517, § 79; 1 Tiffany on Real Property, p. 125, § 49b. The reservation by the owner of the right of ingress for particular purposes implies that she intended to part with the general right of possession.

Moreover, the lease provides that in the event of a breach of the covenants of the instrument, the party of the first part, at her option, may terminate the lease, and "the party of the second part agrees he will then quietly *give up possession*." The party of the second part is required "to perform at his own cost and expense, all of the labor and work necessary for the successful carrying on of the [farming of the] premises leased." He agreed to "employ a sufficient number of good and skillful farmhands to do in proper time and season all of the work required on the premises," at his own cost and expense. The covenant requiring Rodgers to hire the farm hands and the obligation of paying for their services are evidence of a tenancy rather than a mere agreement of employment. 1 Underhill on Landlord & Tenant, 302, § 213. The lessee agreed to replant at least 200 fruit trees each year. He also covenanted to keep in good repair all the ditches and fences and "not commit waste or suffer waste to be committed." He was to perform his work in a farmer-like manner. He was furnished by the owner three horses and farming implements which he agreed "to return to the party of the first part, at the expiration of this lease, in as good condition as when received * * * natural wear and tear excepted." And finally, he agreed that he "will not [sub]let in whole or in part, the premises leased hereby, without first getting the written consent of the party of the first part."

We are unable to reconcile the foregoing provisions of the instrument in question upon any theory other than that of a lease. All of the usual terms of a lease are present. The tenant held the absolute right of possession of the demised premises. Even though it be assumed Mrs. Carlson reserved the title to the fruit for the purposes of delivery and sale, Rodgers certainly had an equitable interest therein. His leasehold title to the demised premises cannot be disputed. Except for a breach of the covenants of this lease he could not be lawfully disturbed in his absolute right of possession. Upon the contrary, his title would enable him to successfully maintain an action of ejectment against any one who sought to trespass upon the premises, except the owner or her agent while they were engaged in supervising the cultivation and harvesting of the fruit pursuant to the terms of the agreement. In effect the premises were demised to the deceased for five years in consideration of one-half of the net proceeds of the sales of the fruit produced thereon. Rodgers was sole tenant of the farm.

The absolute right of possession of the ranch on the part of Rodgers and the agree-

ment for the long term of five years instead of a single season are circumstances strongly indicating the existence of a lease instead of an agreement of employment or cropping contract. 1 Tiffany on Real Property, 121, § 48. In 16 Ruling Case Law, 587, § 62, it is said: "The most important criterion in arriving at the intention of the parties and the consequential relation created is which party was entitled to the possession of the land; if it was the intention that the landowner should part with and the other party have the exclusive possession of the land for the purpose of cultivation, then as a general rule the transaction will be considered a lease and the relation between the parties that of landlord and tenant. * * * It would seem that the proposed duration of the agreement would be an important consideration in arriving at the intention of the parties as to the character of the relation created."

[7] Even though the landlord may reserve all title to the crops as security for the payment of his rent or his share of the produce or otherwise, the terms of the agreement may still characterize it as a lease where the tenant is given the absolute possession of the premises. In 16 Ruling Case Law, page 586, it is said in this regard: "A landlord may expressly reserve all title to the crops and produce of the land and thereby prevent the title to the crops from being considered in the tenant by reason of his right of possession or from their being considered tenants in common as to the crops. The fact that the landowner and the party cultivating the land are tenants in common as to the crops does not, as respects the occupation of the land, prevent the relation of landlord and tenant from existing; indeed, it is expressly stated in many of the cases that the contract may be a lease so as to create the relation of landlord and tenant so far as the land is concerned, while as to the crops there is a tenancy in common between the occupier and owner."

For the reason that it was the evident intent of the parties to the indenture which is involved in the present case to execute a lease and not a mere agreement of employment, and that a relationship of landlord and tenant existed between them, the Industrial Accident Commission was without jurisdiction to adjust the compensation on account of the death of the lessee. The Columbia Casualty Company was not an insurer of the deceased.

The award of damages is therefore annulled as against both petitioners.

All concur.

CARLSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.*
Civ. 4200.

District Court of Appeal, Third District,
California.
Dec. 12, 1930.

Rehearing Denied Jan. 9, 1931. Hearing Granted by Supreme Court Feb. 9, 1931.

Master and servant §361.

In compensation case injured claimant held not employee of defendant, but employee of defendant's tenant.

In the absence of a contract to that effect, the landlord, under such circumstances, would not be liable for injury to tenant's employee. Defendant's tenant employed injured claimant pursuant to covenant of lease requiring him to "employ a sufficient number of good and skillful farmhands."

Certiorari to Industrial Accident Commission.

Application by Addie Carlson and the Columbia Casualty Company for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries to Manuel Gomez.

Award annulled.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for petitioners.

E. O. Allen and G. C. Faulkner, both of San Francisco, and Orin J. Lowell, of Auburn, for respondents.

R. L. THOMPSON, J.

This is a writ of certiorari to review an award of damages to Manuel Gomez as compensation for injuries sustained while blasting out trees with dynamite. This is a companion writ with that of the proceeding entitled "Addie Carlson et al. v. Industrial Accident Commission of the State of California, Belle Cecelia Rodgers et al.," in which an opinion of this court was this day filed. 102 Cal. App. —, 294 P. 399. The claims in both proceedings grew out of the same accident. Both applications for compensation were heard upon the same evidence. The opinion in the last-mentioned proceeding is determinative of this application.

Addie Carlson owned a fruit farm near Newcastle. She leased the farm to Manuel Rodgers on October 1, 1929, for a term of five years in consideration of an equal division of the net proceeds of the sales of crops. Manuel Rodgers took possession and proceeded to cultivate the orchards. His lease required him to "employ a sufficient number

of good and skillful farmhands to do in proper time and season all of the work required on the premises," at his own expense. November 10, 1929, pursuant to this covenant, he employed Manuel Gomez as a farm hand on the premises. He paid Gomez the sum of \$110 a month as wages, and furnished him with a cabin, together with necessary wood and water without charge. In the course of his employment, on February 13, 1930, while engaged in assisting his employer Manuel Rodgers in blasting out trees with dynamite, he was seriously and permanently injured as a result of a premature explosion.

Addie Carlson, the owner and lessor of the ranch, was a member of the Newcastle Fruit Growers' Association. She held an accident insurance policy with the petitioner Columbia Casualty Company, which provided that company "Does hereby agree with this employer * * * [Addie Carlson] as respects personal injuries sustained by [her] employees, including death at any time resulting therefrom," to compensate them for such injuries. Manuel Rodgers and his employees were not insured with this or any other casualty company, notwithstanding the fact that his lease with Mrs. Carlson covenanted that he should "carry and pay for at his own * * * expense accident and liability insurance."

Upon petition, the Industrial Accident Commission found that Manuel Gomez was injured in the course of his employment as a farm hand while engaged in the service of Addie Carlson, who was insured against such accidents by the Columbia Casualty Company. The commission then awarded Gomez damages in the aggregate sum of \$4,070. This writ of certiorari was thereupon instituted by the petitioners.

The record leaves no doubt of the fact that Gomez was employed by Manuel Rodgers, the lessee of the Carlson fruit ranch, and that he was not an employee of Addie Carlson. It is equally apparent that Gomez was not a beneficiary under the accident policy which was held by Addie Carlson. If Rodgers was a tenant and lessee of Addie Carlson and he employed Gomez as a farm hand, he and his sureties alone would be liable for injuries sustained in the course of such employment. In the absence of a contract to that effect, the landlord, under no circumstances, would be liable for injury to her tenant's employees. In the case of Carlson v. Industrial Accident Commission, supra, we have held that the indenture which determines the relationship of Carlson and Rodgers is a lease and not an agreement of employment. We are unable to see any way to escape that conclusion. Upon the authority of that case we are impelled to hold the respondent Manuel Gomez was not an employee of petitioner Addie Carlson, and that neither she nor her surety, the Columbia

Casualty Company, is liable for the injuries sustained by Gomez.

The facts of this case present a sad tragedy. Human sympathy would urge any tribunal of justice to require compensation from the parties who are liable. It would, however, be a miscarriage of law and justice to arbitrarily take money from an individual or a corporation not morally or legally liable, to pay to another regardless of the seriousness of his injuries.

For the reason that Manuel Gomez did not sustain the relationship of employee to Addie Carlson, and that he was therefore not included as a beneficiary of the policy held by the lessor of the ranch, the Industrial Accident Commission was without jurisdiction to adjust compensation for the injuries sustained.

The award of damages is therefore annulled as to both petitioners.

All concur.

110 Cal. App. 523

MILLIGAN v. CITY OF ALHAMBRA.
Civ. 7699.

District Court of Appeal, First District,
Division 2, California.

Dec. 18, 1930.

1. Municipal corporations ⇨226.

Mode of making municipal contracts prescribed by law is exclusive.

2. Municipal corporations ⇨225(5).

Resolution of city commission accepting broker's bid for realty held ineffectual to impose contractual liability on city for sale of property or for broker's commissions because charter limitations were not followed (St. 1915, pp. 1752, 1782, §§ 49, 135).

Charter of city of Alhambra (St. 1915, pp. 1752, 1782, §§ 49, 135) provides that only method for sale or lease of public property shall be by ordinance, except in cases where city commission takes action in pursuance of general state law. Section 135 provides manner of making contracts after competitive bidding, and provides that city shall not be bound by any contract unless provisions thereof are followed.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by N. W. Milligan against the City of Alhambra. Judgment for defendant, and plaintiff appeals.

Affirmed.

Fred W. Morrison, of Los Angeles, for appellant.

R. D. Wickham, City Atty., of Alhambra, for respondent.

SPENCE, J.

Plaintiff brought an action against defendant, city of Alhambra, to recover the sum of \$5,050 alleged to be due as a real estate agent's commission. The action was tried by the court sitting without a jury upon an agreed stipulation of facts, and, from a judgment in favor of defendant, plaintiff appeals.

In November, 1926, notice was published stating that the cities of Pasadena, South Pasadena, and Alhambra would receive sealed bids for their respective interests in property known as the Tri-City Farm. The city of Pasadena owned an undivided four-sixths interest in the property, while the other two cities each owned an undivided one-sixth interest. The notice provided the method for submitting bids upon the basis of a price per acre, a bid to be submitted to each city covering its undivided interest. The notice stated that the three cities intended to reject bids unless the bidders filed bids with all three cities at the same price per acre. It further provided: "Bidders must state specifically whether the price per acre is a net price to the three cities or whether a commission is payable out of said net price, and if any commission is payable, the amount of said commission." On November, 1926, plaintiff submitted a bid in his own name to the defendant city, which bid recited that it was made "on behalf of my Syndicate." It further stated: "This offer is made subject to the regular Realty Board Commission of five per cent (5%) on the total purchase price—to be paid to me." It was stipulated on the trial at the time the bid was submitted "plaintiff had a syndicate composed of various persons who were ready, able and willing to buy said property for the price and upon the terms stated." On November 30, 1926, the commission of the defendant city adopted a resolution accepting plaintiff's bid and, in response to an inquiry by plaintiff, the city manager wrote to plaintiff on December 20, 1926, advising him of the action of the commission. In this letter it was stated that "the City of Alhambra cannot go into escrow in this matter until thirty days after publication," and further that "to date the Board has not taken any adverse action in this matter, nor indicated a desire to rescind action as above outlined." On December 21, 1926, the commission adopted a second resolution rescinding its resolution of November 30th and rejecting plaintiff's bid. The reason for the adoption of the second resolution does not appear, nor does it appear that any sale was ever consummated.

Appellant contends that the rule that a real estate agent is entitled to his commission when he has procured a purchaser ready, willing, and able to buy the property at the price and upon the terms stated is too well settled to require citation of authority. However, appellant is asserting a rule relating to the performance of a real estate agent's contract and not a rule relating to the creation of such contract. The first question to be determined is whether a contract between appellant and respondent city ever came into existence.

[1, 2] The charters of municipal corporations generally provide the manner in which contracts of the municipality may be made and the charter of the city of Alhambra so provided. Stats. 1915, p. 1740. It is generally held that, where the mode of making municipal contracts is prescribed and limited by law, such mode is exclusive, and the municipality can make a contract only in the manner provided. *McQuillan on Municipal Corporations* (2d Ed.) § 1281; *Times Publishing Co. v. Weatherby*, 139 Cal. 618, 73 P. 465; *Frick v. City of Los Angeles*, 115 Cal. 512, 47 P. 250; *City of Louisville v. Parsons*, 150 Ky. 420, 150 S. W. 498; *City of Astoria v. American La France Fire Engine Co. (C. C. A.)* 225 F. 21.

Article 6, § 49, of the Charter, provided: "No action providing for any specific improvement or the appropriation or expenditure of any public money, except a sum not exceeding one thousand dollars; for the appropriation, acquisition, sale or lease of public property; for levying any tax or assessment; granting any franchise; for establishing or changing fire limits or districts, or for imposing any penalty, shall be taken except by ordinance except in cases where the commission takes action in pursuance of a general law of the state." Article 19, § 135, of the Charter, provided for the manner of making contracts after competitive bidding and for the manner of making contracts involving the payment of money not exceeding a thousand dollars. The opening sentence of that section reads in part: "The City of Alhambra shall not be and is not bound by any contract * * * unless * * *" It is apparent from the reading of the foregoing sections and other sections of the charter that the mode by which the city might enter into contracts providing for the expenditure of public money was prescribed and limited.

It is not contended that the mode provided under article 19, § 135, was followed. The only other mode in which a contract for the expenditure of public money might be made was that provided in article 6, § 49. That section required that such action be taken by ordinance. Appellant relies entirely upon the resolution of November 30. Appellant con-

cedes that this resolution was ineffectual to impose a contractual liability for the sale of the property, but contends that the agent's commission stands on a different footing. We find no merit in this contention. No ordinance was passed relating to any contract with appellant either for the payment of the commission or the sale of the property and the adoption of the resolution referred to was insufficient under the charter to impose a contractual liability upon the respondent city.

Judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

110 Cal. App. 442

GILL et al. v. JOHNSON, State Treasurer.
Civ. 468.

District Court of Appeal, Fourth District,
California.

Dec. 15, 1930.

1. Appeal and error ⇐757(2).

On appeal, nature of action and substance of pleadings may be stated in general terms, and only such portion of pleadings need be printed in brief as may be necessary to understanding of points (Code Civ. Proc. § 953c; Rule 8 of Supreme and Appellate Courts).

2. Appeal and error ⇐757(1).

Brief held to contain sufficient portions of record (Code Civ. Proc. § 953c; Rule 8 of Supreme and Appellate Courts; St. 1915, p. 1932).

Appellant's first point was that action did not properly come within *Torrens Law* (St. 1915, p. 1932), and, in support thereof, portion of law was set forth together with one paragraph of complaint relied on to show that action did not come within terms of law. The second point was that respondents were guilty of negligence, and, while brief does not set up all evidence, substance of considerable evidence is set forth, together with some thirty-five parenthetical references to line and page of transcript. The third point was that question had been settled under *res judicata* rule, and in support of that point appellants set forth some considerable quotation from transcript.

3. Appeal and error ⇐757(3).

Appellant, having set out portions of evidence relied on by him, need not set forth other portions desired by respondent.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action to recover value of land erroneously registered under the Torrens Law, brought by Thomas Edwin Gill and another against C. G. Johnson, as State Treasurer. From the judgment, defendant appeals. On motion to dismiss.

Motion denied.

See, also, 284 P. 510.

U. S. Webb, Atty. Gen., and L. G. Campbell and James S. Howie, Deputy Attys. Gen., for appellant.

Barker & Keithly, of Los Angeles, for respondents.

BARNARD, J.

[1-3] This is a motion to dismiss an appeal and affirm a judgment, based upon the contention that the appellant has not printed in his opening brief, or any supplement thereto, as required by section 953c of the Code of Civil Procedure, such portions of the record as are necessary for a determination of the appeal, and that the appellant has not stated in his opening brief, as required by rule 8 of the Rules applying to the Supreme and appellate courts, the substance of the record and the pleadings to the extent required by said rule, and necessary to a proper understanding of the points raised.

Under section 953c of the Code of Civil Procedure and the above-mentioned rule 8, as now existing, it is sufficient to set forth in the brief the substance of the record, parenthetically referring to the line and page of the typewritten transcript for verification. The nature of the action and substance of the pleadings may be stated in general terms, and only such portion of the pleadings need be printed in the brief, as may be necessary to an understanding of the points raised. *Montanez v. Beard*, 207 Cal. 379, 278 P. 858; *Irer v. Gawn*, 99 Cal. App. 17, 277 P. 1053; *Pacific States Corporation v. Rosenshine* (Cal. App.) 290 P. 609.

This action is one to recover from the "Torrens Title Assurance Fund" in the custody of the state treasurer the value of certain lands in Imperial county on account of an erroneous registration of said land under the Torrens Law (St. 1915, p. 1932), due to an alleged

fraud in securing the registration of said title, whereby it is claimed the superior court of the county of Imperial was deceived and imposed upon. In his opening brief appellant sets up three points as grounds for reversal. The first point is that this action does not properly come within the Torrens Law. In support thereof, a portion of the Torrens Law is set forth in the brief, together with one paragraph of the complaint, which are relied on to show that the action as brought, does not come within the terms of that law. The second point urged is that the respondents were themselves guilty of negligence, and therefore, under the provisions of the Torrens Law, are not entitled to recover. While appellant's brief does not attempt to set up all of the evidence in this regard, the substance of considerable evidence is set forth, together with some thirty-five parenthetical references to the line and page of the transcript. Without passing upon the merits of the point raised, we think enough is thus set forth in the opening brief to call for careful study and consideration of the matter. The third point raised is that the question here at issue has already been settled under the rule of *res judicata* in another action, in another jurisdiction. In support of that point, appellant sets forth some considerable quotation from the transcript, showing portions of the opinion and decree in such other action, which portions of the record appear to present a real question.

We are unable to hold that the appellant has failed to comply with the requirements of the rule and Code section referred to. It is apparent that a considerable part of respondents' objection to appellant's brief is addressed, not so much to the failure of appellant to set forth or refer to portions of the evidence relied upon by him as showing error, as to his failure to also set forth other portions of the record which are desired by respondents, in support of their view of the case. We do not understand that any such duty rests upon the appellant.

We are of the opinion that the brief of the appellant shows a sufficient compliance with the rules, as against such a motion, and the motion is therefore denied.

We concur: MARKS, Acting P. J.; WARNER, Justice pro tem.

110 Cal. App. 378

WEISER v. PAYNE, County Auditor.
Civ. 7281.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1930.

1. Garnishment ⇨17, 63.

Public policy denounces as unfavorable to proper functioning of governmental institutions any attachment or garnishment of their funds or salaries of their agents.

2. Garnishment ⇨18.

Statute authorizing garnishment of moneys due from state, or department, board, or officer thereof to judgment debtor, constitutes grant of privilege rather than sanction of inherent right (Code Civ. Proc. § 710, as amended by St. 1929, p. 1047, § 1).

3. Garnishment ⇨63.

Salary of instructor in public schools held not subject to garnishment in favor of judgment creditor (Code Civ. Proc. § 710, as amended by St. 1929, p. 1047, § 1).

Salary of instructor in public schools of city was not subject to provisions of Code Civ. Proc. § 710, as amended by St. 1929, p. 1047, § 1, because judgment against instructor was not founded on claim entitling it to lodgment with state department or officer thereof, and judgment debtor was not officer of state nor of municipality.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action for writ of mandate by William J. Weiser against H. A. Payne, as Auditor of the County of Los Angeles, to compel issuance of warrant to pay judgment against an instructor in the public schools. From an adverse judgment, petitioner appeals.

Affirmed.

Schweitzer & Hutton, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, J.

A judgment having been entered in the superior court dismissing an alternative writ of mandate and sustaining a demurrer to the petition for a peremptory writ, the petitioner has appealed therefrom.

The uncontroverted facts are that appellant as a creditor of an instructor in the public schools of the city of Los Angeles obtained a judgment in the municipal court, which was

duly authenticated and filed with the respondent as auditor of Los Angeles county. The auditor declined to honor the same or to draw his warrant for the amount demanded, whereupon the plaintiff petitioned the court below for a writ of mandamus requiring its issuance under the provisions of section 710 of the Code of Civil Procedure. A demurrer was interposed by respondent upon the ground that said petition did not state facts sufficient to constitute a cause of action. The sole question presented involves the construction and application of the above-mentioned section as amended (Stats. 1929, c. 634, p. 1047, § 1), the pertinent parts of which are as follows: "The duly authenticated transcript of a judgment, for money, against the defendant, rendered by any court of this state may be filed with the state department, board or commission or officer thereof, from which money is owing to the judgment debtor in such action, or if the defendant be an elective officer or officer receiving a statutory salary, with the controller of the State of California, or the auditor of any county, city and county, city or other municipal or public corporation, from which money is owing to the judgment debtor in such action * * *, whereupon it shall be the duty of any such official, or of such public officer with whom such transcript shall have been filed, to draw his warrant in favor of or to pay into the court from the docket of which the transcript was taken, so much of the money, if sufficient there be, * * * which belongs to or is owing to the judgment debtor in the cause designated in said transcript as will cancel said judgment. * * *"

[1-3] This section has been recognized, and is here admitted, as special legislation calculated to provide a method for the subjection of debts due from the state or certain of its specified political subdivisions to liens of judgments. *Irlarry v. City of San Diego*, 186 Cal. 535, 199 P. 1041; *Walker v. Rich*, 79 Cal. App. 139, 249 P. 56; *Gamble v. Utley*, 86 Cal. App. 414, 260 P. 930. Our courts have frequently held that public policy denounces as unfavorable to the proper functioning of governmental institutions any attachment or garnishment of their funds or the salaries of their agents, but that this especial enactment is not such legislation. *Walker v. Rich*, supra; *Ruperich v. Baehr*, 142 Cal. 190, 75 P. 782; *Irlarry v. City of San Diego*, supra. Hence, the statute in question must be accepted and applied rather as a grant of a privilege than as the announcement or sanction of an inherent right, and its scope measured accordingly. With these principles in mind, it becomes obvious that the petitioner's contention, the effect of which would be to include wages and salaries of various municipal employees, is untenable. His claim is not such as may be "filed with the state department, board or commission or officer" of a state de-

partment, board, or commission. It is conceded that the judgment debtor is not an elective officer or officer receiving a statutory salary, and has no money due from the state. This precludes an attempt to invoke the remaining clauses providing that: "If the defendant be an elective officer or officer receiving a statutory salary, [the judgment may be filed] with the controller of the state of California, or the auditor of any county, city and county, city or other municipal or public corporation." We conclude that since the judgment is not founded upon a claim entitling it to lodgment with a state department or officer thereof, and the judgment debtor is not an officer of the state nor of a municipality, the fund in controversy, as salary of an instructor in the public schools, in custody and control of the county auditor, is not subject to the provisions of section 710 of the Code of Civil Procedure.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

110 Cal. App. 616

Ex parte DAVIS.
Cr. 1144.

District Court of Appeal, Third District,
California.

Dec. 23, 1930.

1. Habeas corpus $\hookrightarrow$ 113(5½).

Question of insufficiency of habeas corpus petition could not be raised for first time on appeal.

2. Prisons $\hookrightarrow$ 15.

Prisoner held entitled to time credits under resolutions allowing credits except to those named whose credits were forfeited, though board had previously ordered his credits forfeited.

Prisoner had been released on parole, but parole had been suspended, and he was returned to prison on May 20, 1928, and on November 17, 1928, state board of prison directors ordered his credits earned and to be earned forfeited. On July 13, 1929, however, board adopted resolution allowing credits for six months' period ending June 30, 1929, to all prisoners excepting those named whose credits for such period had been forfeited. This was followed by list of prisoners in which petitioner's name did not appear. On January 11, 1930, board adopted similar resolution in which petitioner's name did not

appear among list of prisoners whose credits had been forfeited.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Application of George F. Davis for a writ of habeas corpus. From an order discharging petitioner, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Lawrence J. Skirving, of Sacramento, for respondent.

FINCH, P. J.

This is an appeal by the people from an order of the superior court of Sacramento county discharging the above-named George F. Davis from imprisonment in the state prison.

[1] The petition for a writ of habeas corpus filed in the superior court is somewhat uncertain and defective. The return by the warden of the state prison supplies some of the defects of the petition. The matter was tried in the superior court on the theory that the matters presented by this appeal were properly in issue, and no objection having been made in the trial court, it is now too late to raise the question of the insufficiency of the petition.

[2] The prisoner was received at the state prison February 1, 1925. Thereafter the term of his imprisonment was fixed at six years. November 9, 1927, he was released on parole; May 16, 1928, his parole was suspended; May 20, 1928, he was returned to prison; November 17, 1928, the state board of prison directors ordered all of his credits earned and to be earned forfeited. Notwithstanding the fact of such forfeiture, however, on July 13, 1929, the board adopted a resolution allowing "credits for the six months' period ending June 30, 1929, * * * to all prisoners * * * serving sentences pursuant to the provisions of section 1168 of the Penal Code * * * excepting those of said prisoners who are hereinafter named whose credits for said period have been disallowed, forfeited or revoked * * * the following are the names of the prisoners hereinbefore referred to whose credits have been disallowed, forfeited or revoked." This is followed by a list of prisoners in which the petitioner's name does not appear. On January 11, 1930, the board adopted a similar resolution in which again the petitioner's name does not appear among the list of prisoners whose credits had been "disallowed, forfeited or revoked."

The uncontradicted evidence shows that, if the petitioner is entitled to credits for the

two periods mentioned, the length of his term was thereby reduced $4\frac{1}{2}$ months. This court on August 19, 1930, in *Ex parte Solman*, 291 P. 224, considered the identical question presented by this appeal and held contrary to appellant's contention. In that case a hearing was denied by the Supreme Court on September 17, 1930.

For the reasons stated in the opinion in that case the order herein is affirmed.

All concur.

110 Cal. App. 541

DU PONT v. ALLEN.

ALLEN v. DU PONT et ux.

Civ. 7419.

District Court of Appeal, First District,
Division 1, California.

Dec. 19, 1930.

1. Judgment ⇨253(1).

Amount erroneously demanded in cross-complaint for conversion became immaterial, where relief granted was consistent with law and embraced within issues (Code Civ. Proc. § 580).

In action to recover purchase price of personalty, defendant filed cross-complaint for damages for conversion, and alleged value of property to be \$5,500, but prayer for relief only alleged damages in sum of \$3,368. Allegations of cross-complaint were denied by plaintiff, and therefore reasonable value of property as alleged was directly put in issue.

2. Judgment ⇨253(1).

Where issue was properly joined on amount of damage for conversion, judgment properly followed measure of damages prescribed by code, notwithstanding erroneous prayer for relief (Code Civ. Proc. § 580).

3. Trover and conversion ⇨68.

Finding on cross-complaint for conversion that property was wrongfully converted and its reasonable value held to sufficiently show damages.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by F. O. DuPont against Wilbur J. Allen, wherein defendant filed a cross-complaint against plaintiff and wife. From a judgment for defendant on his cross-complaint, plaintiff appeals.

Affirmed.

Henry B. Lister and Simeon E. Sheffey, both of San Francisco, for appellant.

Bronson, Bronson & Slaven, of San Francisco (Gordon S. Keith, of San Francisco, of counsel), for respondent.

TYLER, P. J.

Action to recover the purchase price of personal property. The subject of the sale consisted of the equipment and good will of a certain garage. The property was sold under a conditional sales contract. The purchase price was \$5,500. Pursuant to the terms of the contract, defendant paid to plaintiff the sum of \$3,000 at the time of its execution, and agreed to pay the balance on or before a certain date with interest at the rate of 7 per cent. per annum. Defendant having failed to pay, plaintiff commenced an action for said unpaid balance with interest, and subsequently took possession of the property and converted the same to his own use. Defendant filed an amended answer and cross-complaint. In the second count thereof he alleged the value of the property converted by plaintiff to be \$5,500, and that by reason of the conversion he was damaged in the sum of \$3,368, the amount of principal and interest he had paid under the contract. The court found that, by reason of the commencement of the action against defendant for the full unpaid balance due under the contract, the title to the property thereby became vested in defendant and the subsequent taking of the same by plaintiff constituted a conversion. The court further found the value of the property at the time of conversion to be \$4,950. As conclusions of law, the court found as follows: That plaintiff was entitled to the balance of the purchase price due from defendant amounting to the sum of \$2,500, together with interest from the date of the execution of the contract amounting to \$350 and an attorney's fee of \$250 making a total of \$3,100; that defendant was entitled to recover from plaintiff the reasonable value of the property converted, which was fixed at \$4,950; that the sum of \$3,100 due from defendant to plaintiff should be offset against the sum of \$4,950 due from plaintiff to defendant; that defendant was therefore entitled to a judgment against plaintiff for the sum of \$1,850.

[1, 2] Plaintiff appeals from the judgment in favor of defendant on his cross-complaint, and he contends that by reason of the allegation of and prayer for damages in the sum of \$3,368 instead of \$5,500, the alleged value of the property, defendant's measure of damage on his cross-complaint thereby became limited to \$3,368, and that deducting therefrom the sum of \$3,100, which the court found to be due from defendant to plaintiff, the net relief due to defendant amounted to \$268 instead

of \$1,850, as found by the court. There is no merit in the contention. It is true that defendant erroneously concluded that his measure of damage was the amount he had paid under the contract, plus interest, instead of the reasonable value of the property at the time of the conversion. All of the allegations of defendant contained in his cross-complaint, however, were denied by plaintiff. The reasonable value of the property having been alleged to be \$5,500, its value was directly put in issue. This being so, the amount erroneously demanded in the prayer became immaterial, as the relief granted is consistent with the law and embraced within the issues. Code Civ. Proc. § 580. *Kimball v. Swenson*, 51 Cal. App. 361, 366, 196 P. 781. The relief embraced within the issue was the damage for plaintiff's conversion. Issue having been joined on this subject, the judgment properly followed the measure of damage prescribed by the Code for such cases. *Johnson v. Polhemus*, 99 Cal. 240, 33 P. 908.

[3] Plaintiff further complains of the lack of an express finding as to the amount of damage suffered by defendant. The court, as above recited, found that the property was wrongfully converted, and that its reasonable value at that time was \$4,950. This being so, it necessarily follows what damage accrued to defendant. *McCray v. Burr*, 125 Cal. 638, 53 P. 203.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

110 Cal. App. 506

ROSS et ux. v. BEEDELMAN et al.
Civ. 185.

District Court of Appeal, Fourth District,
California.

Dec. 17, 1930.

Rehearing Denied Jan. 12, 1931. Hearing Denied by Supreme Court Feb. 9, 1931.

1. Appeal and error ⇨1011(1).

Finding on conflicting evidence cannot be disturbed.

2. Homestead ⇨214.

Judgment debtors, claiming that deputy sheriff's entry on alleged homestead to pick cherry crop, to satisfy execution was unlawful, must prove existence of homestead (Civ. Code, § 1245 et seq.).

It was contended that, since property was covered by declaration of homestead,

it could not be reached for satisfaction of execution except by proceedings under Civ. Code, § 1245 et seq.

3. Pleading ⇨129(1).

Truth of allegation, met by defective denial, must be deemed admitted.

4. Homestead ⇨214.

In action for damages for deputy sheriff's entry on alleged homestead to pick cherry crop to satisfy execution, every fact essential to existence of homestead must be proved; mere recording of declaration of homestead being insufficient (Civ. Code, § 1245 et seq.).

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by J. Edgar Ross and wife against O. R. Beedelman and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

J. Edgar Ross, in pro. per.

Robert E. Nelson, of Riverside, for respondents.

CARY, P. J.

Plaintiffs brought this action against defendants to recover damages alleged to have been sustained by reason of the breaking of branches and fruitspurs on certain cherry trees on plaintiffs' property. The court found against the plaintiffs and gave judgment for defendants, from which plaintiffs prosecute this appeal, urging as their main ground "that the evidence does not support the decision."

[1] The evidence showed that one of the defendants was a deputy sheriff, and that the others were men engaged by the sheriff to pick a crop of cherries from the trees of the plaintiffs for the purpose of satisfying an execution against the plaintiffs. There was a substantial conflict in the evidence as to whether or not the picking had been done in such a manner as to injure the branches and fruitspurs of the trees. The trial court's finding in favor of the defendants on that issue, therefore, cannot be disturbed.

[2-4] Plaintiffs contend, however, that since the property was covered by a declaration of homestead, the only way it could have been reached for the satisfaction of an execution was by proceedings under Civil Code, § 1245 et seq., that, since such procedure was not followed, the entry upon plaintiffs' property was unlawful, and therefore plaintiffs should be entitled, in any event, to nominal damages. Before this contention could be sustained, it would be necessary for plaintiffs to prove the existence of the homestead. The plaintiffs merely alleged that some two years before the alleged injury one of the plaintiffs

had caused a declaration of homestead to be recorded. Due to a defective denial of this allegation, the truth thereof must be deemed admitted. No proof was given as to the essentials necessary to the creation of a homestead. The mere recording of a declaration of homestead is no sufficient proof of the existence of the homestead, but, in addition thereto, and as a foundation therefor, every fact essential to the existence of the homestead must be proved. *Apprate v. Faure*, 121 Cal. 466, 53 P. 917; *Machado v. Machado*, 36 Cal. App. 646, 648, 172 P. 1124; and *Williams v. Nieto*, 98 Cal. App. 615, 618, 277 P. 513. Plaintiffs, having failed to show the existence of a homestead, likewise failed to show the illegality of the sheriff's entry.

The judgment is affirmed.

We concur: MARKS, J.; BARNARD, J.

110 Cal. App. 569

SYLVESTER v. SELLERS et al.

Civ. 7716.

District Court of Appeal, First District,
Division 2, California.

Dec. 20, 1930.

Deeds  211(3).

Evidence that wife procured deeds from husband by fraud and misrepresentations warranted judgment quieting title in his favor against children as devisees (Civ. Code, § 164).

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by William Sylvester against Mabel Sellers, individually, and as executrix of the estate of Alice Sylvester, deceased, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Fogel & Beman, of Los Angeles, and John W. Loucks, of Pomona, for appellants.

Goudge, Robinson & Hughes and Ernest C. Carman, all of Los Angeles, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendants to recover a judgment quieting title to a house and lot in Los Angeles county. The defendants answered, and a trial was had before the trial court sitting without a jury. The trial court made findings in fa-

vor of the plaintiff, and from a judgment entered thereon the defendants have appealed and have brought up typewritten records.

The plaintiff and Alice Sylvester, now deceased, were husband and wife. The defendants are respectively their daughter and their son. On August 2, 1912, Mr. and Mrs. Sylvester purchased the house and lot from Ruth P. Williams. At the time the purchase was made, the plaintiff possessed a small amount of money, which was his separate property. They used that money in making the down payment. The husband was employed as a mechanic, and his wages were used to make the deferred payments. After the property was purchased, a small store was installed on the property, and during the daytime the store was attended by Mrs. Sylvester, and, when the husband was at home, he assisted in attending to the store. The profits of the store also went into the payments made on the house and lot. All payments had been made as early as the month of April, 1914. The wife had a fairly good education, but the husband had only a slight knowledge of French and less knowledge of English. The deed of August 2, 1912, from Ruth P. Williams was made directly to Alice Sylvester. On October 4, 1912, the husband executed a grant deed to his wife. On January 24, 1924, the husband executed a quitclaim deed to his wife. Some time before her death Mrs. Sylvester made a purported will in which she attempted to convey the entire title to their two children, these defendants. The defendants contend that the deeds made by the plaintiff and the will made by their mother vested the title wholly in them, and that the trial court erred in making findings in favor of the plaintiff. The plaintiff replies that the case presented nothing but questions of fact, that those questions of fact rested on conflicting evidence, and that the ruling of the trial court in his favor can not be disturbed on appeal.

When the action was called for trial, the plaintiff took up the burden of proof, and throughout the trial continued to bear the burden of proof. Thereafter the trial court made a finding with reference to each one of the deeds above mentioned. As to the deed from Ruth P. Williams, the court found: "That substantially all of the negotiations for and details of said purchase of the above-described real property in said city of Los Angeles were conducted and arranged by the plaintiff's said wife, Alice Sylvester; that at the time of said purchase of said property, said Alice Sylvester, stated and represented to the plaintiff, William Sylvester, that it would make no difference as to how the title was conveyed or whether the said above described property was received by plaintiff or her, and that in any event, under the laws of

California, whichever one of them outlived the other would receive the whole of the said property but that it would be for both of them while both lived." As to the deed dated October 4, 1912, the trial court found: "That in these circumstances and shortly prior to October 4th, 1912, said Alice Sylvester stated and represented to the plaintiff, William Sylvester, that it was necessary for him to sign and acknowledge a written document or paper which she had caused to be prepared for the purpose of authorizing her to sign bills or receipts for groceries delivered and to be delivered, from time to time, at and to said grocery store; that she directed plaintiff to the office of a notary where said paper or written document had been prepared and requested him to sign and acknowledge the same." In that same connection the trial court also found that the plaintiff believed the representation so made, acted thereon, could not and did not read the instrument, and that the same was not read to him, but that he executed it in reliance on the representation so made to him.

As to the deed executed January 23, 1924, the trial court found: "That at or about the time of said transaction last hereinabove described, and shortly prior to January 23rd, 1924, said Alice Sylvester stated and represented to the plaintiff that he and she, the said William Sylvester, and Alice Sylvester, might lose their home (meaning and referring to the hereinabove described property involved in this action) if any person should obtain judgment against them for the recovery of damages arising or resulting from the operation of an automobile which they had previously acquired and had been and then were driving and operating; that said Alice Sylvester then further stated and represented to the plaintiff that she had caused her said attorney to prepare a writing or document which, if signed and acknowledged by the plaintiff and said Alice Sylvester, would remove said danger of loss of their said home and make it impossible for said property to be taken by any person to satisfy any judgment or claim for damages arising from the operation of said automobile; that said Alice Sylvester then requested plaintiff to sign and acknowledge said written instrument for the purposes which she had so stated to him and she directed him to an office in said city of

Los Angeles where said written instrument was then held awaiting his signature there-to." In connection with the finding last quoted, the trial court also found that the plaintiff believed the representation, executed the deed, did not read it, nor was it read to him, nor did he know the meaning or contents thereof.

Without reciting the evidence, it is sufficient to state that each of said findings was fully supported by the evidence given by the plaintiff while a witness on the stand. Furthermore, he called other witnesses who testified that Mrs. Sylvester frequently referred to the property as our place, and that she never spoke of it as mine. The defendants call to our attention that on one occasion the plaintiff and his wife were discussing street improvements, and that plaintiff said: "Well, the property is yours; attend to it." The plaintiff took the stand and denied making any such statement. While dwelling on the statement just quoted, it is well to note that said statement is the only piece of evidence in the record which tends to contradict the story as told by the plaintiff. We think it is clear that there was evidence in the record which supported the findings made by the trial court. The defendants rely on the provisions of section 164 of the Civil Code and the presumption therein stated. It is sufficient to state that the direct testimony given by the plaintiff and his witnesses operated to dispel said presumption, if such evidence was believed by the trial court. The defendants also cite and rely on *Donze v. Donze*, 88 Cal. App. 769, 264 P. 294. We find nothing in that case that is opposed to anything which we have stated above. At page 774 of 88 Cal. App., 264 P. 294, 296, the court said: "There are, however, actually well-recognized exceptions to this rule, as, for instance, where an instrument has been procured through fraud, coercion, undue influence, or mistake." Of course, it is the contention of this plaintiff that he brought himself within the exception. As stated above, there was evidence supporting the findings of the trial court. Therefore we think his contention is clearly supported by the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

110 Cal. App. 483

**MERCHANTS' NAT. TRUST & SAVINGS
BANK OF LOS ANGELES v. SNELL.
Civ. 7702.**

District Court of Appeal, First District,
Division 2, California.

Dec. 17, 1930.

1. Mortgages ⇨356.

Foreclosure notices posted on house covering three lots was sufficient posting "in some conspicuous place on property to be sold," within statute, though notice was not posted on each lot (Code Civ. Proc. § 692).

[Ed. Note.—For other definitions of "Conspicuous Places," see Words and Phrases.]

2. Mortgages ⇨356.

Record did not sustain claim that foreclosure notices were not posted in three public places nor posted twenty days before sale nor kept posted for twenty days (Code Civ. Proc. § 1963, subsec. 32).

The affidavits admitted in evidence showed posting in three public places for the time required by law. The further claim that it was not shown that the notices were kept posted for the time required was answered by the presumption of the continued existence of the posting, in absence of evidence to the contrary, under Code Civ. Proc. § 1963, subsec. 32.

3. Appeal and error ⇨1032(1).

Appellant must show prejudicial error to justify reversal.

4. Appeal and error ⇨1031(4).

When defendant fails to disclose facts constituting alleged defense, reviewing court may not assume that rulings rejecting certain fragmentary bits of evidence were prejudicial.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Merchants' National Trust & Savings Bank of Los Angeles against Frank S. Snell. Judgment for plaintiff and defendant appeals.

Affirmed.

E. Neal Ames, of Los Angeles, for appellant.

Rohe & Freston and Ralph E. Lewis, all of Los Angeles, for respondent.

SPENCE, J.

This appeal is taken from a judgment in favor of respondent bank and against appellant in an action for ejectment.

In its complaint respondent alleged that it was the owner and entitled to the possession of certain real property described as lot 50 and portions of lots 22 and 23, and that possession of said property was wrongfully withheld by appellant. The answer denied the material allegations of the complaint. Upon the trial it appeared that respondent claimed title through foreclosure of a deed of trust executed by appellant. On this appeal appellant contends, first, that respondent did not prove a good and sufficient title to the property; and, second, that the court erred in refusing to allow appellant to introduce defenses to respondent's claim of title which were properly admissible under the general denial.

[1, 2] Appellant's first contention is based upon various alleged deficiencies in the proof of the notices given of the foreclosure sale. It is claimed that it did not appear that the notices were posted on each lot nor that notices were posted in three public places nor that the notices were posted twenty days prior to the sale nor that the notices were kept posted for said period of twenty days.

We believe that appellant's claims relating to the notices of sale are without merit. Witnesses testified regarding the notices and certain affidavits relating thereto were offered and admitted in evidence without objection. It appears that the lots described in the deed of trust were contiguous and that the house located upon the property covered all three of the lots involved. Three notices were posted upon the house. Although the witness who posted the three notices upon the house stated upon direct examination that he posted one of said notices on each lot as described in the notice, his testimony shows that at the time of trial he was not certain that a notice was posted on each of the lots described. However, we deem this immaterial. As lot 50 and the portions of lots 22 and 23 described in the deed of trust and in the notices constituted one contiguous piece or unit of land upon which was located a house covering all three lots, we are of the opinion that it was not necessary to post three notices, one on each lot or portion of a lot as described in the deed of trust. The posting of notice upon the house was sufficient posting "in some conspicuous place on the property to be sold" under section 692 of the Code of Civil Procedure. The second and third claims of appellant relating to the notices are not borne out by an examination of the record. The affidavits admitted in evidence showed posting in three public places for the time required by law. The further claim of appellant that it was not shown that the notices were kept posted for the time required is answered by the presumption of the continued existence of the posting in absence of evidence to the contrary. Code Civ. Proc., § 1963, subsec. 32.

[3, 4] Appellant's second main contention relates to rulings of the court sustaining objections to certain questions propounded to appellant while a witness. The burden is upon appellant not only to show error in these rulings, but also to show that the error is sufficiently prejudicial to justify a reversal *Coleman v. Farwell*, 206 Cal. 740, 276 P. 335. This appellant has failed to do. Under the denials of his answer appellant sought to introduce certain evidence relating to alleged invalidity of the original note and deed of trust. Over objection, appellant while a witness was permitted to make a rambling and incomprehensible statement regarding the circumstances surrounding the execution of these instruments. There was considerable discussion between court and counsel regarding some of the questions subsequently propounded to appellant, but nowhere in the testimony nor discussion do we find anything to show that appellant had any valid defense to the action. When a defendant fails to disclose the facts constituting his alleged defense in his pleadings or in some definite offer of proof or otherwise, we may not assume that the rulings rejecting certain fragmentary bits of evidence were prejudicial.

The judgment is affirmed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

Public Works Act, § 1 (St. 1919, p. 487) provides for furnishing bond to secure payment of claims of persons employed by contractors on public works.

Appeal from Superior Court, Los Angeles County; **Ruben S. Schmidt**, Judge.

Action by **William J. Summerbell** against **J. H. Weller**, **A. L. Lindholm**, and **United States Fidelity & Guaranty Company**. Judgment for defendants, and plaintiff appeals.

Judgment in favor of defendants **Weller** and **Lindholm** reversed, and judgment in favor of **United States Fidelity & Guaranty Company** affirmed.

Ernest B. Coil, of Los Angeles, for appellant.

McClure, Griffin & Yokum, of Los Angeles, for respondent.

CONREY, P. J.

Judgment was entered in favor of the defendants, pursuant to an order sustaining demurrers to second amended complaint without leave to amend complaint.

The undertaking (Exhibit A of the second amended complaint) is the statutory bond required by section 1 of the Public Works Act (St. 1919, p. 487), enacted to secure the payment of claims of persons employed by contractors upon public works, etc. *Continental National Bank of Los Angeles v. Republic Casualty Co.*, 202 Cal. 586, 262 P. 300; *Stone v. Shackelford*, 64 Cal. App. 750, 222 P. 846.

[1] It is contended by respondent **United States Fidelity & Guaranty Company** that the record shows that the action was commenced after expiration of the ninety-day period in which such action may be filed, as provided and limited by section 2 of said Public Works Act of 1919, and that for this reason there was no cause of action on the bond. On the other hand, appellant contends that, since he filed his verified statement of claim within the time and within the manner provided by the statute, he was not limited to ninety days after the expiration of the period allowed for filing statement of claim, but might bring his action on the undertaking within a reasonable time thereafter. In this case the action in fact was not commenced until about eighteen months after filing the plaintiff's verified statement of claim with the trustees of the school district for which the building was erected. We are of the opinion the contention made in behalf of the surety should be sustained. In a recent decision the Supreme Court has held that the language "within ninety days following the expiration of the period" (for filing claims), as set forth in said Public Works Act, means "not beyond

110 Cal. App. 406

SUMMERBELL v. WELLER et al.

Civ. 5759.

District Court of Appeal, Second District,
Division 1, California.

Dec. 15, 1930.

1. Schools and school districts ☞81(2).

Action on public school contractor's bond must be commenced before expiration of 90 days for filing claims (St. 1919, p. 487, § 2).

Public Works Act, § 2 (St. 1919, p. 487), requires filing of verified statement of claim against contractor on public works bond, and provides that, at any time within ninety days following expiration of period for filing claim, claimant may commence action against surety on bond.

2. Schools and school districts ☞81(2).

Bond for faithful performance of school construction contract gives no right of action on claims of persons employed by contractor, in view of requirement for statutory bond (St. 1919, p. 487, § 1).

the nineteenth day after such period." *Williamson v. Egan* (Cal. Sup.) 287 P. 503, 505.

[2] In the foregoing statement of the case we have ignored the fact that the complaint counts upon a second undertaking in the form of a bond to owner in a sum equal to 25 per cent. of the contract price, and conditioned for faithful performance of the contract. In view of the requirement and existence of the separate statutory bond hereinbefore described, we think that the plaintiff has no right of action on the "faithful performance" bond to owner. *Maryland Casualty Co. v. Shafer*, 57 Cal. App. 580, 208 P. 192.

The demurrers of defendants Weller and Lindholm should have been overruled. A cause of action was stated against them, for breach of their contract to pay for the materials furnished to them by the plaintiff.

The judgment in favor of defendant United States Fidelity & Guaranty Company is affirmed. The judgment in favor of defendants Weller and Lindholm is reversed.

We concur: HOUSER, J.; YORK, J.

110 Cal. App. 610

KAWAMOTO v. SAWANO et al.

Civ. 7708.

District Court of Appeal, First District,
Division 2, California.

Dec. 23, 1930.

1. Bills and notes §527(2).

Evidence sustained finding note executed by corporation and individual jointly was not paid by acceptance of other notes executed by corporation alone.

2. Appeal and error §880(1).

Granting plaintiff's motion to restore one joint maker of note as defendant over comaker's objection held not reviewable (Code Civ. Proc. § 389).

The joint maker as to which plaintiff voluntarily dismissed action was a necessary party, and court was authorized to bring it in as defendant under Code Civ. Proc. § 389, and, there being no objection by said maker as to time or manner in which it was restored as defendant, court's order restoring it as defendant was not reviewable on appeal, notwithstanding comaker's objection to such restoration.

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by H. C. Kawamoto against J. Sawano and another. Judgment for plaintiff, and named defendant appeals.

Affirmed.

J. Marion Wright, of Los Angeles, for appellant.

Le Roy Reames and James R. Jaffray, both of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued on a promissory note. He had judgment against both defendants, and Sawano alone appeals on typewritten transcripts.

The due execution of the note is admitted, Sawano and the corporation being joint makers. The consideration was money admitted to have been given the corporation and used in the business of the corporation in which Sawano was a heavy stockholder. The defense to the action was that the note had been paid by the acceptance of two other notes executed by the corporation alone.

[1] The trial court found against defendants on this special defense, and on this appeal the appellant insists that this finding is not supported by the evidence. The appellant offered testimony of a number of witnesses tending to show that in January, 1926, the plaintiff delivered the note in suit to the corporation and took in lieu thereof two other notes executed by the corporation alone. In rebuttal the plaintiff offered as a witness one of the members of a "committee" which conducted the transactions at that time on behalf of defendants. From his testimony it appears that the corporation was financially embarrassed, and that, in order to obtain accommodations from the bank, it was necessary to make it appear that the note in suit was not outstanding; that, for this purpose, the committee persuaded plaintiff to deliver the note to this witness temporarily and to accept two other notes of the corporation made payable at a future date. The note in suit was delivered to the witness with the express understanding that it should be returned to plaintiff, and that appellant's obligation should not be released. The witness then testified that he took the note from plaintiff under these conditions and later returned it to him. The note was received in evidence and bore no mark of cancellation or payment. From its judgment we must assume that the trial court rejected the conflicting testimony as unreasonable or improbable.

[2] During the course of the trial the plaintiff voluntarily dismissed the action as to the corporation, and then discovered that, as the note in suit was joint, it was necessary to have the corporation as a party defendant. Its motion to restore the corporation as a de-

fendant was granted over the objection of Sawano, but without objection from the corporation. As the corporation was a necessary party, the court was authorized to order it brought in. Section 389, Code Civ. Proc. As there is no objection by the corporation as to the time or the manner in which this was done, the order is not reviewable on this appeal.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

110 Cal. App. 670

**FLETCHER v. ORIGINAL PIT BARBECUE
et al.***

Civ. 5651.

District Court of Appeal, Second District,
Division 2, California.

Dec. 26, 1930.

1. Evidence ⇨441(11).

Statement on back of note that interest in business should revert to payee on makers' default *held* not mere contemporaneous parol agreement.

The heading of the note was "Installment note (including interest) Secured by Agreement."

2. Sales ⇨354(4).

Answer alleging agreement that interest in business should revert to payee of note on defendants' default did not plead conditional sale thereof.

Plaintiff asserted on appeal that defendants pleaded conditional sale of business to themselves, and hence could not rely on finding that provision on back of note sued on that payee's interest in business should revert to him on their failure to make payments provided for therein was part of entire written agreement.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Fletcher, a corporation, against the Original Pit Barbecue and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Superseding opinion, 293 P. 874.

George P. Cook, of Los Angeles, for appellant.

IRA F. THOMPSON, J.

This is an appeal from a judgment of the superior court affirming a judgment of the

municipal court in favor of the defendants in an action upon a promissory note. The findings of the municipal court recite that the sole consideration for the execution of the note was the purchase by defendants from the payee of the note of his interest in a business known as the Original Pit Barbecue, and that the execution and delivery thereof was upon the express understanding and agreement that, in the event the defendants were unable to keep up the payments provided for in the note, the seller and payee would retake his interest, and the liability of defendants should cease; that defendants were unable to meet the terms of the note, and requested the seller to retake his interest, which he refused to do; that the assignment and transfer of the note by the payee to the plaintiff was solely for the purpose of collection and without valuable consideration therefor. The court further found that the instrument sued upon was not a promissory note for the sum of \$1,085, but a written instrument which incorporated an understanding and agreement expressed in writing on the reverse side of the note in these words: "In the event of failure to meet terms of note, said one-fourth interest shall revert to Ralph D. Maxwell" (the payee).

We are not furnished the evidence taken at the trial, nor was the superior court. We do find incorporated in the statement of the case the following: "It further appears from the evidence that the sole consideration for the so-called note was the purchase by defendants, from R. D. Maxwell, of a one-fourth interest in the equipment and business above referred to; that said note was executed and delivered by defendants under an express agreement with Maxwell that in the event the defendants were unable to make sufficient profits from said business to keep up payments provided for therein that Maxwell would retake his interest in the equipment and business and that thereupon the defendants' liability to Maxwell would terminate; that defendants were unable from the profits of the business, or otherwise, to make said payments and offered to give back to Maxwell his one-fourth interest in the business, which he refused to accept." It is obvious from this recital that, so far as the record before us discloses, the evidence fully sustained the finding of the court to similar effect.

[1] It is insisted, however, by appellant, that the writing indorsed on the back of the note was merely a contemporaneous parol agreement which should not be allowed to vary the terms of the note itself. It is to be observed, however, that the heading of the note was "Installment note (including interest) Secured by Agreement," which statement "secured by agreement" could only have reference to the writing on the reverse side. The

finding of the court is in effect that it was part and parcel of the entire written agreement, and the evidence as stated in the record is sufficient for that purpose.

[2] It is also asserted by appellant that the defendants pleaded a conditional sale of the business to themselves, and that, having placed that interpretation upon the contract, are now foreclosed of their right to rely upon the finding which we have heretofore referred to. A complete answer to this argument is the answer of the defendants therein, which says: "And that upon failure of said defendants to make the payments in said instrument provided that the one-fourth interest of said Maxwell should revert to him, and the liability and obligation of these defendants thereupon terminate."

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

tax illegal, no protest is necessary to warrant recovery of such payment.

5. Taxation $\Rightarrow$ 542.

Taxpayer need not protest payment of taxes where protest would be useless, and especially not when officer has notice of illegality of tax.

Appeal from Superior Court, City and County of San Francisco; Raglan Tuttle, Judge.

Action by W. R. Whyte against the State and others. From portion of judgment denying recovery in part, plaintiff appeals.

Portion of the judgment appealed from reversed.

Willard P. Smith, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondents.

PER CURIAM.

Action to recover corporation taxes paid to the state under the Corporation License Tax Act (St. 1915, p. 422), as amended.

Plaintiff is the assignee of certain foreign corporations who paid license taxes for the years 1926 and 1927 under the act. The statute was declared to be unconstitutional in the case of Perkins Mfg. Co. v. Jordan, 200 Cal. 668, 254 P. 551, and taxes paid thereunder were held in Welsbach Co. v. State, 206 Cal. 556, 275 P. 436, to be recoverable.

In the present action a judgment was entered by the trial court allowing a recovery of all of the franchise taxes paid under protest and denying recovery of all paid without protest. Plaintiff appeals from that portion of the judgment denying recovery of the taxes paid without protest.

The sole question here presented is whether or not taxes collected under the unconstitutional act can be recovered back where no written protest was filed at the time of payment. Appellant's position is that the terms of the corporation license tax are so harsh and penalties provided for so severe and drastic that payment thereunder amounts to duress and such taxes are recoverable even though no written protest against the payment was ever filed.

[1-4] The coercive provisions of the act, in the event of nonpayment of the tax, provide for the fine and imprisonment of any person who attempts to transact business of the corporation, and all contracts of the corporation are declared to be void and unenforceable, and it is deprived of the right to invoke the benefit of the laws limiting the time for the commencement of civil actions. Gen. Laws, 1923, Ed. p. 554 et seq. It is obvious that payment under such circumstances cannot be

110 Cal. App. 314

WHYTE v. STATE et al. Civ. 7392.

District Court of Appeal, First District,
Division 1, California.

Dec. 9, 1930.

Rehearing Denied Jan. 8, 1931. Hearing Denied by Supreme Court Feb. 5, 1931.

1. Taxation $\Rightarrow$ 541.

Payment of taxes is not voluntary when made under coercion and duress.

2. Taxation $\Rightarrow$ 542.

When payment of taxes is made under duress, protest is not necessary, in absence of special statute to contrary.

3. Taxation $\Rightarrow$ 542.

Payment of corporation franchise taxes held not voluntary, in view of penalties imposed on failure to pay, and therefore protest at time of payment was not necessary (Gen. Laws 1923, Act 1743, § 11).

Gen. Laws 1923, Act 1743, § 11, provided, in event of nonpayment of corporation franchise taxes, for fine and imprisonment of any person attempting to transact business of corporation, and declared all contracts of corporation void and unenforceable, and deprived it of right to invoke benefit of laws limiting time for commencement of civil actions.

4. Taxation $\Rightarrow$ 542.

Where taxing officer illegally exacts payment of taxes with notice of facts rendering

considered voluntary. Payment is never voluntary when made under coercion and duress. Under the penalties provided for by the self-executing provisions of the act, a corporation is either compelled to comply with same or go out of business. Payment is therefore compulsory and not voluntary, and, when payment is made under compulsion, no protest is necessary, in the absence of a special statute to the contrary, and here there is nothing in the permissive statute relating to the subject, the statute being silent upon the question. 26 R. C. L. p. 459; 3 Cooley on Taxation (4th Ed.) § 1297; Pacific Coast Co. v. Wells, 134 Cal. 471, 66 P. 657; Grimes v. Merced County, 96 Cal. App. 76, 273 P. 839. It has been repeatedly held in this state that, where an action is brought to recover taxes illegally collected under an act which did not provide for protest, that protest is not necessary. Otis v. City and County of San Francisco, 170 Cal. 98, 148 P. 933; Brenner v. Los Angeles, 160 Cal. 72, 116 P. 397; 20 Cal. Jur. p. 968. Then, again, where an officer illegally demands money of a person, and exacts the payment thereof by coercion, when at the time he has notice of the facts which render the demand illegal, the party who pays him need not make the payment under protest in order to be able to recover it back. Meek v. McClure, 49 Cal. 623; Grimes v. Merced County, 96 Cal. App. 76, 273 P. 839; 20 Cal. Jur. p. 968.

[5] Here it appears from the record that the secretary of state, at the time the taxes were paid, had notice that the tax was being protested by other corporations. The law does not require a man to protest where a protest would be useless, and this is particularly so when the officer has notice of the illegality of the tax. Woodward on Quasi Contracts, § 244; Meek v. McClure, supra.

Further discussion of the subject would answer no useful purpose. The portion of the judgment appealed from is reversed.

110 Cal. App. 672

PEOPLE v. RISHELL et al.
Cr. 2016.

District Court of Appeal, Second District,
Division 2, California.

Dec. 26, 1930.

Rehearing Denied Jan. 9, 1931. Hearing Denied by Supreme Court Jan. 22, 1931.

1. Larceny ⇨26.

It was not essential to grand theft prosecution not involving embezzlement to establish demand for return of money misappropriated by building and loan association's president.

president by building and loan association's president.

2. Larceny ⇨63.

Evidence sustained conviction of president of building and loan association for grand theft by fraudulent misappropriation of association's funds.

3. Larceny ⇨18.

On issue of guilt of grand theft, possession by building and loan association's president of association's money held not consistent with idea possession was corporation's.

Accused president of building and loan association gave agent who handled sale of association's realty a check for \$15,000 ostensibly as commission, and had agent return to him a check for \$10,700, being the difference between the \$15,000 check and amount actually due agent for agreed commission, and accused then deposited the \$10,700 in his own account and not in funds of association.

4. Criminal law ⇨1169(6), 1172(8).

Any errors in excluding evidence and in instructions relating to count on which accused was acquitted were nonprejudicial.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

John D. Rishell was convicted of grand theft, and he appeals.

Affirmed.

Buel R. Wood, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman and Warner I. Praul, Deputy Attys. Gen., for the People.

IRA F. THOMPSON, J.

John D. Rishell, together with his wife, Mabel L. Rishell, was charged in an information with grand theft. The first court was directed against both defendants charging them with the fraudulent appropriation of \$10,000. The jury acquitted the defendant Mabel L. Rishell, but disagreed as to the defendant John D. Rishell under this count; they returned a verdict of guilty as to the second count which charged that the defendant John D. Rishell alone did unlawfully take \$700 in money of the property of the Bay Cities Guaranty Building & Loan Association. It is from the judgment pronounced upon this verdict that the appeal is prosecuted.

The first contention of the appellant is that the evidence is insufficient to support the verdict. The appellant organized the building and loan association, and was its president in 1928. Mrs. Rishell was a director and

secretary of the company. In November, 1928, the loan association sold a piece of property to the Bank of Italy for the sum of \$310,000. Edward B. Conliss was the real estate agent who handled the negotiations. He had an oral understanding with Mrs. Rishell and a Mr. Stintin, representing the Bank of Italy, that his commission to be paid by the loan association would be \$5,000. During the pendency of the escrow the purchasing bank insisted that the taxes be paid by the seller. As a matter of compromise it was finally agreed that Mr. Conliss would pay one-half thereof (which was subsequently fixed at \$700) and Mr. Stintin, presumably for the bank, would take care of the other half. Before the escrow was closed, however, the loan association paid approximately \$2,800 taxes on the property. After the sale was consummated and on December 7, 1928, the witness Conliss testified that he went to the appellant for the purpose of collecting his commission; that they discussed the deal; that appellant asked him how much he had coming, to which he replied \$5,000, whereupon appellant said, "Well, how about those taxes"; that he thereupon told appellant he could deduct the taxes if he wanted to, whereupon appellant checked the records and compromised, as heretofore suggested, on the sum of \$700; that appellant then suggested he would give Conliss (the witness) a check for \$15,000, and that the latter would give him back a check for \$10,700, which arrangement was carried out. The appellant deposited the check in his own account and not in the funds of the loan association. A little more than a year later, to wit, on January 28, 1930, appellant wrote a letter to the loan association inclosing his check for \$1,400 and interest amounting to \$111.06, saying that it was to reimburse the association for the last half of the taxes of the year 1928-29, and that the withholding thereof was unconscious on his part. It should also be added that the assistant secretary of the loan association testified that appellant directed her to make an entry in the books charging the sum of \$15,000 to the cost of real estate and building. It does not appear whether appellant was still connected with the company at the time he wrote the letter. A resolution was adopted by the board of directors on November 20, 1928, authorizing the sale of the property to the Bank of Italy for \$295,000 net to the association. As to the item of \$700 it is asserted by appellant that the proof is not sufficient for the following reasons:

"1. It cannot be ascertained from the evidence whether any demand was ever made by the officers of the association on the defendant for the alleged \$700.00;

"2. That the evidence fails to disclose any misappropriation of the alleged sum;

"3. That the evidence fails to disclose any fact tending to show that the possession of said money by the appellant was not the possession of the corporation, appellant being the president of the association;

"4. That said evidence fails to show any intent to divert the said sum to the use of the appellant."

[1-3] We have set out the language used by appellant to specify the claimed insufficiency, but it is obvious that the assignments should not be treated separately, because they are all aiming at the same underlying contention, to wit: That the evidence fails to show a fraudulent appropriation of the funds of the association. It is not essential to a prosecution for grand theft of the kind here involved, as it was not for embezzlement, to establish a demand for its return. The requirement is that the evidence disclose a fraudulent appropriation of the money involved. *People v. Ward*, 134 Cal. 301, 66 P. 372; *People v. Hatch*, 163 Cal. 368, 125 P. 907; *People v. Blair*, 19 Cal. App. 688, 127 P. 657. We need to point out in this case that the appellant went to the extent of drawing funds from the association for the purpose of passing it through the hands of Conliss and back into his own. It is difficult to believe that this was done for an innocent and proper purpose, in view of the facts that he was well advised that the agent Conliss only claimed and was only to be paid the sum of \$4,300 and the further fact that the difference was shortly deposited in appellant's own bank account instead of being restored to the funds whence it came. At least the jury were entitled to put that construction upon the circumstances. Nor do we think that the facts are consistent with the thought that appellant's possession was that of the corporation. *People v. Royce*, 106 Cal. 173, 37 P. 630, 39 P. 524, is of no assistance to the appellant, for the reason that the testimony in that case evidenced a disclosure by the defendant of his actions, which were manifestly consistent with a proper purpose on his part.

[4] It is next contended that the trial court erred in excluding certain stenographic notes from the evidence. Sufficient it is for a disposal of the point to say that they could only bear upon count I, which is not before us upon this appeal. In the same category is appellant's complaint that the court erred in giving an instruction relating to the invalidity of a broker's agreement for compensation when not in writing and its refusal to give an instruction concerning the ownership of the \$10,000.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 561

In re IVEY'S ESTATE.

BROWN et al. v. NELSON et al.

Civ. 7556.

District Court of Appeal, Second District,
Division 2, California.

Dec. 19, 1930.

1. Appeal and error ⇨1001(1).

Verdict of jury must be sustained on appeal, if there is any substantial evidence in support thereof.

2. Wills ⇨384.

In will contest, trial judge's statement during examination of subscribing witness regarding admissibility of opinion on testatrix's mental capacity, though improper, held not prejudicial, in view of instructions.

Instruction in substance told jury to disregard whatever court might say upon questions of law raised during trial. General instructions informed jury that law presumed that subscribing witnesses noted mental capacity of testatrix, and that therefore their opinions were entitled to more consideration.

3. Evidence ⇨63.

Presumption exists that person is sane.

4. Wills ⇨55(1).

Burden is upon contestants of will to show affirmatively and by preponderance of evidence that testatrix was of unsound mind at time she executed will.

5. Wills ⇨292.

In will contest, excluding certificate of proof of will and facts found in matter of decedent's estate offered by proponents held not error.

6. Appeal and error ⇨110, 870(6).

Order denying motion for new trial is not appealable, but ruling on motion is reviewable on appeal from judgment.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

In the matter of the estate of Anna M. Ivey, deceased. Proceeding by Pearl L. Brown and another against Maude L. Nelson and others, to contest the probate of the alleged will of decedent. From a judgment declaring alleged will void, and from an order denying proponents' motion for a new trial, proponents appeal.

Judgment affirmed, and appeal from the order dismissed.

R. D. McLaughlin and J. B. McLaughlin, both of Los Angeles, for appellants.

Duke Stone, of Los Angeles, for respondents.

IRA F. THOMPSON, J.

This is an appeal from a judgment in a will contest declaring the purported last will and testament of Anna M. Ivey, deceased, to be void. The contest was based upon the grounds of undue influence and the unsound mind of the testatrix. The jury found that Anna M. Ivey was not mentally competent to execute a will on October 10, 1925, and also that the execution thereof on that date was obtained through the undue influence of one or more of the following: Maude A. Nelson, her husband, Elan A. Nelson, and Birdinia J. Wilson.

[1] The principal contention relied upon for a reversal of the judgment is that the evidence is insufficient to support the findings of the jury. Heretofore an appeal was taken by contestants from a judgment of nonsuit. In the decision of that case, Estate of Ivey, 94 Cal. App. 576, 271 P. 559, the court reviewed the testimony adduced and concluded that there was substantial evidence of the unsoundness of mind of the testatrix. The evidence produced in the second trial by the contestants and apparently from the same witnesses differs in a few respects from that set forth in the opinion. But the variances are insubstantial and immaterial. No useful purpose can be served by again setting forth the testimony which supports the finding of the jury that the testatrix was of unsound mind. And regardless of how we might view the evidence as a whole, if we were charged with the duty of finding facts, our duty is to sustain the verdict of the jury if there is any substantial evidence to support it. Nor is it essential for us to set forth the testimony relating to undue influence. The result would be the same, though the evidence as to the latter finding should be otherwise insufficient.

[2] It is also urged that the court commented on the evidence or rather the credibility of one of the witnesses before the jury. What happened is as follows: One of the subscribing witnesses was called to the stand and testified as to what was said and done at the time the will was executed. She was then asked whether Mrs. Ivey in her opinion "appeared to be a woman of sound mind." An objection was lodged by counsel for contestants on the ground that she was not qualified to express an opinion. The judge's attention was called to the fact that she was an attesting witness, whereupon the following statements were made:

"The Court: A different rule, of course, prevails there.

"Contestants' counsel: Not as to soundness of mind, if your Honor please.

"Proponents' counsel: Even as to soundness of mind.

"The Court: Well, I think there should be some foundation laid for it. There is still some foundation lacking.

"Contestants' counsel: May I have the code?

"The Court: She can state what she saw as to her physical condition, etc. The foundation should be laid.

"Contestants' counsel: This is merely for the signature.

"The Court: The mere fact that a person walked into a house and sees one for a few minutes, even an attesting witness has to be qualified on that.

"Proponents' counsel: I was looking for the code.

"The Court: I know what you refer to.

"Proponents' counsel: An attesting witness doesn't have to be qualified, but one who is not an intimate acquaintance.

"The Court: It is a matter of common sense. A person can't walk into a house and see a person for five or ten minutes—I am speaking generally—and witness their signature and be qualified to testify they are of sound mind.

"Proponents' counsel: Well, there is some argument about it. I know there should be some foundation laid.

"The Court: If she is to testify to that, she should be qualified. You can examine the code if you want to."

(Mr. McLaughlin examines a book.)

"The Court: Take a recess at this time. It is eleven o'clock."

(After recess.)

"Proponents' counsel: Mrs. Vohs, I believe, was on the stand. Now, if the court please—

"The Court (interposing): Now, just a moment. I will say to the jury at this time that whenever the court is ruling upon questions which are questions of law raised during the trial of the case, anything that the court may say upon the matter is not to be regarded by you as any evidence or any indication of how the court feels about it, so that any remarks I may have made or may make about this matter the jury will disregard. You need not go into the matter at all. The witness may answer the question. It is a matter for cross-examination."

We are satisfied that no damage was done to the cause of the proponents by the remarks of the judge. He did comment erroneously, but he immediately instructed the jury to disregard his remarks and permitted the witness to answer the question. And in his general instructions to the jury he informed them that the law presumes that the

subscribing witnesses had their attention directed to, and noted, the mental capacity of the testatrix, and that for that reason their opinions are entitled to more consideration than would be given to one who was merely passive.

[3-5] Appellants assert that the court committed error when it refused to admit in evidence the certificate of proof of will and facts found in the matter of the estate of Anna M. Ivey. It is their contention that, this being a contest after probate, they were entitled to have the document presented for the purpose of establishing the presumption that the deceased was of sound mind. We see no merit in the contention. "The presumption is always that a person is sane, and the burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the testatrix was of unsound mind at the time of the execution of the will." Estate of Perkins, 195 Cal. 699, 235 P. 45, 46. The court instructed the jury to this effect.

[6] The notice of appeal recites that an appeal is taken from an order denying proponents' motion for a new trial. Such an order is not appealable. The ruling on that motion is reviewable on the appeal from the judgment.

No other points require discussion.

Judgment affirmed. Appeal from order dismissed.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 385

ASSOCIATED OIL CO. v. MULLIN et al.

Civ. 7573.

District Court of Appeal, First District,
Division 1, California.

Dec. 13, 1930.

1. Judgment $\Rightarrow$ 472.

Generally, judgment rendered by court having jurisdiction of parties and subject-matter is not open to collateral attack.

2. Judgment $\Rightarrow$ 486(1).

Void judgment may be collaterally attacked either by parties or by strangers.

3. Judgment $\Rightarrow$ 485.

Collateral attack of void judgment by parties and privies is ordinarily limited to cases where judgment is void on its face.

4. Judgment **↪511.**

Stranger to judgment whose rights would be prejudiced by its enforcement may collaterally attack judgment for fraud or collusion.

5. Judgment **↪497(1).**

Neither parties, their privies, nor strangers can attack judgment of domestic court of record on jurisdictional grounds unless want of jurisdiction appears on face of record (Code Civ. Proc. § 1916).

6. Judgment **↪501.**

Neither parties, their privies, nor strangers can attack judgment of domestic court of record in collateral proceeding on account of mere errors or irregularities.

7. Judgment **↪497(2).**

Recital in judgment that defendants appeared by demurrer is conclusive, in absence of anything in record contradicting recital.

8. Attorney and client **↪70.**

Attorney appearing and entering demurrer for defendant must be presumed to have authority.

9. Pleading **↪198.**

Defendants' joint demurrer *held* properly overruled, where complaint stated cause of action, notwithstanding uncertainty as to who purchased goods for which action was brought.

10. Pleading **↪38½.**

It is essential to jurisdiction that there be some proper application invoking judicial power of court in respect to matters sought to be litigated.

11. Judgment **↪18(2).**

Where complaint shows subject-matter and demand for relief within court's jurisdiction, that complaint fails to state cause of action does not render judgment void and subject to collateral attack.

12. Judgment **↪503.**

Judgment rendered against person voluntarily appearing in action as defendant is not collaterally assailable, although his name was not inserted in complaint.

13. Judgment **↪129.**

Default judgment reciting that copartner appeared by demurrer *held* not void on its face as against copartnership (Code Civ. Proc. § 388).

14. Judgment **↪570(7, 8).**

Nonsuit for plaintiff's failure to prove defendant was member of copartnership constituted "final judgment" for such defendant.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

15. Partnership **↪206.**

Defendant ceased to be party to suit after dismissal as to him for plaintiff's failure to prove defendant was member of copartnership.

16. Execution **↪161.**

Court has power to quash execution, where it is inadvertently issued, or where writ is void, or where judgment on which execution is based is void on its face.

17. Execution **↪161.**

Court cannot quash execution merely on ground that judgment is irregular or erroneous.

18. Execution **↪163.**

None but parties to action who are liable to be injured can move for recall of writ of execution, unless judgment or writ is void on its face.

19. Execution **↪161.**

Court has no power to vacate execution for omission or act of sheriff after writ has duly come into his hands.

20. Execution **↪161.**

Levy on property exempt from execution is not reason for recalling writ of execution.

21. Execution **↪161.**

That sheriff, directed to satisfy judgment from judgment debtors' property, levied on property of defendant obtaining nonsuit did not justify court in quashing execution.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the Associated Oil Company against Frank D. Mullin and F. W. Hyland, individually and as copartners doing business under the firm name and style of Hyland & Mullin Drayage Company, and others. Frank D. Mullin obtained a judgment of nonsuit. From an order quashing execution issued on judgment for plaintiff, the plaintiff appeals. Reversed.

William E. Gearhart, Bernard B. Stimmel, and Ralph C. Hesthal, all of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondents.

PER CURIAM.

An appeal by the plaintiff from an order quashing an execution.

On September 15, 1925, the above-entitled action was commenced in the superior court in and for the city and county of San Francisco to recover for goods, wares, and merchandise alleged to have been sold for an agreed price. The complaint was in two counts, and a demurrer thereto, alleging as to each count that the same failed to state facts sufficient to constitute a cause of action, was filed by an attorney on behalf of the defendants. The demurrer was overruled and time allowed to answer. On July 9, 1927, and answer was filed by defendant Mullin, denying the allegations of the complaint and particularly that the defendants at any of the times mentioned therein were doing business under the name and style alleged. On September 29, 1927, a default judgment was entered against defendant Hyland and Hyland & Mullin Drayage Company, reciting that these defendants had failed to answer the complaint within the time stipulated between the counsel for the respective parties. On July 9, 1928, a judgment was entered against defendant Mullin, reciting that he had failed to appear at the trial of the action. Subsequently, on motion, this judgment was set aside, and the action as between plaintiff and Mullin was tried, resulting in a judgment of nonsuit being entered in favor of the latter. This judgment, as well as that entered against the other defendants, has become final.

On May 20, 1930, execution was issued on the judgment last mentioned, reciting that a judgment against defendants F. W. Hyland and Hyland & Mullin Drayage Company had been entered and directing the sheriff to satisfy the same out of the property of the judgment debtors. The sheriff levied upon certain real property, the notice filed reciting that he had levied on "all the right, title and interest and equity therein belonging to Frank D. Mullin, the therein named defendant, or to which he may be entitled." Respondent Mullin thereupon served upon the plaintiff and filed in the action a notice of motion for an order quashing the issuance and levy of the writ, the ground for the motion being that the execution "was illegally, wrongfully, unlawfully and improperly issued." After a hearing the order appealed from was entered.

It is not contended that the judgment upon which the execution issued was void as to defendant Hyland, but only as respects the association, and this for the reason that while the association as such was joined as a party, no cause of action save as against the individuals Mullin and Hyland was stated in the complaint.

[1-6] The general rule applicable to a judgment rendered by a court having jurisdiction of the parties and subject-matter is that unless reversed or annulled it is not open to contradiction or impeachment with respect to its validity or binding effect by parties or privies

in any collateral proceeding. 34 C. J. Judgments, § 815, p. 511; Rowley v. Howard, 23 Cal. 401. A void judgment, however, may be collaterally attacked either by the parties or by strangers. Estate of Pusey, 180 Cal. 368, 181 P. 648. With respect to parties and privies such an attack is ordinarily limited to cases where the judgment is void on its face. 15 Cal. Jur., Judgments, § 142, p. 56; Emery v. Kipp, 154 Cal. 83, 97 P. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792; Estate of McNeil, 155 Cal. 333, 100 P. 1086. A stranger, however, whose rights would be prejudiced by its enforcement, is not bound by this limitation, but may attack a judgment for fraud or collusion. 34 C. J., Judgments, § 832, p. 526; Hackett v. Manlove, 14 Cal. 85; Bennett v. Wilson, 133 Cal. 379, 65 P. 880, 85 Am. St. Rep. 207. But neither the parties, their privies, nor strangers can attack a judgment of a domestic court of record on jurisdictional grounds unless the want of jurisdiction appears on the face of the record (15 Cal. Jur., Judgments, § 834, pp. 528, 529; Bennett v. Wilson, supra), and section 1916 of the Code of Civil Procedure does not change the rule (Hill v. City Cab, etc., Co., 79 Cal. 188, 21 P. 728). Nor can they object to it on account of mere errors or irregularities. Cloud v. El Dorado County, 12 Cal. 128, 73 Am. Dec. 526; Hall v. Brittain, 171 Cal. 424, 153 P. 906.

[7, 8] The Hyland & Mullin Drayage Company was joined as a party to the action, and the judgment recited that both the concern and defendant Hyland appeared therein by demurrer; and such a recital, in the absence of anything in the record contradicting it, has been held to be conclusive. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Hickey v. Algie, 51 Cal. App. 595, 197 P. 359. The authority of the attorney who appeared for these defendants must also be presumed. Title Ins., etc., Co. v. Cal. Development Co., 168 Cal. 397, 143 P. 723.

[9] The complaint alleged that the individual defendants Hyland and Mullin were doing business under the name of Hyland & Mullin Drayage Company; also, that the merchandise in question was sold and delivered to the defendants. While the pleading was uncertain and ambiguous with respect to the parties to whom the sale was made, this objection was not raised; and the complaint having stated a cause of action the joint demurrer filed was properly overruled. Asevado v. Orr, 100 Cal. 293, 34 P. 777.

[10-12] It is essential to jurisdiction that there be some proper application invoking the judicial power of the court in respect to the matters sought to be litigated (Young v. Rosenbaum, 39 Cal. 646; Tinn v. U. S. District Attorney, 148 Cal. 773, 84 P. 152, 113 Am. St. Rep. 354); but if a complaint shows a subject-matter and a demand for relief within the jurisdiction of the court, the mere fact that it

fails to state a cause of action does not render the judgment void and subject to collateral attack (*Gillespie v. Fender*, 180 Cal. 202, 180 P. 332); or, as the rule is stated in *Christer-son v. French*, 180 Cal. 523, 182 P. 27, a judgment is not void if the court has jurisdiction of the parties and subject-matter, irrespective of whether the complaint states a cause of action or not, so long as it apprises the defendant of the nature of plaintiff's demand. This rule applies both to contested cases (*Le Mesnager v. Variel*, 144 Cal. 463, 77 P. 988, 103 Am. St. Rep. 91) and to default judgments in other respects valid (*Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 P. 880; *Christer-son v. French*, supra). It has also been held that a judgment rendered against a person who has voluntarily appeared in the action as a defendant is not void so as to be collaterally assailable, although his name was not inserted in the complaint and no order granting leave to appear and answer is contained in the record. *Tyrrell v. Baldwin*, 67 Cal. 1, 6 P. 867.

In this connection respondent cites several cases in support of his contention that the judgment entered against the association was void; but an examination thereof shows that there was either a nonjoinder of the association as a defendant in both the caption and body of the complaint, or that the pleading was attacked on appeal for failure to state a cause of action against the association.

[13, 14] Measured by the above rules, the judgment against the drayage company was not void on its face, and there is no contention that the same was procured by fraud or collusion. Section 388 of the Code of Civil Procedure provides: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability." Respondent Mullin denied that he was a member of the drayage company or liable for the debt, and plaintiff failed to prove these allegations. The resulting nonsuit was a dismissal of the action as to respondent. *San Francisco v. Brown*, 153 Cal. 644, 96 P. 281.

[15] While the entry of the order did not affect plaintiff's right to proceed against the others (*Hanna v. De Garmo*, 140 Cal. 172, 73 P. 830), respondent thereupon ceased to be a party (9 R. C. L., Dismissal, Discontinuance and Nonsuit, § 29, p. 209; *Page v. W. W. Chase Co.*, 145 Cal. 578, 79 P. 278); and for all purposes connected with the further proceedings the order had the effect of a final judgment in his favor (*Dowling v. Polack*, 18 Cal.

625; *Leese v. Sherwood*, 21 Cal. 151; *Hurgren v. Union, etc., Ins. Co.*, 141 Cal. 585, 75 P. 168). There was consequently no judgment in the action which bound the individual property of respondent though he was served with process.

[16-20] Although the court has power to quash an execution inadvertently issued (*Creditors' Adjustment Co. v. Newman*, 185 Cal. 509, 197 P. 334), or where the writ is void as lacking statutory and decretal authority for its issuance (*Montgomery v. Meyerstein*, 195 Cal. 37, 231 P. 730), or if the judgment on which it is based is void on its face (*Sanchez v. Carriaga*, 31 Cal. 170; *Winrod v. Wolters*, 141 Cal. 399, 74 P. 1037), it cannot do so merely upon the ground that the judgment is irregular or erroneous (*Town of Hayward v. Pimental*, 107 Cal. 386, 40 P. 545); and it is the general rule that none but the parties to the action who are liable to be injured can move for recall of the writ (23 C. J., Executions, § 426, p. 541) unless the judgment upon which it issued or the writ is void on its face. In such cases it has been held that subsequent purchasers, lienholders, and execution and judgment creditors may so move (23 C. J., Executions, § 426, p. 542, and cases cited; *Dorland v. Smith*, 93 Cal. 120, 28 P. 812; *Montgomery v. Meyerstein*, supra). In the present case, however, the judgment is valid upon its face, and the execution issued thereon was regular in form. Under such circumstances it is well settled that the court has no power to vacate an execution for the omissions or acts of the sheriff after the writ has duly come into his hands. 23 C. J., Executions, § 424, p. 540. Hence it has been held that a levy upon property exempt from execution is not a reason for recalling the writ (*Roth v. Insley*, 86 Cal. 134, 24 P. 853); nor can the levy be quashed on the ground that the judgment debtor has no interest in the property levied upon, as strangers to the action have means provided by law for protecting their rights (23 C. J., Executions, § 285, p. 470; *Bancroft Code Practice and Remedies*, § 1999, p. 2630).

[21] As stated, the action was dismissed as to respondent. Consequently he was not a party to the judgment, nor was his property bound thereby, and the sheriff was not directed by the writ to satisfy the judgment from his property, but from that of the judgment debtors. Under these facts neither the judgment nor the proceedings thereunder would affect his rights or cast a cloud upon his title. *Roman Catholic Archbishop of San Francisco v. Shipman*, 69 Cal. 586, 590, 11 P. 343; *Russ & Sons Co. v. Crichton*, 117 Cal. 695, 49 P. 1043; *Brum v. Ivins*, 154 Cal. 17, 21, 96 P. 876, 129 Am. St. Rep. 137.

It is our conclusion from the facts that there was no ground for the recall of the execution and that the order was erroneous,

The order is, accordingly, reversed.

110 Cal. App. 499

In re ATKINSON'S ESTATE.

ATKINSON et al. v. ATKINSON et al.

Civ. 4325.

District Court of Appeal, Third District,
California.

Dec. 17, 1930.

Rehearing Denied Jan. 16, 1931. Hearing Denied by Supreme Court Feb. 9, 1931.

1. Wills ⇨132.

Presence of typewritten words on paper on which codicils were written did not invalidate olographic codicils, of which such words formed no part.

2. Wills ⇨130.

That olographic codicil is written on one of pages of original will is immaterial, except that document mentioned in codicil is more clearly identified.

3. Wills ⇨98.

Will or codicil executed pursuant to statute may incorporate, by appropriate reference, document or paper not so executed (Civ. Code, § 1287).

Civ. Code, § 1287, provides that execution of codicil, referring to previous will, has effect of republishing will, as modified by codicil.

4. Wills ⇨130.

Olographic codicil, to be valid, need not be designated as codicil by testator (Civ. Code, § 1287).

5. Wills ⇨384.

Question presented by appeal from order admitting codicils to probate involved their testamentary character, not construction of codicils or will.

6. Wills ⇨104.

Olographic codicil, stating that children of deceased brother were to have brother's share, manifested intent to give children share brother would have received if living, although deceased brother technically had no share (Civ. Code §§ 1317, 1318, 1320, 1325, 1340).

It appeared that original will divided residue equally among testator's brother, four sisters, and three children of deceased brother, and that it would be unnatural for testator to give a total of three times as much property to his deceased brother's three children as to any of his sisters, or to his surviving brother. Civ. Code, §§ 1317, 1318, 1320, 1325, and 1340, relate to construction of wills.

Appeal from Superior Court, Humboldt County; T. H. Salvage, Judge.

Proceedings by Mary A. Atkinson and another for the probate of certain writings as codicils to the will of Thomas G. Atkinson, also known as T. G. Atkinson, deceased. From an order in favor of the proponents, admitting the writings to probate, the protestants, Lucile Atkinson and others, appeal.

Affirmed.

H. C. Nelson and Nelson & Ricks, all of Eureka, for appellants.

Mahan & Mahan, of Eureka, for respondents.

Mr. Presiding Justice FINCH delivered the opinion of the court.

This is an appeal by Lucile Atkinson, Margaret Atkinson Gardner (formerly Margaret Atkinson), and Henry Atkinson, devisees and legatees named in the last will of the above-named decedent, from an order "admitting to probate as codicils to said last will * * * two certain writings appearing on pages one and two of said last will."

The will mentioned is typewritten, and was duly attested by subscribing witnesses November 2, 1911. The second and third clauses thereof bequeath sums of money to persons named therein. The fourth clause gives money and described real estate to the decedent's wife. The fifth and sixth clauses read as follows:

"Fifth: All the rest and residue of my estate, real, personal and mixed, I give, devise and bequeath to my brother Edward Atkinson, of Escanaba, Michigan, to my sister Bessie Gleeson, wife of T. P. Gleeson of Green Bay, Wisconsin, to my sister Maggie Corcoran, of Escanaba, Michigan, to my sister Jennie Jones, wife of B. W. Jones of Vulcan, Michigan, to my sister Ella Laughran, wife of C. J. Laughran of New Mexico, and to Lucile Atkinson, Margaret Atkinson and Henry Atkinson, children of my brother John Atkinson, deceased—share and share alike.

"Sixth: My brother John being dead and leaving the three children, Lucile, Margaret and Henry—who are now minors—I will that they shall not receive their shares under the preceding paragraph of this will until the youngest thereof surviving shall reach his or her majority, and that in the meantime I appoint the above named Edward Atkinson, Bessie Gleeson, Maggie Corcoran, Jennie Jones and Ella Laughran trustees, without bond, to have and hold the shares of such children, as aforesaid, and to invest and reinvest the same as occasion requires for the best interests of such children and their said estate, the share of each in which with the accumulations thereof shall be paid to them respectively when the youngest surviving in case of death of either before distribution to them shall reach his or her majority. In case either of

such children shall die without issue before the distribution to them shall be made the share of such child so dying without issue shall go to the survivors of such children, but if such child dying shall leave issue the share of such deceased child shall go to such issue share and share alike."

On July 9, 1913, the decedent drew ink lines through the words of the second and third clauses of the will, and wrote, in red ink, across the typewritten lines thereof the following:

"July 9 1913

"I cut out this part of will

"T. G. Atkinson"

At the same time and in the same manner he wrote across the lines of the sixth paragraph, but without drawing any lines through the words thereof, the following:

"July 9th 1913

"John Atkinson children are to get John share in this will

"T. G. Atkinson."

Appellants admit that the second and third clauses were effectively canceled, and the only contentions made by them relate to the writing over the sixth clause.

[1] The mere presence of typewritten words upon the paper upon which the codicil is written does not render the olographic codicil, of which such words form no part, invalid. *Estate of De Caccia*, 205 Cal. 719, 273 P. 552, 61 A. L. R. 393; *Estate of Oldham*, 203 Cal. 618, 265 P. 183.

[2-4] Appellants contend that by the olographic codicil the testator "sought to make a new will by making certain changes on the face of the old will and retaining the remaining provisions thereof that were not scratched out or written over. The altered document, as thus changed, was intended to be his revised original will." It is of no materiality that the codicil is written upon one of the sheets of the original will, except that the document referred to in the codicil is thereby more clearly identified. "It has long been settled that a will or codicil executed in accordance with the requirements of statute may, by an appropriate reference, incorporate within itself a document or paper not so executed." *Estate of Plumel*, 151 Cal. 77, 79, 90 P. 192, 193, 121 Am. St. Rep. 100. The codicil considered in the case cited was olographic. It certainly is no objection that a document so incorporated has been formally executed as a will. "The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil." Civ. Code, § 1287. In the case of *In re Soher*, 78 Cal. 477, 479, 21 P. 8, 9, it is said: "The argument is that the olographic codicil cannot be understood without referring to the attested will; that the latter is, in contemplation of

law, 'a part' of the former; and that therefore it does not come within the definition of an olographic will, which is a will 'entirely written, dated, and signed by the hand of the testator himself.' * * * The only difference between an olographic and an attested will is in the form of execution. * * * One form is the precise equivalent of the other. * * * Whatever may be done in or by the one, may be done in or by the other." The document referred to in *Estate of Plumel*, supra, was an invalid olographic will, and the decision is based upon the terms thereof, which terms are in no manner mentioned in the codicil. See, also, *Estate of Johnston*, 64 Cal. App. 197, 221 P. 382, and *Estate of Sullivan*, 94 Cal. App. 674, 271 P. 753. It is true that the writing is not denominated by the testator as a codicil, but no reason appears for requiring greater formality in the execution of a codicil than in the execution of an original will, and many olographic wills have been held valid which were not expressly called wills by their makers. *Estate of Spitzer*, 196 Cal. 301, 237 P. 739, and *Estate of Beffa*, 54 Cal. App. 186, 201 P. 616, illustrate the liberality indulged in favor of such wills.

[5] The question presented by this appeal is whether the codicil is testamentary in character and not the proper construction to be placed upon it or upon the terms of the original will. *Estate of Spitzer*, supra. It is necessary, however, to determine, incidental to the question of the admission of the codicil to probate, whether it is so uncertain and meaningless as to be wholly ineffective and therefore void.

[6] Appellants contend that, because the testator's brother John had no share under the will, the reference in the codicil to "John share in the will" is meaningless, and that therefore the codicil is void for uncertainty. "A will is to be construed according to the intention of the testator." Civ. Code, § 1317. "In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." Civ. Code, § 1318. "Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument." Civ. Code, § 1320. "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." Civ. Code, § 1325. "When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his in-

tentions cannot be received." Civ. Code, § 1340.

"Particular words are not requisite to create a legacy or devise. It is essential that the intention of the testator to make the gift be shown. * * * The cardinal rule for the construction of wills is to ascertain the intention of the testator, and this is determined from the words of the will, considering the circumstances under which it was made, if there is any uncertainty in its language, * * * The will and its entire scheme, the property disposed of, the persons named as devisees and legatees, the words and the context should be considered together, and words used in the will should be construed according to their surroundings. * * * It is equally well settled that a devise or bequest may arise by implication. To warrant the court in so declaring there must be something more than conjecture. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind. * * * Estate of Franck, 190 Cal. 28, 31, 210 P. 417, 418.

"The primary purpose of all interpretation of wills is, of course, to ascertain the testator's intent, as disclosed by the language he has used. * * * Of this class of questions, it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value." Estate of Henderson, 161 Cal. 353, 357, 119 P. 496, 498.

"While, of course, conjecture and speculation cannot be indulged in to import into the will of a testator something which no language used by him warrants simply because he seems to have omitted something which it is reasonable to assume should have been provided for, still, when he has used language which can be reasonably interpreted to raise a devise, it should be so construed. * * * While the intention of the testator is to be reached from what he has said, this includes not only a determination of what he meant by the explicit use of language, but also the necessary implication arising from language which he has employed, though less explicit." Estate of Blake, 157 Cal. 448, 467, 468, 108 P. 287, 295.

In Estate of Bennett, 134 Cal. 320, 66 P. 370, the court had under consideration the following clause of an olographic will: "In case of the death of any of the legatees of my estate under this will before distribution, then and in that case the portion so bequeathed to such legatee shall revert to the children of the family of which such legatee is a member, share and share alike." It is perfectly clear that property cannot revert to a person who has never owned any interest therein, but the court found no difficulty in giving effect to the evident intention of the testator by holding

that by the use of the word "revert" the testator meant that the property was to "go" to the persons indicated. In the Matter of Estate of Wood, 36 Cal. 75, the will there under consideration reads as follows: "I wish five thousand dollars to go to John C. Cole, in the event of my dying intestate," etc. It was contended that, "if this instrument is a will, then the deceased did not die intestate, and the event upon which the property was to take the direction indicated has not, and cannot, transpire." In overruling the contention, the court said: "If a word has no meaning, or is absurd, or repugnant to the clear intention manifested in other parts, it may be regarded as surplusage, or restricted in its application. * * * We see no reason why the same rule should not apply in interpreting the language of an instrument for the purpose of determining whether it is a will or not. * * * Upon the whole instrument, it is perfectly plain to our minds, that the deceased intended to make a disposition of his property, in case of his death, and he evidently meant by the term, 'dying intestate,' dying without making any further or other will."

The testator in the instant case had a brother and four sisters, each of whom had children. Another brother, John, had died, leaving three children, the appellants. Apparently the testator was on friendly terms with, and had implicit confidence in, his living brother and sisters, because he gave them equal shares in his estate and appointed them trustees of the estates of John's children, without bonds. Under such circumstances, it would be an unnatural division for the testator to give John's three children a total of three times as much property as that given to the brother or either sister. By the fifth clause of the will, the living brother and sisters were given equal shares in the testator's property. While technically inaccurate, it was not unnatural for the testator to refer to the share he would have given to his brother John, if living, as John's share. In common parlance, it is not unusual to refer to the property which one possibly or probably may receive from the estate of a relative as his share of such estate. Had John been living when the codicil was executed the term "John's share" would clearly imply a share equal to those respectively of the other brother and the sisters. It seems equally clear that the testator intended by the codicil to give John's children the share which would have been given to John if he had been living; that is, a share equal to that given to each of the living brother and sisters. Laymen would so understand the language used, and, since the testator was not a lawyer, it is a fair inference that he so understood it. The intention of the testator clearly appearing from the inartificial language used by him, that intention should be carried into effect.

The order is affirmed.

110 Cal. App. 603

LONG BEACH FINANCE CORPORATION v. SLOCUM et al.

Civ. 6135.

District Court of Appeal, Second District,
Division 1, California.

Dec. 22, 1930.

1. Pleading ⇨428(7).

Plaintiff not objecting to evidence regarding estoppel, waived failure to plead estoppel.

2. Estoppel ⇨87.

Assignee of conditional seller *held* not estopped, by statement to defendant, who had already exchanged automobiles with conditional buyer, that he had paid for automobile, to deny defendant was owner.

The evidence showed that an officer of assignee corporation stated to defendant exchanging automobiles with conditional buyer that conditional buyer had paid for automobile, but evidence also showed that defendant had delivered her own automobile to conditional buyer under exchange transaction before such statement was made, so that defendant did not, in reliance upon such statement, part with anything of value or alter her position to her damage.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by the Long Beach Finance Corporation against Paul Slocum and others. From a judgment for defendants, plaintiff appeals.

Reversed.

John C. Miles, of Los Angeles, for appellant.

James McLachlan, of Los Angeles, for respondents.

YORK, J.

This is an appeal from a judgment of the trial court in favor of defendants, which judgment is based upon the theory that the plaintiff was estopped to claim that one Jessie Slocum was not the owner of the automobile, which is the real subject of this action, at the time of the commencement of the action and at all times subsequent thereto.

The legal title to the automobile was shown to be vested in appellant. The main issue of fact actually tried by the court was in relation to the claim of respondent Jessie C. Slocum that, by reason of facts which respondent sought to prove, appellant was estopped to deny that Mrs. Slocum was the owner and entitled to possession of said automobile.

[1] The record discloses the fact that the evidence relating to the so-called estoppel was introduced without any objection on the part

of the plaintiff. Under the authority of *Flandreau v. Downey*, 23 Cal. 354, it is deemed that the plaintiff waived the lack of said so-called estoppel being pleaded before the court in this case. See, also, *Carpy v. Dowdell*, 115 Cal. 677, at page 688, 47 P. 695.

[2] However, assuming that estoppel was properly pleaded, appellant insists that the evidence adduced at the trial fails to establish an equitable estoppel, for the reason that one of the vital elements of estoppel is that injury must result from the acts or conduct relied upon as constituting an estoppel.

Prior to the transactions relied upon as creating an estoppel, Mrs. Slocum had entered into an agreement with one Skinner, by which she was to transfer to Skinner a car owned by her, in exchange for a car which Skinner then had in his possession under a contract of conditional sale to him, the legal title of which was then vested in plaintiff as assignee of Skinner's vendor.

The record shows that one Miller, an officer of the plaintiff corporation, stated to Mrs. Slocum that Skinner had paid for the car, which constitutes the subject of this controversy, but the record is replete with evidence showing that Mrs. Slocum had delivered her own car to said Skinner, the maker of the dishonored check which was supposed to pay for the automobile in question, before the conversation referred to took place. It is quite evident that she did not, in reliance upon plaintiff's statement, part with anything of value or alter her position to her damage; therefore no facts constituting an estoppel were proven.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

110 Cal. App. 464

BROWN v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

Civ. 7765.

District Court of Appeal, First District,
Division 2, California.

Dec. 16, 1930.

Rehearing Denied Jan. 15, 1931. Hearing Denied by Supreme Court Feb. 9, 1931.

Divorce ⇨243.

Interlocutory divorce decree providing that order for maintenance pendente lite should continue in force until further order *held* to provide for alimony (Civ. Code, §§ 137, 139).

In such case it was not absolutely necessary that it should appear from the language used in the interlocutory decree that it rested on Civ. Code, § 139; it being clear that the decree did not purport to rest on section 137.

Original application by Ada Brown for writ of mandate prayed to be directed to the Superior Court, in and for Alameda County, to require T. W. Harris, judge of such court, to hear and determine petitioner's application for an execution for unpaid alimony.

Writ granted.

L. L. Steele, of Oakland, for petitioner.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., James H. Oakley, Deputy Dist. Atty., and Pierre A. Fontaine, all of Oakland, for respondents.

STURTEVANT, J.

This is an original application for a writ of mandate. It involves the following facts: Heretofore Ada Brown commenced an action in divorce against her husband, Jolly C. Brown. In her complaint she asked for maintenance. Thereafter the trial court duly made an order for a payment of attorney fees, costs of suit, and "\$60 per month for support of plaintiff payable as follows, to-wit: Upon the 11th and 27th days of each month commencing December 11, 1929, and to continue until the further order of court." Thereafter, December 17, 1929, the default of the defendant was entered. On January 6, 1930, the action was tried, and an interlocutory decree of divorce was rendered. That decree contained a passage as follows: "It is further hereby ordered that the order of court made herein on or about the 6th day of December, 1929, wherein the above defendant, Jolly C. Brown, was ordered and directed to pay to plaintiff herein the sum of \$60 per month as and for the support and maintenance of plaintiff, to-wit: the sum of \$30 upon the 11th day of the month, and a like sum upon the 27th day of each month, continue in full force and effect until the further order of this court." On the 6th day of October, 1930, the plaintiff filed an affidavit and applied for an execution to issue against the defendant for the sum of \$515 alleged to be due and unpaid pursuant to the orders theretofore made by the court. On October 16, 1930, the court denied the application, and expressed its denial as follows: "Orders that plaintiff's application for an execution to issue be denied, and the plaintiff's application for a citation to issue for contempt, be denied, and that each of said applications are denied on the ground that the interlocutory judgment and decree of divorce January 6, 1930, volume 174 at page 479, makes no provision for the support and maintenance of said plaintiff." Now at this time the plaintiff asks this court to direct the trial court to hear and determine her application on the merits. The respondent opposes the granting of the writ, and contends that the language used in the interlocutory decree is void for uncertainty and that the same may not now be amended because the time within

which an amendment may be made has expired.

As we view the matter, no amendment is necessary. It is perfectly clear that the interlocutory decree does not purport to rest on the provisions of section 137 of the Civil Code. The order made December 6, 1929, rested on said section. The interlocutory decree thereafter rendered rested on the provisions of section 139 of the Civil Code. The respondent claims that the fact last stated does not appear from the language used in the interlocutory decree. We think it does. However, it is not absolutely necessary that it should so appear. In the case of *Watson v. Lawson*, 166 Cal. 235, at page 241, 135 P. 961, 963, the court said: "In case of doubt regarding the signification of a judgment, or any part thereof, the whole record may be examined for the purpose of removing the doubt." 1 *Freeman on Judgments*, § 45. "When it admits of two constructions, that one will be adopted that is consonant with the judgment that should have been rendered on the facts and the law of the case." 1 *Black on Judgments*, §§ 3, 123; *Peniston v. Somers*, 15 La. Ann. 680." In the case of *Pacific Paving Co. v. Vizelich*, 1 Cal. App. 281, 82 P. 82, the language of the judgment contained the expression, "for the sum of \$107.02, being the amount of principal and interest due on assessment against the lot in the complaint set forth, together with the further sum of \$15, attorney's fees of plaintiff herein, and \$14.80, costs in this action." Considering a similar contention at page 282 of 1 Cal. App., 82 P. 82, the court said: "We think the court was authorized to enter the judgment 'according to the prayer of the complaint,' in accordance with the stipulation or written agreement of the parties." In 1 *Freeman on Judgments* (5th Ed.) 134, the author states: "If the entry of a judgment is so obscure as not to express the final determination with sufficient accuracy, reference may be had to the pleadings and to the entire record. If, with the light thrown upon it by them, its obscurity is dispelled, and its intended significance made apparent, it will be upheld and carried into effect. In case of doubt regarding the signification of a judgment, or any part thereof, the whole record may be examined for the purpose of removing the doubt. One part of the judgment may be modified or explained by another part; and uncertainties in the judgment may become certain under the light cast upon them by the pleadings or other parts of the records." In the light of the foregoing rules, it is perfectly clear that the trial court, by the interlocutory decree, did not overlap the terms of the order for maintenance pendente lite, but did order that the same relief be continued until the further order of the court. It is not claimed that any further order of court was made which pur-

ported to terminate the interlocutory decree either in whole or in part.

Let the writ issue as prayed for.

We concur: **NOURSE, P. J.; SPENCE, J.**

110 Cal. App. 508

CRUM et ux. v. CITY OF LOS ANGELES
et al.
Civ. 117.

District Court of Appeal, Fourth District,
California.

Dec. 17, 1930.

Rehearing Denied Jan. 12, 1931. Hearing Denied by Supreme Court Feb. 9, 1931.

1. Escrows § 8(1).

As between vendor and purchaser, loss falls on owner at time of embezzlement from or loss by escrow holder.

2. Estoppel § 72.

Loss resulting from escrow holder's unauthorized cashing of city warrant, received for price of land, and subsequent insolvency before vendor became entitled thereto, fell on purchaser (Civ. Code, § 3543).

Defendant city sent to bank a warrant for price of land with letter instructing bank to hold check in escrow until bank received defendant's written instructions for disposal thereof. Notwithstanding instructions, bank indorsed warrant as deposited to vendors' credit, and sent warrant through for collection, and thereafter treasurer of defendant city likewise disregarding instructions paid warrant on presentation. City treasurer having paid warrant in violation of defendant's own instructions brought case within Civ. Code, § 3543, providing that, where one of two innocent persons must suffer by act of third, he through whose negligence it happened must be the sufferer.

3. Escrows § 8(1).

Evidence sustained finding vendors were not chargeable with knowledge escrow holder, in violation of instructions, cashed warrant for price and used proceeds to pay off loan to vendors.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by W. D. Crum and wife against the City of Los Angeles and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Erwin P. Werner, City Atty., W. B. Mathews, Clarence S. Hill, George T. Warren, and Chas. C. Cooper, Jr., all of Los Angeles, for appellants.

A. H. Swallow, of Los Angeles, and Robert Richards, of Bishop, for respondents.

CARY, P. J.

Plaintiffs began this action to recover from defendants the balance due on the purchase price of certain property. The complaint gave defendants credit for a down payment of \$400 and claimed that the balance of \$39,837.67 was unpaid. The answer admitted the allegations of the complaint, other than the nonpayment of the purchase price, and set up full payment as an affirmative defense. The court found that the allegations of the complaint were true, except as to the amount still unpaid, gave defendants credit for a further payment of \$7,823.99, and gave judgment for plaintiffs for the balance—\$32,013.61.

As grounds for reversal, defendants contend (1) that the evidence does not support the finding of nonpayment, (2) that the finding that \$7,823.99 was a pro tanto payment entitled defendants, as a matter of law, to a further finding that the entire amount had been paid, and (3) that the court committed prejudicial error (a) in refusing to find, as requested by defendants, that plaintiffs had both authorized and ratified certain acts of their alleged agent in receiving the balance of the purchase price and (b) in refusing to find that plaintiffs are estopped to dispute the authority of their alleged agent in receiving such payment.

Since the major portion of the defendants' argument is based upon their contention that the facts are such that but one construction can be placed upon them—a construction which they claim necessitates a judgment in defendants' favor—it will be necessary to set forth these facts in some detail.

Practically all of the transactions occurred in 1927, so we shall merely give the day and the month, adding the year only when it is other than 1927. By contract executed February 9th, plaintiffs agreed to sell and the defendant board of water and power commissioners (hereinafter referred to as the board) agreed to buy certain land in Inyo county, together with rights to the use of water for the price of \$40,000. The property was to be free and clear with certain exceptions not material to this discussion. Four hundred dollars of the purchase price was paid plaintiffs when the contract was executed. The balance of \$39,600, with interest, was payable when plaintiffs should furnish the board with a certificate of title showing the required title in plaintiffs and deliver to the board a deed conveying such title to the board.

The defendant board had been engaged for some period of time in acquiring an addi-

tional water supply in Inyo county. So voluminous were these transactions that the board had stationed one of its attorneys at Bishop, in Inyo county, who devoted his time exclusively to legal matters in connection with the acquisition of such water.

Plaintiffs' land was incumbered with a federal farm loan of something over \$7,000, and, unless this loan was paid off by April 2d, plaintiffs believed they would have to pay another six months' interest. A preliminary title search incident to the sale to the board showed irregularities which would apparently delay the issuance of the certificate for several months. In order to escape paying this additional interest, plaintiffs, during the latter part of March, requested the First National Bank of Bishop (hereinafter referred to as the bank) to loan plaintiffs the money to pay off this farm loan. The bank agreed to do so, provided plaintiffs would retain an attorney in Bishop, whom it named, to handle the papers in connection with the deal. This, plaintiffs promptly proceeded to do. This attorney contacted the resident attorney for the defendant board and as a result of this interview plaintiffs, on March 30th, wrote the board's attorney requesting that all matters relating to the sale of the property, together with all payments, be handled through and escrowed with the bank, and at the same time plaintiffs executed a deed to the land and delivered it to the bank. On March 31st, the following occurred: The bank delivered this deed to the board's attorney, together with a letter stating in part: "This deed is submitted to you at this time subject to the final payment under contract of purchase and sale, W. D. Crum and Elinor Adell Crum, his wife, in favor of The Board of Water and Power Commissioners of the City of Los Angeles." The board's attorney delivered to the bank a warrant for \$39,837.60 payable to the order of W. D. Crum and Elinor Adell Crum, together with a letter of transmittal, in part as follows: "You are hereby instructed to hold the enclosed check in your escrow until you receive our written instructions as to the disposal thereof." A carbon copy of this latter was sent direct to plaintiffs; and the bank immediately sent its cashier's check for \$7,823.99 to the Federal Farm Loan Bank holding the mortgage on plaintiffs' land in full payment thereof.

Up to this point there is no complaint from either side as to any unauthorized act of the bank.

Many similar deals between the board and parties other than plaintiffs had been cleared through this bank, and the evidence showed it had been the custom of the bank, without consulting the owners of the land, to indorse the owners' names on the warrants, send them through for collection, and hold the money until the escrows were closed. There is no evidence that plaintiffs were aware of such

custom. Following out this usual custom the bank, instead of obeying the board's instructions to hold the warrant, indorsed it April 1st as follows: "Deposited to the credit of W. D. Crum and Elinor Adell Crum. Endorsement guaranteed First National Bank, Bishop, California," and sent it through for collection. The treasurer of the defendant city, likewise disregarding the instructions that the warrant should be held by the bank, promptly paid it on presentation April 4th. April 8th, the Federal Farm Loan Bank, which held the mortgage on plaintiffs' property, wrote the bank at Bishop inclosing plaintiffs' canceled note and mortgage papers to be delivered to plaintiffs, sent a copy of its letter direct to plaintiffs, wrote the Farm Loan Association inclosing a \$400 check to be refunded to the plaintiffs for the purchase price of the Farm Loan Bank stock which plaintiffs had purchased when they secured the loan, and sent a copy of this letter also to plaintiffs. Thereafter, the Farm Loan Association sent its check for the \$400 to plaintiffs which was received by plaintiffs some time between May 11th and 21st.

At all times after the proceeds of the warrant had been received by the bank, the bank was in financial difficulty, and its cashier testified that, had plaintiffs demanded from the bank the balance of the purchase price, the bank would not have been able to pay the same. August 4th, the bank closed its doors through insolvency. Plaintiffs testified that they believed the money used to pay off their farm loan had been advanced them by the bank and that not until November—long after the failure of the bank—did they know that the Los Angeles city warrant had been cashed by the bank. Not until January 23, 1928, was the certificate of title issued showing good title in plaintiffs, and it was then tendered to the board.

It is at once apparent that the vital question in the case is: Upon whom shall the loss, occasioned by the bank's failure, fall?

Defendants contend that plaintiffs had selected the bank as their agent, that plaintiffs, knowing in April that their farm loan had been paid off, were charged with notice that the only method by which it could have been paid was the use of the purchase money represented by the city's warrant, that the bank in cashing the warrant was acting solely as agent for plaintiffs, that plaintiffs in receiving and accepting the \$400 returned them by the Farm Loan Association and by accepting the benefit of the seven thousand odd dollars paid to clear off their farm loan had, as a matter of law, thereby ratified the acts of their agent the bank in cashing the warrants. They also contend that plaintiffs, having neglected from April to August 4th to take any action regarding the unauthorized cashing of the warrant and the bank in the meantime having become insolvent and the purchase money thus lost,

the plaintiffs are estopped to deny the authority of the bank to cash the warrant. Plaintiffs contend, on the contrary, that they were not entitled to receive the purchase price until they had furnished the board with a proper certificate of title, that prior to such time, even though the bank had, unknown to plaintiff, cashed the warrant, it was holding the proceeds in its capacity as agent for the city, and that since it closed its doors five months before the certificate of title had been issued entitling plaintiffs to the final payment, the loss should fall upon the city, citing *Hildebrand v. Beck*, 196 Cal. 141, 145, 146, 236 P. 301, 39 A. L. R. 1076, and *Shreeves v. Pearson*, 194 Cal. 699, 707, 708, 711, 230 P. 448.

[1, 2] If the property in the custody of the escrow holder is either embezzled or lost by it, then, as between the seller and the buyer, the loss falls on the one who owns the property at the time of its embezzlement or loss. For example, if the escrow holder embezzles the purchase price before the time when, under the terms of the escrow, the seller is entitled to it, the loss falls on the buyer, since it is still his money. On the other hand, if the money be embezzled after the time when the seller has become entitled to the money, the loss falls on him, since it is now considered his property. *Hildebrand v. Beck* and *Shreeves v. Pearson*, *supra*. If this rule be applied to the case at bar, the money in the hands of the bank as escrow holder was lost before plaintiffs became entitled thereto, and hence the loss should fall on the defendants whose property it still remained. The defendants contend, however, that the facts do not bring this case within such rule. They argue that, in order to create an escrow at all, it is essential that the defendants should have relinquished entire control over their property, citing *Fitch v. Bunch*, 30 Cal. 208, 212, 213; *Cannon v. Handley*, 72 Cal. 133, 139-141, 13 P. 315; *McDonald v. Huff*, 77 Cal. 279, 282, 19 P. 499; *Kenney v. Parks*, 125 Cal. 146, 149, 150, 57 P. 772, that by its letter of transmittal the defendants specifically directed the bank to hold the warrant until it received written instructions as to its disposal, thereby retaining to themselves control thereof, and hence that the principles announced in these two cases do not apply. But the cases cited by defendants were concerned primarily with whether or not the parties to the alleged escrows had so far parted with dominion over deeds to their property that, upon the happening of the condition mentioned in the escrow, a delivery thereof would take place. Regardless of whether the facts in the case at bar constitute a true escrow, nevertheless the principles laid down in *Hildebrand v. Beck* and *Shreeves v. Pearson*, *supra*, are applicable. When defendants delivered the warrant to the bank, with instructions to hold it until further directions, obviously there was no intent on defendants' part

to have the funds represented by the warrant paid over forthwith to the plaintiffs. The only reasonable construction which can be placed upon the letter of transmittal is that the defendants were appointing the bank as their agent to hold the warrant. The next step was the act of the bank in indorsing the warrant: "Deposited to the credit of W. D. Crum and Elinor Adell Crum. Endorsement guaranteed First National Bank, Bishop, California." When the warrant was presented to the city treasurer for payment, an inspection thereof would have shown that the bank was violating defendants' written instructions both in cashing the warrant and in depositing it to the account of the plaintiffs. In spite of that fact the defendants paid the warrant and by their own act thus created a situation which made it possible for the later loss to occur. Under these circumstances the situation comes within the provisions of Civil Code § 3543—that where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.

[3] Defendants contend with great earnestness that this court must hold the plaintiffs were chargeable with knowledge of the fact that the bank had both cashed the warrant and used part of the proceeds to pay off plaintiffs' farm loan. They contend that plaintiffs must have known that the only way the farm loan could possibly have been paid off was from the proceeds of the warrant, and that plaintiffs with such knowledge ratified the bank's act by accepting and retaining the benefit of the mortgage payment and the return of their \$400 stock subscription. We now proceed to scrutinize the evidence to ascertain what knowledge or notice of the bank's act was chargeable to plaintiffs. Plaintiffs were informed by the bank that it could arrange to pay off the farm loan if plaintiffs would allow a certain attorney to handle the papers. To this plaintiffs agreed. March 30th plaintiffs gave the bank a deed to the property, and on the same day wrote a letter to the board's attorney asking that the deal be cleared through the bank. The board's reply to such letter was to mail plaintiffs a copy of the board's letter to the bank dated March 31st which stated that the board was sending the bank the warrant and directing it to "hold the check in your escrow until you receive our written instructions as to the disposal thereof." Upon receipt of this letter certainly plaintiffs could have no reason to believe that the bank either intended to or could cash the warrant. Now it should be borne in mind that plaintiffs were extremely anxious to have their farm loan paid off by April 2d in order to save paying another six months' interest. It therefore must have been immediately apparent to plaintiffs that the warrant could not be used in time to make such payment. Under date of April 8th plain-

tiffs received from the Farm Loan Bank of Berkeley a copy of that bank's letter to the First National Bank of Bishop. This letter bore the title "Loan No. 8022. W. D. Crum" and stated in part: "We have received your letter of March 31st enclosing draft for \$7,823.99 which is payment in full of the above numbered loan." Plaintiffs thus knew that the First National Bank had on March 31st forwarded its draft to pay off the farm loan. They also knew that defendants had not sent their warrant to the bank until March 31st, with what amounted to express directions not to cash it. Under these circumstances the inference which the trial court drew that plaintiffs believed that the bank, without cashing the warrant, had advanced its own funds to pay off the plaintiffs' farm loan was a most reasonable one. To a lay mind possessing only the usual limited familiarity with banking practices it would not be an unreasonable assumption under the circumstances that the bank was willing to advance from its own funds sufficient money to pay off the farm loan, relying upon the fact that when the plaintiffs finally received their money from the defendants that money would have to be paid through the bank, which at that time could deduct from the amount it turned over to the plaintiffs an amount sufficient to repay to the bank with interest the sum which it had advanced to pay off the farm loan.

The defendants submitted proposed findings to the effect that plaintiffs had authorized the cashing of the warrant, that plaintiffs had ratified the bank's act in cashing the warrant, and that plaintiffs were estopped to deny the bank's authority so to do. Defendants contend that the court's refusal to find on these three matters is reversible error, arguing that, while neither ratification nor estoppel were specifically pleaded in their answer, yet evidence on both subjects was received without objection, and therefore must be held to have been one of the issues tried by the court. In support of this contention the defendants cite *Goetz v. Goldbaum*, 4 Cal. Unrep. Cas. 749, 37 P. 646; *Resetar v. Leonardi*, 61 Cal. App. 765, 216 P. 71; *Cross v. Bouck*, 175 Cal. 253, 165 P. 702; *McDougald v. Hulet*, 132 Cal. 154, 64 P. 278; *Otis Elevator Co. v. First National Bank*, 163 Cal. 31, 37, 124 P. 704, 41 L. R. A. (N. S.) 529; and *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 41 P. 1017, 45 P. 252. Regarding the alleged authorization by plaintiffs to the bank to cash the warrant and also the ratification by plaintiffs of such act of the bank, under the plea of payment set up in defendants' answer, proof both of the authorization and the ratification was properly within the issues. By the same token a finding by the court of nonpayment—the ultimate fact—covered the fact that there was neither authorization nor ratification.

Regarding the refusal to find on the question of estoppel, suffice it to say that there is no evidence in the record upon which a finding of estoppel could have been predicated.

The judgment is affirmed.

We concur: BARNARD, J.; MARKS, J.

110 Cal. App. 605

Ex parte NORQUIST.
Cr. 2037.

District Court of Appeal, Second District,
Division 2, California.
Dec. 22, 1930.

1. Extradition ⇨34.

Affidavit presented Governor of demanding state *held* to excuse delay in applying for extradition, if excuse was necessary.

The affidavit alleged that shortly after committing offense accused fled from demanding state, and, after great diligence was used to find him, was just located after nearly three years.

2. Extradition ⇨34.

It is unnecessary that criminal complaint excusing long delay in presenting charge against accused be presented Governor of asylum state before rendition may be ordered.

Application of Lester E. Norquist for a writ of habeas corpus to be directed to the Sheriff of Los Angeles County to secure petitioner's release from custody on a warrant of extradition.

Writ discharged, and petitioner remanded to custody.

William M. Morse, Jr., and S. A. Shoop, both of Los Angeles, for petitioner.

Tracy Chatfield Becker, Deputy Dist. Atty., of Los Angeles, for respondent.

WORKS, P. J.

Petitioner is in the custody of the sheriff of Los Angeles county after requisition upon the Governor of this state by the Governor of Colorado for the extradition of petitioner, and after order of rendition by the Governor of this state made in compliance with the requisition.

The criminal complaint filed against the petitioner in Colorado states a public offense within the laws of that jurisdiction.

It is said in *Scott on Extradition*, at pages 98 and 99, that, as a proper basis for the issuance of a requisition for extradition by

the Governor of a demanding state, a certificate of a district attorney or prosecutor of that state must show to the Governor, among other things: " * * * (i) If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application." This language is of interest here, for the reason that petitioner departed from Colorado on December 7 or 8, 1927, and that he has never again been in that state, that he arrived in California on December 27, 1927, where he has resided continually since, and that criminal complaint was never filed against him in Colorado until November 28, 1930.

[1] If the rule stated by Scott is a correct one—and we do not pause to consider whether or not it is—it is met by evidence presented at the hearing held after return to the writ of habeas corpus heretofore issued by us. An affidavit presented to the Governor of Colorado by a district attorney, for the purpose of procuring the issuance of the requisition afterward issued, contains the averment that shortly after committing the offense with which he is charged petitioner fled from Colorado, and "that thereupon great diligence was used to find said fugitive, and he has just been located, arrested and held" in California.

[2] It is contended that before rendition could have been ordered by the Governor of California, a criminal complaint, filed in Colorado, should have been presented to him containing an allegation excusing the long delay in the presentation to the Colorado courts of a charge against petitioner. No authority is cited to uphold this contention, and we are satisfied that it is without merit.

It is also insisted that before a rendition may be made of one charged with crime in another state the governor and courts of the asylum state must be satisfied that there is good reason for long delay in making the charge against the person whose rendition is sought. Without inquiring whether this rule applies to both the Governor and the courts, or, in truth, whether it applies to either, we are satisfied that in the present instance a sufficient excuse for the delay appears in the various papers going to make up the requisition. Among these papers was the affidavit of the Colorado district attorney, already mentioned. The charge against petitioner was for failure to provide for his minor child under a decree of divorce requiring him so to do. Among the papers submitted to the Governor of California was an affidavit made by the complaining witness, the former wife of petitioner and the mother of the minor child in question. It is averred in the affidavit: "Affiant * * * says that after diligent search she has just learned that the said Lester E.

Norquist is under arrest in the city of Los Angeles, State of California. * * * " The same language occurs in an affidavit, part of the record before the Governor of this state, which was made by an adult daughter of petitioner and of his former wife.

Other points are made by petitioner, but we are satisfied they are without merit.

We think the order of rendition was properly made by the Governor.

Writ discharged. Petitioner remanded to custody.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

110 Cal. App. 467

LEVINSON v. SILVERMAN.
Civ. 7710.

District Court of Appeal, First District,
Division 2, California.

Dec. 16, 1930.

1. Mandamus ⇨190.

Judgment granting mandamus directing judge to certify bill of exceptions carried costs, although nothing was said about costs (Code Civ. Proc. § 1095).

2. Mandamus ⇨190.

Party prevailing in mandamus proceeding to compel judge to certify bill of exceptions was required to file cost bill if he desired costs (Code Civ. Proc. §§ 1033, 1110).

3. Mandamus ⇨190.

Costs incurred in mandamus proceeding to compel judge to certify bill of exceptions could not be collected as costs in main action (Code Civ. Proc. § 1027).

4. Costs ⇨264.

Where it was admitted that amount paid for printing record on appeal was \$118 and not \$122, as listed in defendant's cost bill, plaintiff's motion to tax should have been granted.

5. Costs ⇨203.

Memorandum of costs served before remittitur had been filed held prematurely served.

6. Costs ⇨220.

Where first memorandum of costs was prematurely served but second copy was both served and filed in proper time, and order denying motion to strike did not specify to which memorandum it referred, error, if any, held waived.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by M. Levinson against Herman Silverman. From orders refusing to tax costs and to strike out cost bill, plaintiff appeals.

Affirmed in part, and reversed in part.

Henry O. Wackerbarth, of Los Angeles, for appellant.

James, Pace, Smith & Younkin, of Los Angeles, for respondent.

STURTEVANT, J.

[1-4] This is an appeal by the plaintiff from an order refusing to tax costs, and also from an order refusing to strike out a cost bill. Heretofore this plaintiff commenced an action against the defendant to recover the balance of the purchase price of certain Russian rubles. Thereafter judgment was rendered in favor of the plaintiff. The defendant made a motion for a new trial. His motion was denied, and he took an appeal. Later when he presented his bill of exceptions for settlement the plaintiff objected to the settlement and the objection was sustained. Thereupon the defendant filed in the Supreme Court an original application for a writ of mandamus directing the trial judge to settle and certify the bill of exceptions. *Silverman v. Thompson*, 196 Cal. 585, 238 P. 684. The writ was granted. Although the judgment granting the writ said nothing about costs, under the provisions of section 1095 of the Code of Civil Procedure the last-mentioned judgment carried costs. Nevertheless, the prevailing party did not in the mandamus proceeding file a cost bill. If he wanted costs, he should have done so. Code Civ. Proc. §§ 1033, and 1110. The judgment in the main action was reversed. *Levinson v. Silverman*, 89 Cal. App. 416, 264 P. 796. On April 26, 1928, the defendant served on the plaintiff his memorandum of costs. The remittitur from the District Court of Appeal reversing the original judgment was filed in the office of the clerk of the trial court on May 2, 1928. The memorandum of costs which had theretofore been served was filed on May 3, 1928. The plaintiff prepared and served a notice of motion to tax and of a motion to strike it out. The hearing of that motion was noticed for May 10, 1928. After the notice and motion had been filed, the defendant served and filed another copy of his memorandum on May 7, 1928. In his motion to tax, the plaintiff made his objection to three items of expense claimed to have been disbursed in the mandamus proceeding.

Those items incurred in the mandamus proceeding were \$1 for the clerk's certificate, \$7.50 filing fee in the Supreme Court, and \$35.50 for the cost of printing the record. The plaintiff concedes that said items could have been collected in the mandamus proceeding if the defendant had seen fit to follow that procedure; but the plaintiff contends that they may not be collected as costs in the main action. 15 C. J. 186. The defendant cites and relies on the language contained in section 1027 of the Code of Civil Procedure. Conceding that the language is somewhat broad, nevertheless it is confined to expenditures actually paid out by the prevailing party in connection with the appeal. The section does not purport to award costs in one action that were incurred in another action or special proceeding. In *Chapin v. Broder*, 16 Cal. 403, at page 418, the court said: "The recovery of costs is a matter regulated exclusively by statute, and the mode pointed out for that purpose must be strictly pursued." Connected with the foregoing items the plaintiff objected to a charge of \$122 for printing the record on appeal in the main action. It was an admitted fact that the amount paid for said purpose was \$118 and not \$122. The item should have been taxed at \$118 and not \$122. We think the motion to tax should have been granted as to the items complained of.

[5, 6] The motion to strike the entire cost bill rests on the fact that the plaintiff's memorandum of costs was served before the remittitur had been filed, although it was filed thereafter. However, as stated above, another copy was served and filed on May 7, 1928. As to the last-mentioned copy, the record does not show that any attack whatever was made thereon. The original memorandum was prematurely served, although it was filed in proper time. The second copy was both served and filed in proper time. The order denying the motion to strike does not specify whether it refers to the memorandum served on April 26, 1928, or the one served on May 7, 1928. Under these circumstances the error, if any, was waived. 7 Cal. Jur. 294; *Legg & Shaw Co. v. Worthington*, 157 Cal. 488, 108 P. 284.

The order refusing to strike out the memorandum of costs is affirmed, but the order refusing to tax the costs is reversed, and the trial court is directed to make an order not inconsistent with what has been said above. The appellant will recover his costs on this appeal.

We concur: NOURSE, P. J.; SPENCE, J.

WOLFE v. WILLARD H. GEORGE, Inc.
Civ. 4224.

District Court of Appeal, Third District, California.

Dec. 18, 1930.

Rehearing Denied Jan. 17, 1931. Hearing Denied by Supreme Court Feb. 16, 1931.

1. Bailment ⇨14(1).

Bailee of garments for hire was bound to exercise ordinary care to preserve property in same condition as when received and to return garments when bailment terminated or on demand (Civ. Code, § 1852).

2. Bailment ⇨22.

In absence of agreement regarding time during which deposit of garments should continue, it could be terminated by depositor at any time (Civ. Code, § 1854).

3. Bailment ⇨23.

It is sufficient excuse for nondelivery of property deposited as bailment that it was lost or stolen before bailment terminated without bailee's fault.

4. Bailment ⇨31(3).

Bailee's refusal to deliver chattels when bailment is terminated or on notice constitutes prima facie evidence of conversion.

5. Bailment ⇨31(1).

Failure to return property for unreasonable length of time after bailment is terminated places burden on bailee to show good cause for detention.

6. Bailment ⇨23.

Theft after termination of bailment furnishes no excuse for wrongful delay in restoring property to owner after adequate demand.

7. Bailment ⇨23.

Bailee's delay of 18 days following demand for return of garments, which were stolen after demand, constituted negligence.

Bailee was engaged in business of storing goods for hire, and bailor deposited fur garments with bailee to be kept until demand therefor. On October 17, 1924, and on three occasions thereafter prior to November 5, 1924 bailor demanded an immediate delivery of garments, and bailee promised to return the furs on October 20, 1924, but failed to do so. On November 5, 1924, an attempt was made to return them with automobile, but automobile was held up en route and furs were stolen.

8. Bailment ⇨31(3).

Evidence warranted finding that bailee's negligent delay in returning garments stolen while being returned amounted to conversion.

9. Bailment ⇨31(3).

In action for conversion of fur garments stored with bailee for hire, evidence held sufficient to show market value of furs at time of conversion.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Clara L. Wolfe against Willard H. George, Inc. From a judgment for plaintiff, defendant appeals.

Affirmed.

George De Lany Blair, of Los Angeles, for appellant.

Steadman G. Smith, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment for the sum of \$1,250 for conversion of fur garments which were stored with the appellant as a depositary for hire.

The appellant was engaged in the business of a bailee of goods for hire. The respondent owned five fur garments. June 10, 1924, these garments were deposited with the appellant for hire, to be kept for the benefit of the respondent and returned to her upon demand therefor. October 17, 1924, and upon several subsequent occasions prior to November 5, 1924, the respondent demanded an immediate delivery of the garments. The appellant promised to return the furs on October 20, 1924, but failed to do so at that time, or at all. After several demands on the part of the owner for a return of the property and a delay of eighteen days, Harold Chrisman, a young man who was employed with the appellant, attempted to return them with an automobile on November 5, 1924. He testified that the machine was held up en route and that he was robbed of the furs. He said: "I stopped at Fifth and Commonwealth to a house, delivered a coat, come back. There was two men coming down the street. Just as I was going, practically getting up to the car, one fellow said, 'I got you covered.' I didn't hear him at first, I looked and saw the gun at the time. So he told me, 'Get in the car and have a ride.' So I got in the car. The other fellow—one fellow drove, the other come around to the back seat, he put a gun to the back of my neck. We drove around from three o'clock until six. They let me out at Fourth and Commonwealth, told me to walk three blocks and not look around. Then I called the police, * * * They drove around to a vacant lot, one of the fellows got out, went back and told me to unload the furs on the curb. I unloaded the furs at the curb, waited a few minutes. He gave a signal, and there was

also four men in the back. So then I drove around a couple of blocks. * * * They told me to get out and walk three blocks and then I could do as I pleased."

This story seems improbable. It will be observed that Chrisman contradicts himself. He first says, "One fellow drove, the other come around to the back seat, he put a gun to the back of my neck." Later he says, "So then I drove around a couple of blocks." It also seems strange that they started from Fifth and Commonwealth and that they "drove around from three o'clock until six," three hours, and then landed "at Fourth and Commonwealth" within a block of their starting point. However, this evidence of the robbery was not refuted. The court found that the furs were stolen. All the other material issues were found in favor of the respondent, including the fact that the furs were worth \$1,250. Judgment was rendered for that amount. This appeal was then perfected.

The appellant asserts that the evidence fails to support the judgment and findings because (1) it does not appear the depositary refused to return the furs to the owner when their possession was demanded, (2) the garments were stolen through no fault or negligence on the part of the depositary, and (3) the market value of the property was not established.

[1-6] The appellant was bailee of the garments for hire. It was not an insurer of the property. Under such circumstances as the present case presents, the bailee is bound to exercise ordinary care to keep and preserve the property in the same condition in which it is received (section 1852, Civ. Code; 4 Cal. Jur. 22, § 13; *England v. Lyon Fireproof Storage Co.*, 94 Cal. App. 562, 271 P. 532), and to return the garments to the owner when the bailment is terminated, or upon demand. In the absence of an agreement as to the length of time during which a deposit is to continue, it may be terminated by the depositor at any time. Section 1854, Civ. Code. It is a sufficient excuse for nondelivery of property deposited as a bailment that it was lost or stolen, before the bailment is terminated, without fault or negligence on the part of the bailee. 4 Cal. Jur. 22, § 13; 6 C. J. 1140, § 93. A refusal on the part of the bailee to deliver chattels to the owner when the bailment is terminated by lapse of time or upon notice constitutes prima facie evidence of a conversion thereof. 38 Cyc. 2031, subd. C. Failure to return property to the owner for an unreasonable length of time after a bailment is terminated by notice or otherwise places the burden on the bailee to show good cause for detaining the property. An unwarranted failure to return property after the termination of a bailment may constitute wrongful acts of dominion antagonistic to the owner's title and right of possession, amount-

ing to conversion. The period of time and the circumstances under which property, which is wrongfully withheld from the owner, will constitute conversion thereof, are largely questions of fact for the determination of the court or jury. A theft of goods subsequent to the termination of a bailment furnishes no excuse for unwarranted and wrongful delay in restoring the property to the owner after adequate demand therefor.

In the case of *Durell v. Mosher*, 8 Johns. (N. Y.) 445, where the defendant had taken some sheep from the plaintiff's flock, supposing that they belonged to him, the defendant, but subsequently promised to return them and failed to do so, the court said: "Though a demand and refusal of the sheep was not proved; yet the promise by the defendant to return them, and a failure to do so, was evidence of a conversion."

In the case of *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377, a slave which was held as a bailment was not returned to the owner when the bailment terminated. The slave subsequently died while he was retained by the bailee. In a suit of trover against the bailee, the court said: "The bailment * * * terminated when the objects for which it was made were accomplished, and it then devolved upon the party in possession * * * to return the slave * * *."—*Story on Bailments* § 414; *Benje v. Creagh's Adm'r*, 21 Ala. 151. As to him, therefore, the plaintiff was entitled to recover damages."

[7, 8] In the present case, the appellant was engaged in the business of storing goods for hire. At least four specific demands for the prompt delivery of the garments were made upon the bailee by the owner. A delay of eighteen days followed the first demand before any attempt to return them was made. There was a definite promise on the part of the appellant to deliver them on October 20th. This promise was not fulfilled. No satisfactory excuse for the unwarranted delay in attempting to deliver the goods was offered by the appellant. A prompt delivery of the furs, upon demand, would probably have avoided the theft. These circumstances constitute negligence.

There is substantial evidence upon which the court was warranted in finding this negligent and wrongful delay amounted to a conversion.

[9] There is also ample evidence of the market value of the furs at the time of the conversion. Several witnesses testified to the value of such furs. There was evidence of the approximate original cost of the furs and the condition thereof. An appraisal of their value was furnished the respondent by Mr. Ayling, the secretary of the corporation appellant. It contained the following language and valuations:

"In executing this appraisal of merchandise, we use our best judgment based upon our experience and the market value at the time of appraisal * * *

"Willard H. George
Furs
Los Angeles, Calif.

Name Mrs. H. C. Wolfe

Address Windemere Hotel, Chicago, 6-11-24

Insurance Broker Blaine, Appraiser.

Description	Value
Persian broadtail coat 46" long 92" sweep 10" Kolinsky chin collar..	\$2000.00
Hudson seal jacquette 28" deep 10" civit chn collar.....	450.00
2 skin dyed Hudson Bay Sable scarf	250.00
4 drop skin Hudson Bay Sable muff	300.00
Silver fox scarf, animal style....	450.00
7 skin flat mink muff.....	300.00"

The judgment is affirmed.

110 Cal. App. 597

In re VETTER'S ESTATE.

ANGELO v. VETTER.

Civ. 7510.

District Court of Appeal, First District, Division 2, California.

Dec. 22, 1930.

Rehearing Denied Jan. 21, 1931. Hearing Denied by Supreme Court Feb. 19, 1931.

1. Wills ⚡302(8).

In proceeding to have lost will admitted to probate, judgment for defendant *held* not error, notwithstanding plaintiff's uncontradicted testimony.

Memories of plaintiff's witnesses carried facts very accurately and for long period of time in almost same identical words, and while testimony under such circumstances must not necessarily be rejected as unworthy of belief, it must inevitably occur that trial judge will regard it with serious misgiving. Defendant's testimony showed that deceased objected to making a will, that widow never saw will and never destroyed it, and that attorney immediately after deceased's death made search for will and did not find one.

2. Wills ⚡302(8).

Lost will, not destroyed fraudulently or by public calamity during testator's lifetime, must be proved in existence at time of death and provisions proved by two witnesses (Code Civ. Proc. § 1339).

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Frederick J. Vetter, deceased. Proceeding by Henry J. Angelo to have a lost or destroyed will admitted to probate, opposed by Anna Vetter. Judgment for defendant, and plaintiff appeals.

Affirmed.

Kington & Cunningham, of San Francisco, for appellant.

Theodore J. Roche and Keogh & Olds, all of San Francisco (Henry E. Monroe, of San Francisco, of counsel), for respondent.

STURTEVANT, J.

[1] Henry J. Angelo commenced a proceeding to obtain a judgment admitting an alleged lost or destroyed olographic will to probate. Process was served on Anna Vetter, the surviving wife of the decedent, Frederick J. Vetter, and she appeared and answered. A trial was had before the trial court. The trial court made findings of fact in favor of the surviving wife, Anna Vetter, and, from a judgment entered thereon, the plaintiff has appealed under section 953a of the Code of Civil Procedure. In his opening brief the plaintiff contends that the findings of the court are unsupported by the evidence; the findings are contrary to the evidence; the court prejudicially erred in the admission of evidence; the court prejudicially erred in excluding evidence; and the court arbitrarily found and decided contrary to evidence and law. True it is that certain declarations of the deceased were objected to by the plaintiff and that his objections were overruled. However, the plaintiff does not brief the ruling made by the trial court showing wherein any error was committed, nor that the error, if any, was prejudicial to the plaintiff. In his brief the plaintiff earnestly contends that the trial court arbitrarily disregarded the testimony given by the witnesses called by the plaintiff. In this connection the plaintiff claims there was no conflict in the evidence and that the plaintiff proved a full and complete case. In reply, the defendant contends that there was an abundance of conflict in the evidence, and furthermore she contends that the case as presented by the plaintiff failed to prove certain material issues.

Richard Spreckels, a witness called by the plaintiff, testified that in the month of May, 1915, he met the deceased in the office of an attorney at law, Charles L. Patton. He was not sure whether the plaintiff was present. He testified that at said time and place the decedent produced a paper which he handed over to the witness, and that the paper had written thereon, "I give to my friend, Henry J. Angelo, fifty thousand dollars." The witness further testified that the paper was dat-

ed. The year of the date was 1915, but he could not remember the month nor the day of the month. He did not testify whether the place of the dating was or was not on the paper. The signature on the paper was "Fred Vetter." The foregoing testimony was given by the witness in the month of June, 1928. The witness had been acquainted with the decedent some months prior to the meeting just described. Mr. Vetter died August 3, 1915. After that date and before the end of the year 1915 the witness saw the plaintiff on several occasions. At one time he asked the plaintiff if he had received his \$50,000, and the plaintiff said he had not. It does not appear that he and the plaintiff had any other discussions on the subject of the will until the date of the trial. He was not sure whether the writing which he saw contained words or figures, or both, expressing the sum \$50,000. There was evidence introduced that the decedent never signed his name omitting the middle initial, but wrote it "Fred J. Vetter." The witness testified that he had received letters from Mr. Vetter, but gave no testimony regarding the manner in which the decedent signed his name.

Fred J. Hildebrant testified that he knew both Mr. Vetter and the plaintiff. In the early part of 1915 the witness and the plaintiff were in a room at the residence of Mr. Angelo. Mr. Angelo went out of the room and was gone for about five minutes. While he was out, the witness testified that Mr. Vetter took out of his pocket an envelope, opened it, and took out a piece of paper on which appeared, in the handwriting of Mr. Vetter: "I leave to my friend Henry Angelo the sum of fifty thousand dollars. Fred Vetter." No explanation of any kind or nature was given by the witness why the decedent happened to exhibit the paper to him. Regarding the date, he testified, "All I can remember 1915." As to the familiarity of the witness with the writing of the decedent, he testified that about two years before that in a store in which he was employed he saw the decedent sign orders for goods. After the above occurrence, the witness remained in San Francisco about three years. Then he was out of town five years. He did not see Mr. Vetter again before the death of the latter. Before the death of the decedent, the witness did not tell Mr. Angelo what he had seen, but he testified that in 1923 he told Mr. Angelo the same thing which he testified to on the trial.

The plaintiff testified that in the fore part of 1915 the decedent showed to him a paper on which was written: "I give Henry Angelo fifty thousand dollars." This witness also stated the date as 1915, but did not remember the month nor the day of the month; neither did he state the place of the date. The document was signed "Frederick Vetter." It was all in the handwriting of the decedent. The will was so exhibited to him at the safe de-

posit vault. When the decedent exhibited the document, he said to the witness: "You never have to worry or want for anything any more in your old age."

The witness Beauce testified that he and the plaintiff were assistants in the tax collector's office. He recalled the death of Mr. Vetter on August 1, 1915. Several days before his death Mr. Vetter came in. The witness, the plaintiff, and Mr. Vetter were the only ones present. The witness was on one side of a desk and the plaintiff was on the other side. As the decedent came in he took an envelope from his pocket, and, speaking to Mr. Angelo, said: "Here is my will. You needn't worry the rest of your life." And, turning to the witness, he said: "Do you think fifty thousand dollars is enough for this young man?"

Adverting to the conversation in the tax collector's office, the plaintiff testified that the decedent said, "Here is my will" and handed it to me and I opened it and looked in the envelope and took it (the will?) out and said 'Fred, I don't want this. People might think I influenced you by taking it. I don't want it. Why did you take it out of the safe deposit box?'" He put it back in his pocket. It does not appear that any witness made any memoranda at any time of any of the foregoing facts.

There was oral evidence and written evidence that commencing as early as the year 1911 the plaintiff had received many gratuitous donations in the form of checks from the decedent. After the defendant took out letters of administration, this plaintiff presented to her, on June 15, 1916, a claim for \$4,244.50 in which the payment was alleged to be contingent on the sale of the Market street property. The plaintiff testified that he consulted as his attorneys among others Mr. Charles L. Patton, Mr. John P. Jones, Mr. Daniel Ryan, Mr. Francis V. Keesling, Mr. Joseph Levine, and finally Messrs. Kingston and Cunningham, who commenced this proceeding by filing the petition on May 29, 1928. The record does not show that to any one of those attorneys, except Mr. Jones, who was dead at the time of the trial, and except the last two, the plaintiff ever stated the fact that the alleged will was ever in existence. It is the foregoing evidence which the plaintiff contends was uncontradicted and which the trial court should have accepted and followed. This claim assumes that the evidence was uncontradicted. Men's minds may differ. If the trial court determined that in the extreme accuracy of detail and the close agreement of the statements of the witnesses rested its weakness and was its contradiction, we could not say it erred. It is very peculiar, and quite out of the ordinary, that memories should carry so accurately and for such a long period of time almost all of the facts in almost the same identical words. While we cannot say under such cir-

cumstances it must necessarily be rejected as unworthy of belief, yet it must inevitably occur that the trial judge will regard it with serious misgivings. *Turman v. Ellison*, 37 Cal. App. 204, 174 P. 396. In *Davis v. Judson*, 159 Cal. 121, at page 128, 113 P. 147, 150, the court was considering a similar question. Among other cogent remarks the court said: " * * * And, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." See, also, *Nichols v. Pacific Electric Ry. Co.*, 178 Cal. 630, 631, 632, 174 P. 319. Certainly we are not able to say as a matter of law that there were no matters or circumstances in the instant case which at all impaired the accuracy of the evidence given by the witnesses quoted above.

[2] There was no testimony that the purported will was written in San Francisco or any other particular place. There was testimony that it bore a date consisting of a statement of the year, the month, and the day of the month, but there was no evidence as to what month or what day. The purported will as described by the witnesses included a legacy to this plaintiff. The testimony does not show that it did not include other legacies or bequests, and, if so, what they were. Under a very slight variation in the facts, it was held that the proof was insufficient. *Estate of Price*, 14 Cal. App. 462, 112 P. 482. No claim was made that during the lifetime of the testator without his knowledge the purported will was destroyed fraudulently or by public calamity. It was therefore statutory that the will should not be proved as a lost or destroyed will unless it was proved to have been in existence at the time of the death of the testator and unless its provisions were clearly and distinctly proved by at least two credible witnesses. Code Civ. Proc. § 1339. Moreover there was testimony given in behalf of the defendant that the decedent objected to making a will because he entertained the idea that the making of a will would hasten his death. If he entertained that opinion regarding a will which would dispose of all of his property, it may readily be assumed that he entertained the same opinion regarding a will that would dispose of a part of his property. There was also the positive testimony of the defendant that she never saw the decedent's will and never destroyed it. And there was the positive statement of her attorney that immediately after the decedent's death he made a search for a will and did not find one.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

VANDIVEER v. CHARTERS et al.

Civ. 4219.

District Court of Appeal, Third District,
California.

Dec. 11, 1930.

1. Appeal and error ⇨1071 (3).

In action for false imprisonment and to recover money paid, finding unsupported by evidence *held* not essential and not to require reversal.

The court on sufficient evidence found facts showing that plaintiff was restrained of her liberty at her employer's store in connection with charges of theft and by duress compelled to acknowledge the theft and agree to make restitution by drawing money from a savings account. The court also found that by threats of arrest and intimidation, defendants compelled plaintiff to accompany one of them to her place of residence, and there by threats of arrest and intimidation and threats of use of force and violence compelled her to obtain her deposit book and to withdraw the money from the bank. There was no evidence of any restraint or imprisonment while plaintiff was going to her residence and to the bank.

2. Appeal and error ⇨989.

On conflicting evidence, appellate court merely determines whether testimony for plaintiff, successful below, is sufficient to sustain judgment.

3. False imprisonment ⇨2.

"False imprisonment" is trespass committed against another's person by unlawfully arresting or detaining him without legal authority, in prison or any place temporarily used for that purpose (Pen. Code, § 236).

Pen. Code § 236, defines "false imprisonment" as unlawful violation of personal liberty of another.

[Ed. Note.—For other definitions of "False Imprisonment," see Words and Phrases.]

4. False imprisonment ⇨5.

Use of actual physical force is not necessary to constitute false imprisonment (Pen. Code, § 236).

5. False imprisonment ⇨39.

Whether words or conduct of defendants charged with false imprisonment were such as to induce plaintiff to apprehend use of force and coercion if she did not act in accordance with their demands *held* question of fact for trial court.

Plaintiff was called into stock room of her employer's store, where, after intimation that officer was present, she was accused of stealing from her employer, threatened with arrest, and given three minutes' time within which to copy and sign alleged confession, or be taken to jail.

6. False imprisonment ⇨31.

In action for false imprisonment and to recover money paid, evidence *held* to warrant finding that alleged confession of theft was signed under duress.

7. False imprisonment ⇨36.

\$750 as exemplary and actual damages for false imprisonment *held* not excessive.

8. Payment ⇨87(2).

Amount paid in settlement of alleged theft of which plaintiff was falsely accused under threats of arrest was recoverable.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Jessie B. Vandiveer against James W. Charters and others. From a judgment for plaintiff, the defendant named appeals.

Affirmed.

Errol O. Shour, of Los Angeles, for appellant.

D. Howard Painter and A. P. Ohanneson, both of Los Angeles, for respondent.

PLUMMER, J.

The plaintiff had judgment against the defendants in the sum of \$1,450 and costs of suit in an action based upon a charge of false imprisonment, \$700 of said sum being for the amount of money involuntarily paid by the plaintiff to the defendants, and \$750 for and on account of exemplary and actual damages. From this judgment the defendant Charters appeals.

The record shows that on the 11th day of June, 1926, the plaintiff was, and for some four or five years prior thereto had been, an employee, as clerk in the drug store owned by the defendant James W. Charters. Prior to the 11th day of June, 1926, the defendant Charters employed the defendants Condon and Johnson to check up on the clerks employed in his drug store. This work was begun on or about the 9th day of June, 1926, and was conducted for a period of two or three days. On the 11th day of June, 1926, the defendants Condon and Johnson, in the presence of the defendant Charters, took several dollar bills, money of the United States of America, and marked them with an identification mark. Thereafter, and on the same day, the opera-

tives employed by the defendants Condon and Johnson went into the drug store referred to and made purchases of merchandise from the plaintiff, paying her for said purchases with money, a part of which consisted of the marked bills. The plaintiff did not ring up on or deposit in the cash register the entire purchase price of the purchases made, as aforesaid, but instead of doing so, placed a part of the purchase price, including the marked bills referred to, in a pocket in an apron worn by the plaintiff. Shortly thereafter the defendants Condon and Johnson reported the result of their investigation to the defendant Charters, who thereupon informed the plaintiff that Condon and Johnson desired to question her, and immediately the plaintiff and defendants Condon and Johnson went into an adjoining room, known as the stock room, in the rear of the drug store. While in said room the defendants Condon and Johnson demanded of the plaintiff that she produce from her person and give to the defendants Condon and Johnson the bills previously marked which she had failed to ring up on the cash register in the drug store heretofore mentioned. The plaintiff thereupon produced from the pocket in the apron worn by her, four of the marked dollar bills. It appears that the plaintiff and the defendants Condon and Johnson remained in the stock room for a considerable period of time, the court finding that the interview lasted about three and one-half hours, during which time the defendant Charters was in and out of the room a number of times. The plaintiff was also called out of the room once or twice to answer telephone calls. During the time the plaintiff and the defendants were in the stock room, as just mentioned, the defendants Condon and Johnson produced, and induced the plaintiff to copy and sign, a confession in the following words:

"Los Angeles, Calif., June 11, 1926.

"During the last four (4) years of my employ by J. W. Charters in his drug store located at 54th Vermont, Los Angeles, Calif., I have taken for my own use money that rightfully belong to him amounting to Twenty-two Hundred and Fifty (\$2250.00) dollars. Some days I took nothing and some days I took as high as \$6.00 dollars.

"I make this statement of my own free will and accord without threats or violence or promises of immunity. I promise to lead a straight-forward life in future and my failure to do so will be sufficient grounds to make this statement public.

"Jessie B. Vandiveer."

After this writing had been signed, the plaintiff, in company with the defendant Condon, went to the home of the plaintiff in an automobile driven by the defendant Condon, a distance of some 15 or 16 city blocks from the drug store, obtained a passbook, went to

a bank, where the plaintiff withdrew therefrom the sum of \$700, obtaining the same in the form of a cashier's check, defendant Condon remaining in the automobile outside the bank while the plaintiff entered the same for the purpose of obtaining the sum of money referred to. The plaintiff returned from the bank with a cashier's check, and being informed by Condon that the \$700 was desired in the form of cash, the plaintiff returned to the bank, obtained the cash in lieu of the cashier's certificate, and returned to the automobile where the defendant Condon was waiting, and delivered to him the \$700, and accompanied the defendant Condon back to the drug store where the defendant Condon turned over to the defendant Charters the \$700. The plaintiff sued for the return of the money, and for damages in the sum of \$12,500 for false imprisonment. The defendant Charters filed a cross-complaint, asking for the sum of \$2,250, the sum mentioned in the writing signed by the plaintiff hereinbefore set forth.

Among other things, the court found as follows: That on the 11th day of June, 1926, at the drug store to which we have referred, the defendants accused the plaintiff of having committed thefts, all of which accusations were false and without merit, and were made without a prior investigation as to the merits of said accusations; and that the said defendants did, at said time and place, subject the plaintiff to a severe cross-examination commonly termed the "third degree"; and that the defendants did, at said time and place, threaten to have the plaintiff arrested and placed in prison. That the defendants, by reason of their false accusations and harsh conduct, did forcefully detain plaintiff and grossly humiliate her. That the acts, words, and conduct of the defendants, as aforesaid, continued for a period of over three hours; that at the expiration of said period the plaintiff was worn out, tired, and fatigued both mentally and physically; that by reason of the acts, words, and conduct of the defendants, as aforesaid, while the plaintiff was undergoing said cross-examination commonly termed the "third degree," and while the plaintiff was being forcefully detained and restrained by the defendants, and while the plaintiff was in a fearful and dazed condition of mind, worn and tired out, etc., she copied and signed the paper to which we have referred.

The court further found, in finding No. V, that the defendants, by means of threats of arrest and by intimidation, restrained, detained, and imprisoned plaintiff, and that the defendants did, by the exercise of threats of arrest, and intimidation, compel plaintiff to accompany the defendant Condon to plaintiff's place of residence, and then and there, by means of threats of arrest and intimidation, and by threats of the use of force and violence compel the plaintiff to obtain her deposit book; and, likewise, did compel plaintiff to withdraw the \$700 from the bank, as hereinbefore stated.

[1] A portion of finding No. V is seriously challenged as being wholly unsupported by the evidence, in that it is claimed the defendant herself did not testify that any threats were made of the use of force or violence relative to compelling her to withdraw the \$700 from the bank, and that the plaintiff went into her own home alone to get the passbook to withdraw the money from the bank, and also went into the bank twice, unaccompanied by any of the defendants, and that during such period of time, there was no restraint and no imprisonment. In this behalf we think the contention of the appellant well taken. While the circumstances as detailed by the plaintiff, if accepted by the trial court as being a correct statement of the occurrences, would constitute a sufficient basis upon which to enter judgment for the return of the money, there does not appear to be any basis for the allegation that during said period of time the plaintiff was either restrained or imprisoned. This, however, does not necessitate a reversal of the judgment, the portion of finding number V challenged by the appellant not being necessary for its support.

[2] A number of witnesses testified in this cause contradicting the plaintiff upon every vital issue, and as the typewritten record before us appears, the claim of the appellant that the judgment should have gone in favor of the defendants would appear to be amply sustained by the weight of the testimony. But the witnesses are not before us, and if the trial court saw fit to accept and believe the testimony of the plaintiff as against the testimony of a number of other witnesses, if that testimony is sufficient to sustain the judgment, our inquiry as to the sufficiency of the testimony is ended. For this purpose we have only to review the testimony of the plaintiff, as the record indicates the findings and judgment of the trial court are essentially based thereon.

After testifying to her employment in the drug store for a number of years, and as to seeing the defendants there on the 11th day of June, 1926, the plaintiff testified substantially as follows: "At about 11 o'clock we had quite a rush of customers, an unusual number of customers for that time in the morning; I was entirely alone in waiting on customers; I waited on these customers, and in waiting on our customers it was usual, if rushed, to lay the money on the register until we could get time to ring it up, that is, if we were alone; so I laid some money, change and bills, on the register that was near the fountain, and there was a place to walk in back of the fountain, either this way (illustrating), or down toward the back of the store; a gentleman came in who wanted to look at a shaving brush; I immediately went back to wait on him, and as I was waiting on him, I noticed a man sitting at the end of the fountain on a stool near the cash register, and I went back and picked up these bills and put them in my little black satin apron pocket; after I had

sold the shaving brush, Mr. Charters came into the store and called me back; as we went back into the back room, Mr. Charters introduced me to Mr. Condon, and Mr. Condon said, 'Is there an officer here?' And just then, from behind the prescription case, Mr. Johnson stepped in and said, 'All right.' Mr. Condon said, 'I am representing the Bonding Company.' Mr. Johnson asked me about the money; he asked me to produce it; I handed him my purse; he asked me then for the bills; I told him that I hadn't had time to ring it up. Mr. Johnson said, 'Do you realize that those are marked bills?' I said, 'What do you mean, marked bills?' Johnson said, 'It means you have been stealing from Mr. Charters.' After I had handed Condon my coin purse, Condon said, 'Have you any more money?' He looked over the coin purse very carefully * * * and handed it back, saying, 'This is all right;' I dropped it down in the front of my dress; then Condon said, 'Have you any more money on your person?' and I said, 'No, sir.' He said, 'Do you want me to search you?' and I said, 'No, sir.' 'You know,' said Condon, 'the other day I practically undressed a woman that did not want to be searched.' Condon said it would not do for me to take a couple of bills. Up to this time Condon had not made any remark about money. Mr. Condon said that I had taken things off the shelves at various times and taken them home, and he also asked me how many times I had deliberately opened the register drawers and taken out money; I told him I had never done anything of the kind; Mr. Condon kept telling me that I had been doing these things; then Condon asked me if I had any money in the bank or any property, and I told Mr. Condon that I thought that was my business; Mr. Condon questioned me a great many times, and I wouldn't tell him; he got very angry and walked out of the room; threw a note book that he had in his hand and struck me in the side; walked out of the room and stayed there a few minutes and left me in the room with Mr. Johnson; Mr. Condon came back in and I begged him to bring Mr. Charters so that I could talk with Charters; Condon would go back in the room and come back and say that Charters was busy; Condon kept telling me that I had been doing these things; finally I told Condon and Johnson that I had \$700.00 in a savings account that had been given to me Christmas by Mr. Vandiveer, \$485.00 of which was my mother's money which she had received at Christmas; they said, 'You have stolen that from Mr. Charters, and you know you have.' I told them I had canceled checks to show for this money. Mr. Condon finally went out and called Mr. Charters in, and they said, 'Well, what do you think about \$2500.00?' I went out and answered the telephone once; I told them that I had never taken anything, and that the money I had in the bank was my money. Finally

Mr. Charters said, 'Make it \$2500.00.' Mr. Condon went outside and then returned and said, 'I will give you just three minutes now to copy and sign this confession, or I am going to take you to jail. Do you want to go to jail?' I said I couldn't think of anything like that; I have no reason to be taken to jail; I have a mother and two children. Condon said, 'We don't care anything about your mother and two children. You either copy and sign this, or we are going to take you with us.' They gave me a couple of boxes the same height, and rather than being taken to jail, I copied and signed the confession; I sat on one box and used the other in copying the confession; I thought they were plain-clothes men, and Condon told me if I didn't sign the confession within three minutes, I would be taken.' After the writing was signed by the plaintiff, the plaintiff accompanied Mr. Condon to the bank for the cash, as we have heretofore stated.

The plaintiff further testified that she thought Condon and Johnson were plain-clothes men. "Condon told me that he was working for the higher-ups; that he was just a representative of the Bonding Company, and that I must pay this \$700 or they were going to take me up; that they were going to take me to jail; they said this a dozen or more times; they kept repeating that to me, that they were going to take me, and Mr. Condon said he had other places to go, and that if I didn't do it, they were certainly going to take me right away, if I didn't tell them what I had taken and what I had done at different times after accusing me of taking money out of the registers. Every five or ten minutes they would come back and say, 'How many times have you opened the cash register and deliberately taken money out that belonged, rightfully, to Mr. Charters?'" Asked as to whether she had made any request to be permitted to go out of the room, the plaintiff answered, "No, I didn't attempt to go out of the room while I was in there; naturally, when there was an officer of the law I didn't think I could if I tried, and I was afraid of being taken out, and that is what I was trying to avoid." Neither Condon nor Johnson were, in fact, officers of the law, but the inference could very well be drawn from the testimony of the plaintiff that language was used by Condon and Johnson to give the plaintiff the impression that one or the other of them was an officer authorized to make arrests. This testimony is all flatly contradicted, but there is no contradiction that the interview lasted approximately three and one-half hours; that during that period of time the plaintiff signed the writing set forth in this opinion, and thereafter accompanied Condon to the bank, procured the \$700, which finally found its way into the possession of the defendant Charters. Upon this testimony and the recital of other incidental facts not necessary to be set forth herein, the court found that the plaintiff

signed the confession under duress, paid over the money involuntarily, and was, at least for a portion of the time, restrained of her liberty through threats of being arrested, with the apparent show of force of the two men there ready to take the plaintiff to jail.

[3, 4] On the part of the appellant it is seriously contended that sufficient facts are not shown to warrant a finding of false imprisonment and judgment thereon. Section 236 of the Penal Code reads: "False imprisonment is the unlawful violation of the personal liberty of another." This does not necessarily mean that one shall actually be confined within the walls of a prison. It is a trespass committed by one against the person of another by unlawfully arresting him or detaining him without legal authority, either in prison or in any place temporarily used for the purpose of restraining and detaining such person. Nor is it necessary that there should be any actual physical force used to constitute the imprisonment. In 11 Ruling Case Law, p. 793, we find the following: "In order to constitute false imprisonment it is essential that there should be some direct restraint of the person; but to constitute 'imprisonment,' in the sense in which the word is here used, it is not necessary that there should be confinement in a jail or prison. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to go, or to go where he does not wish to go, is an imprisonment. * * * While actual force is not necessary, it is generally held essential that the conduct of the person complained of must show that force will be used to detain the plaintiff, if necessary, or that the person detaining him does so by some legal authority. The essential thing is the restraint of the person. This may be caused by threats, as well as by actual force; and the threats may be by conduct or by words. If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars."

[5] It was a question of fact for the trial court to determine whether the words "or conduct," of Condon and Johnson, were such as to induce the plaintiff, as a reasonable person, to apprehend the use of force and coercion, if she declined to act in accordance with their demands. According to the testimony of the plaintiff she was asked to go into the stockroom to be questioned. That she may have gone in there voluntarily does not change the fact that she was immediately confronted with an intimation that an officer was near. Thereafter, during the interview she was accused of stealing and threatened with arrest, and given three minutes' time within which to copy and sign the alleged confession. During

that three minutes of time she was effectually restrained and detained, as though she had been behind prison bars. The threat was to take her to jail at the end of three minutes, and the two men were there to take her. This, of course, is based upon giving full credence to the testimony of the plaintiff. To do so was within the province of the trial court.

[6] In 25 C. J. p. 454, § XI, the rule as to apprehension of force is thus stated: "The restraint constituting false imprisonment may arise out of acts, words, gestures or the like, which induce a reasonable apprehension that force will be used if the plaintiff does not submit, and it is sufficient if they operate upon the will of the person threatened, and result in the reasonable fear of personal difficulties or personal injuries. * * * A voluntary display of force, intended to deprive plaintiff of his liberty, even without actual laying hands on plaintiff, has been held sufficient, but there is no legal wrong unless the detention was involuntary in the sense of being contrary to the will of the plaintiff." The facts and circumstances set forth in the record are sufficient, if accepted by the trial court as true, to show that the signing of the alleged confession was entirely involuntary, and that the plaintiff copied and signed the instrument involuntarily, and while so doing was acting under the implied threat that at the end of the time specified, if she did not comply with the demands of the defendants, she would be taken to jail.

In the notes to the case of *Whitman v. A. T. & S. F. Ry. Co.*, collected in Ann. Cas. 1912D, pages 722 and 731, we find the following: "The question of false imprisonment is a mixed question of law and fact. It is a question of law for the court to decide what facts will constitute a false imprisonment; and a question of fact for the jury, whether such a state of facts does exist as is necessary to make out an imprisonment under the law as settled by the court." (Citing a number of cases.) Thus, in the present case it was necessary for the plaintiff to show that for an appreciable length of time she was detained and restrained of her liberty. This may be done either by threats of the use of force—there being present the means of using such force—or by the actual use of force. It was the province of the trial court to determine if such circumstances existed in the present case. We think the testimony sufficient to warrant the trial court in so finding, if the trial court felt justified in accepting the plaintiff's version of what took place in the stockroom in the rear of the drug store owned and operated by the defendant Charters.

In the case of *Fleisher v. Enslinger*, 140 Md. 604, 118 A. 153, referred to in the notes 31 A. L. R. 315, we find a state of facts very similar to those characterizing the instant case, and held sufficient to uphold the finding

of false imprisonment. We quote the following: "It appeared that the plaintiff, a saleswoman in the defendant's store, had sold an article and had dropped the money paid therefor, 20 cents, into her apron pocket, intending, so she said, to ring it up on the cash register as soon as she had finished showing goods to a customer who was waiting. Before she did so, however, she was summoned to the defendant's office, whither she was accompanied by another employee, and where, so she alleged, she was charged by the defendant with stealing money and articles, abused, and ordered to bring her pocketbook from the locker room, which she did while accompanied by an employee at the defendant's direction. She testified also that the defendant told her that he could have her arrested and that she feared such action. The court declared that any deprivation of another's liberty without his consent, by violence, threats, or otherwise, when done unlawfully, constituted false imprisonment, and that it could not be said that there was no evidence in this case to go to the jury." It was further said: "The plaintiff's willingness to comply with the defendant's orders would not, it was held, defeat recovery by the former if such willingness was induced by fear of arrest or force." To the same effect is the case of *Whitman v. A. T. & S. F. Ry. Co.*, supra, also reported in 85 Kan. 150, 116 P. 234, 34 L. R. A. (N. S.) 1029. See, also, *Hebrew v. Pulis*, 73 N. J. Law, 621, 64 A. 121, 7 L. R. A. (N. S.) 580, 118 Am. St. Rep. 716, and the cases there cited.

[7, 8] The amount of damages awarded is not excessive, and under the facts found by the trial court, the plaintiff was entitled to judgment for the return of the \$700 paid by her to the defendants, and also entitled to a judgment that the defendant Charters take nothing by reason of his cross-complaint; the testimony of the plaintiff being sufficient to sustain the finding in favor of the plaintiff with regard to these questions.

The judgment is affirmed.

All concur.

110 Cal. App. 565

FISHER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7628.

District Court of Appeal, Second District,
Division 2, California.

Dec. 19, 1930.

I. Divorce ☞160.

Default divorce judgment, void for plaintiff's fraud in preventing defendant from hav-

ing fair trial, is regarded by equity court as not rendered.

2. Divorce ☞161.

In wife's proceeding to set aside interlocutory divorce decree for fraud, and secure separate maintenance, court has same jurisdiction as though decree had not been rendered.

Application by Roy Fisher for a writ of prohibition to prevent the Superior Court of Los Angeles County from proceeding to punish petitioner and prevent it from hearing the order to show cause why he should not be punished for contempt.

Writ denied.

See, also, 294 P. 446.

Hancock & Rogers, of Huntington Park, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

IRA F. THOMPSON, J.

On July 5, 1929, the petitioner here commenced an action in the respondent court against his wife for divorce. After default of the defendant and trial, and on August 1, 1929, an interlocutory decree was made and rendered. On August 2, 1930, the defendant in the divorce action filed a complaint for separate maintenance on the grounds of desertion, willful neglect, and extreme cruelty, and also set up a cause of action to set aside and vacate the interlocutory decree, for the reason that it was obtained by the plaintiff there through extrinsic fraud practiced upon the court and the defendant. On August 22, 1930, the respondent court made an order requiring the petitioner here to pay to the plaintiff in the second action, during the pendency of the action, certain sums of money for the support of herself and their minor children and also the sum of \$75 as attorneys' fees therein. Later an order was made requiring the petitioner to appear and show cause why he should not be punished for contempt for refusal to comply with this order. It is for the purpose of preventing the respondent court from proceeding to punish the petitioner and to prevent it from hearing the order to show cause that the writ of prohibition is sought in the matter now before us.

[1, 2] In *Parsons v. Weis*, 144 Cal. 410, 77 P. 1007, 1010, which was an action to set aside a judgment quieting title on the ground that it was fraudulently obtained and to have it declared that plaintiff was in fact the owner of the property, it is said: "An attack upon a judgment on the ground that it was procured by fraud is a direct attack, *since the*

establishment of the fraud shows that no judgment has been rendered. The fraud, however, from which said relief may be given, does not include a judgment regularly obtained upon a fraudulent claim or by false testimony, but it is limited to a fraud in procuring the judgment. *Pico v. Cohn*, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159." (Italics ours.) An examination of a leading case upon the subject, *United States v. Throckmorton*, 98 U. S. 61, 64, 25 L. Ed. 93, discloses that in those cases where an attack upon a judgment is to be sustained on account of the character of the fraud employed the courts proceed upon "the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments." Assuming for the moment that petitioner here was guilty of fraud designed, intended, and which actually resulted in preventing the defendant from having a fair trial of the divorce action, and that the judgment rendered against her by reason thereof was unjust and unconscionable, it is obvious that in the eyes of a court of equity it is as though no judgment had ever been rendered. In the proceeding to set aside the judgment on the grounds mentioned and to secure separate maintenance, the court is clothed with the same jurisdiction as though no decree had been rendered. It becomes a matter of fact for the court to determine, in the exercise of a sound judicial discretion, whether the petitioner was guilty of perpetrating the kind of fraud which authorizes the judgment to be declared void and of no effect.

Writ denied.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 567

FISHER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7629.

District Court of Appeal, Second District,
Division 2, California.

Dec. 19, 1930.

Divorce ⇨156.

Court properly refused final divorce decree during pendency of wife's action to set aside interlocutory decree for fraud.

Application by Roy Fisher for a writ of mandate compelling the Superior Court of Los Angeles County to enter final decree in divorce action.

Writ denied.

Hancock & Rogers, of Huntington Park, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

IRA F. THOMPSON, J.

This is a companion case to *Fisher v. Superior Court*, 294 P. 445, this day decided. In this proceeding the petitioner seeks the writ of mandate compelling the respondent court to enter the final decree in the divorce action, which he alleges he demanded of that court after the expiration of one year from the date the interlocutory decree was entered. In addition to the authorities relied upon in the opinion in that case, we quote from *Dunlap v. Steere*, 92 Cal. 344, 28 P. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143, as follows: "In general, it may be stated that in all cases where, by accident or mistake or fraud or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained." *Story, Eq. Jur. § 885.*" It having been made to appear by a complaint filed in the respondent court that such a situation may exist with respect to this judgment, it was the plain duty of the court to refuse to enter the final decree.

Writ denied.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 445

STOUT v. GILL et al.
Civ. 508.

District Court of Appeal, Fourth District,
California.

Dec. 15, 1930.

Rehearing Denied Jan. 12, 1931. Hearing Denied by Supreme Court Feb. 9, 1931.

1. Acknowledgment ⇨52.

Presumption arising from certificate of notary public before whom deed was acknowledged is some evidence of execution.

2. Deeds ⇨207.

In action to quiet title, evidence established that plaintiff executed deeds to property and that same were not forgeries.

While plaintiff denied having signed deeds in question, they contained usual certificates of acknowledgment before notary public. Grantee, who was former

husband of plaintiff, testified that plaintiff signed deeds, and gave surrounding circumstances with some particularity. Wife of notary public corroborated grantee's testimony.

3. Divorce ⇨254.

Divorce decree adjudging ownership of property *held* not judgment against specific realty, and therefore not conclusive upon defendant's successor in interest taking without notice (Code Civ. Proc. § 1908).

4. Vendor and purchaser ⇨239(1).

Bona fide purchaser for value without notice is entitled to protection against undisclosed rights and titles.

5. Vendor and purchaser ⇨231(9).

Rule that, where person holds title to unoccupied land by unrecorded contract or deed, bona fide purchaser for value from apparent record owner takes free from undisclosed title applies to person claiming such a title through decree of court obtained in county where land is not situated.

6. Divorce ⇨254.

Wife, adjudged separate owner of realty in divorce decree, *held* estopped from disputing title of bona fide purchaser from husband as record owner, absent constructive notice of pending divorce suit (Code Civ. Proc. §§ 674, 1908; Civ. Code, §§ 1158, 1159, 1169).

Husband before and pending divorce suit was separate and record owner of property in controversy. Wife allowed record of ownership in husband to remain so for nearly two years after interlocutory judgment of divorce and for nearly year after entry of final judgment. No effort was made to give constructive notice of pendency of divorce suit.

7. Divorce ⇨254.

Divorce decree adjudging certain realty separate property of wife, not recorded where land was situated, could not affect rights of bona fide purchaser from husband as record owner (Code Civ. Proc. §§ 674, 1908; Civ. Code, §§ 1158, 1159, 1169).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Saydee Alvira Stout against J. B. Gill and wife and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellant.

William Guthrie, of San Bernardino, for respondents.

BARNARD, J.

This is an action to quiet title to certain real property in San Bernardino county. From the evidence introduced, the following facts appear: The defendant Stout and the plaintiff were formerly husband and wife. They had acquired the real property involved in this action, together with certain other real property situated in Los Angeles county. On April 19, 1922, Stout conveyed the San Bernardino property to his wife by quitclaim deed. On February 6, 1924, Stout and his wife, the plaintiff herein, joined in another quitclaim deed, conveying the same premises to the plaintiff; the deed stating that it was given and accepted for the express purpose of vesting title in the wife, as her separate property. On March 12, 1925, as a part of a property settlement, the defendant Stout agreed to give to the plaintiff the real property in Los Angeles county, and the plaintiff executed and delivered to Stout a grant deed conveying to him the San Bernardino property, which deed contained the following clause: "This Deed is given to carry out the mutual agreement of the parties hereto that said property shall become vested in the Grantee, as the Grantee's sole and separate property free from all interest, title or claim of Grantor now existing or which may hereafter arise by reason of the marital relation of said parties, and is so accepted by said Grantor."

On March 23, 1925, the plaintiff executed and delivered a quitclaim deed to the defendant Stout, covering the same property in San Bernardino county. On April 1, 1925, Stout filed a suit in the county of Los Angeles, asking for a divorce from the plaintiff herein. On April 13, 1925, Stout conveyed his interest in the Los Angeles property to his wife. On January 26, 1926, an interlocutory decree of divorce in the action above referred to, was entered in the superior court of Los Angeles county, in favor of the wife, upon her cross-complaint. On October 20, 1927, Alexander M. Stout conveyed the San Bernardino property to J. B. Gill, one of the defendants herein. This deed was recorded in San Bernardino county on October 22, 1927, and the other deeds referred to, covering the same property, had all been recorded in that county within a few days after their execution. Nothing was recorded in San Bernardino county having any reference to the divorce proceeding or to any decree entered in that action in the superior court of Los Angeles county. Defendant J. B. Gill purchased the San Bernardino property for its actual value and without notice of the claims of the plaintiff. Among other things, the trial court found that on March 12, 1925, the plaintiff and her husband made, executed, and delivered to the said husband, for a valuable consideration, a deed whereby the real property in question

was conveyed to the husband; that on March 23, 1925, for a valuable consideration, the plaintiff made, executed, and delivered to her husband, a quitclaim deed covering the same property; and that ever since October 20, 1927, the said real property has been and still is the community property of the defendants J. B. Gill and Thelma Gill. From the judgment that followed, the plaintiff has appealed.

[1, 2] It is first contended by appellant that the findings just referred to are not supported by the evidence; it being insisted that the deeds of March 12, 1925, and March 23, 1925, respectively, were forgeries, that they were never signed by plaintiff, and that they conveyed no title. Upon this point, it is significant that the record shows that no real attack was made upon the genuineness of the appellant's signature to these instruments. While the appellant denied having signed the instruments, the record shows none of the usual efforts to prove that the purported signatures were not hers. On the other hand, the instruments contained the usual certificates of acknowledgment before a notary public; her ex-husband testified that she signed the deeds, giving the circumstances with some particularity; and the wife of the notary public corroborated the husband's testimony as to appellant's acknowledgment of the deed dated March 12, 1925. Appellant insists that the record shows that the quitclaim deed of March 23, 1925, was not acknowledged by her. While that is not important, the presumption arising from the notary's certificate was some evidence, and the only other evidence appearing is the statement of appellant that she did not acknowledge it, and the statement of the husband that he did not know whether she did or not. While appellant sets forth a number of circumstances upon which she relies as showing that it was improbable that she signed the two deeds in question, these create no more than a conflict in the evidence, at best, and the findings attacked are not only supported by the evidence, but, we think, by a preponderance thereof.

The only other point raised is that the judgment and findings of fact are contrary to law, in that the trial court failed and refused to give any effect whatsoever to the judgment of the superior court of Los Angeles county. A certified copy of the findings of fact and interlocutory decree dated January 26, 1926, in the divorce action in Los Angeles county, and of the final decree therein dated January 31, 1927, were introduced in evidence, from which it appears that the court found the property involved in this action to be the sole and separate property of the appellant herein. Appellant contends that, irrespective of anything shown by the official records of San Bernardino county as to the title to this property, the judgment of the superior court of Los Angeles

county is absolutely conclusive and final, to the effect that Alexander M. Stout had no title in the property here involved, and therefore could convey none of the respondent Gill. In support thereof, appellant cites *Allen v. Allen*, 159 Cal. 197, 113 P. 160; *Fannie Briggs Carr v. Carr Company*, a corporation, 39 Cal. App. 53, 177 P. 856; *Scarpa v. Scarpa*, 40 Cal. App. 345, 180 P. 637; *Huneke v. Huneke*, 12 Cal. App. 199, 107 P. 131; *Abbott v. Superior Court*, 69 Cal. App. 660, 232 P. 154; and *Barrow v. Barrow*, 42 Cal. App. 50, 183 P. 364.

That the decree in the divorce action in Los Angeles county was conclusive between the parties thereto may be conceded, but we are here considering the rights of an innocent purchaser of land situated in another county for value and without notice, either actual or constructive. Section 1908 of the Code of Civil Procedure reads in part as follows:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

"1. In a case of a judgment or order against a specific thing, * * * the judgment or order is conclusive upon the title to the thing. * * *

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

[3, 4] This decree of divorce was not a judgment or order against this specific real property, and, under the terms of the section, this judgment is conclusive upon a successor in interest of one of the parties, only in the event he had notice, actual or constructive. No such notice here appears. Ample provision is made in our Codes to enable a person securing such a judgment to give constructive notice thereof in any county where real property covered thereby may be situated. Code Civ. Proc. § 674; Civ. Code, §§ 1158, 1159, and 1169. A bona fide purchaser of real estate for value and without notice is entitled to protection against undisclosed rights and titles. 25 Cal. Jur. 820, and cases cited. In *Bernhard v. Wall*, 184 Cal. 625, 194 P. 1040, 1046, the court says: "The rule is well settled that where land is unoccupied and a person holds title thereto by a contract or deed which is not recorded, and a third person in ignorance thereof, in good faith and for value, buys the land from the apparent record owner thereof, he takes the title free from the prior, but undisclosed and unrecorded title of the other party."

[5-7] The same rule applies to a person claiming such a title through a decree of court, obtained in a county where the land is not situated. Not only did these respondents have no notice of the proceedings in Los Angeles county, but the records in San Bernardino county, upon which they relied, not only showed the title of the property to be in appellant's former husband, but also affirmatively showed that such title had been conveyed to him by the appellant, free from any of her marital rights. Although appellant had every opportunity to protect her own interests, she not only placed the title to the property in her husband's name, but allowed the record thereof in San Bernardino county to remain in that condition for nearly two years after the interlocutory judgment was entered in Los Angeles county, and for nearly a year after the entry of final judgment, before respondents purchased the land. The fact that respondents bought the land in reliance upon the record title is due to the laches of appellant herself, rather than to any negligence upon the part of respondents. By thus holding her former husband out as the owner of the land, the appellant is estopped from disputing the validity of the title conveyed by him to respondents. *Schumacher v. Truman*, 134 Cal. 430, 66 P. 591. The decree of the superior court of Los Angeles county in the divorce action referred to, not having been recorded in the county of San Bernardino, had no effect upon the rights of the respondents, who had no actual knowledge thereof.

The judgment is affirmed.

We concur: CARY, P. J.; MARKS, J.

110 Cal. App. 451

J. B. GILL and Thelma Gill, Plaintiffs and Appellants, v. S. C. PRATT, Defendant, Fidelity & Deposit Company of Maryland, a Corporation, Defendant and Respondent.

Civ. 25.

District Court of Appeal, Fourth District,
California.

Dec. 15, 1930.

Hearing Denied by Supreme Court Feb. 9, 1931.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

William Guthrie, of San Bernardino, for appellants.

Joe Crider, Jr., of Los Angeles, for respondent.

BARNARD, J.

This is a companion case to *Stout v. Gill*, 294 P. 446, this day decided. In that action it

was contended that certain deeds were forged and not acknowledged by the grantor. This is an action for damages brought against the notary public who had attached certificates of acknowledgment to those deeds, and against his surety, based upon the theory that said certificates of acknowledgment were false. The two cases were tried at the same time, and the court, having found, in the case of *Stout v. Gill*, that the deeds involved were genuine, entered judgment in favor of the defendants in this action. The plaintiffs have appealed, and the parties have stipulated that the decision herein shall correspond to the decision in the other case.

The judgment in *Stout v. Gill*, having been affirmed, the judgment here appealed from is also affirmed.

We concur: CARY, P. J.; MARKS, J

110 Cal. App. 641

WINSTANLEY v. ACKERMAN.

Civ. 427.

District Court of Appeal, Fourth District
California.

Dec. 24, 1930.

Rehearing and Motion for Supplemental Findings of Fact Denied Jan. 15, 1931.

Hearing Denied by Supreme Court Feb. 19, 1931.

1. Release ⇨23, 24(2).

Notwithstanding release was procured by fraud, plaintiff was bound thereby, in absence of rescission, or tender of amount received (Code Civ. Proc. §§ 448, 462; Civ. Code, §§ 1566, 1691).

Plaintiff sued for death of husband allegedly caused by defendant's negligent driving of automobile. Defendant pleaded release, and court, after finding for plaintiff on issue of negligence, found that release was void because procured by fraud. Amount paid in consideration of release was credited on total damages, and judgment entered for remainder. Plaintiff did not file affidavit denying execution of release as authorized by Code Civ. Proc. § 448. Civ. Code, §§ 1566, 1691, specify requirements for rescission, one of which is that offer must be made to return everything of value received.

2. Pleading ⇨291(2).

Plaintiff, although not filing statutory affidavit denying execution of release, could, without further pleading, offer any legitimate defense, except want of genuineness or execution (Code Civ. Proc. §§ 448, 462).

3. Appeal and error ☞931(1).

Every intendment will be indulged to sustain trial court's fact finding, especially where appeal is taken on judgment roll alone.

4. Judgment ☞200.

Trial court's finding that release executed by plaintiff was void *held* not to sustain judgment for plaintiff (Civ. Code, §§ 38, 1541, 1566, 1691).

Finding did not support judgment for plaintiff, because it was expressly found that release was void because it was procured by defendant by fraud, deceit, and by undue influence, without finding that plaintiff was then so devoid of understanding as to render her contract of release a nullity under Civ. Code, § 38, providing that person entirely without understanding has no power to make contract of any kind.

5. Release ☞15.

Nervousness and neurasthenia do not constitute "mental incompetency" avoiding release *ab initio*, although transaction may be avoided by timely rescission and tender (Civ. Code, §§ 38, 1541, 1566, 1691).

Civ. Code, § 1541, provides that written release, with or without new consideration, extinguishes obligation, but section 38 provides that person entirely without understanding has no power to make contract of any kind.

[Ed. Note.—For other definitions of "Mental Incompetency," see Words and Phrases].

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Arline Ruth Winstanley against Morris Ackerman. Defendant by supplemental answer pleaded a release, and, from a judgment for plaintiff, avoiding the release on the ground of fraud, defendant appeals.

Reversed, and remanded for new trial.

Superseding opinion in 291 P. 273.

George L. Greer, of Los Angeles, and Titus & Macomber, of San Diego, for appellant.

Edward J. Kelly, of San Diego, for respondent.

AMES, Justice pro tem.

The plaintiff in this action is the surviving wife of Joseph Vincent Alexander Winstanley, deceased. She instituted this action for the recovery of damages for his death, alleged to have been caused by the negligent and careless driving of an automobile by defendant. In his answer the defendant denied negligence and pleaded contributory negligence

on the part of the plaintiff. After the case was at issue, the defendant, by leave of the court, filed a supplemental answer in which it was alleged that, since the filing of the original answer, plaintiff and defendant had made and entered into an accord and satisfaction, fully and finally settling and satisfying any and all claims of the plaintiff against defendant. A copy of this release is attached to the supplemental answer as an exhibit thereto. In said release it is recited that, in consideration of the sum of \$1,250, plaintiff released and discharged defendant of, and from, any and all claims on account of, and arising out of, the accident on which the claim for damage is based. The case was tried before the court without a jury, and, on the issues of negligence and contributory negligence, the court found in favor of the plaintiff and against the defendant. On the issue tendered by the allegations in the supplemental answer, the court found that said release had been executed, and that defendant had paid to the plaintiff the said sum of \$1,250, but that said accord and satisfaction was null and void and of no effect, for the reason that the same was procured by the defendant by fraud and deceit and undue influence practiced upon the plaintiff by the representatives of the defendant.

The court further found that, at a time prior to the accident which resulted in the death of plaintiff's husband, an agent of the Pacific Indemnity Company had written a policy of insurance for the protection of the defendant against financial loss in any accident occurring through his negligent driving of an automobile; that on the 10th day of February, 1928, and after the filing of the original answer in said action, an agent of the Pacific Indemnity Company took the plaintiff to the office of the attorney for the defendant; that she was then and there importuned to settle her claim against the defendant for \$1,000; that plaintiff and said agent of the Pacific Indemnity Company were directed by said attorney to the office of an agent and representative of said company, where plaintiff was again importuned and urged to settle her claim for \$1,000; this she declined to do; that thereafter, and on or about the 14th day of February, 1928, the agent of the indemnity company again called upon the plaintiff, and, by means of false and fraudulent representations made to her, induced her to accept the sum of \$1,250 as a final settlement of her claim.

The court further found that the plaintiff had explained to the agents' servants, representatives, and attorneys of the defendant that she was poor and destitute; that they were well aware of said facts; that the plaintiff was nervous and neurasthenic, and that they then and there practiced undue influence

upon her, in this, that they took an unfair advantage of her weakness of mind, and in that they took a grossly oppressive and unfair advantage of her necessities and distress; that, in her reliance upon the truth of these representations, plaintiff accepted the sum of \$1,250 and executed the accord and satisfaction as aforesaid.

The court further found that by reason of the death of her husband plaintiff had been damaged in the sum of \$7,500, and crediting that amount with the sum of \$1,250 which had been paid her on said settlement, entered its judgment for the balance of \$6,250. From this judgment defendant appeals upon the judgment roll alone.

[1, 2] The principal point relied upon by the appellant, and which we think is controlling, is that there is no finding of any offer of payment, or tender of a return of the said sum of \$1,250 to the defendant, or any finding of a rescission of said accord and satisfaction. It is true that there is no such finding in the record, nor does the record disclose any offer of rescission or tender of benefits of said contract at the trial of said action. After the filing of the supplemental answer, the plaintiff did not file an affidavit denying the execution of the said agreement as provided in section 448 of the Code of Civil Procedure. And, having failed to deny its execution, it was open to plaintiff, without further pleading, to introduce evidence to sustain any legitimate defense thereto except want of genuineness or due execution. Code Civ. Proc. § 462; *Baird v. Pacific Electric Co.*, 39 Cal. App. 512, 179 P. 449, 451; *Garcia v. California Truck Co.*, 183 Cal. 767, 192 P. 708, 710. "An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without a new consideration." Civ. Code, § 1541. But any rights asserted under such release are subject to the equitable defense of fraud, misrepresentation, or undue influence. Section 1566 of the Civil Code is as follows: "A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties, in the manner prescribed by the chapter on rescission."

Section 1691 of the Civil Code prescribes that the rescission of a contract when not affected by consent can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with certain specified rules, one of which is that "he must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same," etc. The record in this case does not disclose that such tender was made.

In the case of *Garcia v. California Truck Co.*, supra, the facts were similar to the case at bar, and the question before the court was as to the necessity of a tender of the amount

of money which had been paid to plaintiff in consideration of the execution of a release. In that case the court quoted with approval from *Fox v. Hudson*, 150 Ky. 115, 150 S. W. 49, Ann. Cas. 1914A, 832, as follows: "Where the claim is for unliquidated damages, or when the settlement is made to adjust a matter in dispute, or where there is a controversy as to the amount owing, and the parties agree upon a sum that shall be paid in settlement, the amount so paid must be returned, if the party settled with seeks to avoid the settlement on the ground of fraud. But when there is no dispute as to the sum due, and the creditor is induced by fraud to accept a less amount than his whole debt, he may attack the settlement without returning what he has received."

And further in this case, at page 771 of 183 Cal., 192 P. 708, 710, the court said: "As stated in the case of *Kley v. Healy*, 127 N. Y. 555, 561, 28 N. E. 593, 595, cited approvingly in *Matteson v. Wagoner*, supra [147 Cal. 739, 82 P. 436], the rule is as follows: 'A more satisfactory answer, however, may be found in the principle that one who attempts to rescind a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain either by virtue of the contract sought to be set aside, or the original liability.'"

In the instant case, at the time of the execution of the release, defendant had filed an answer denying his liability, and that issue was wholly undetermined, and the amount of such liability, if any, was necessarily unliquidated. And, while a creditor is not required to restore that which in any event he would be entitled to retain, it cannot be said that the plaintiff in this case had retained only that which, without dispute, belonged to her. The court in the case last cited distinguishes between that case and *Meyer v. Haas*, 126 Cal. 560, 58 P. 1042, 1043, cited by respondent herein, where the plaintiff was induced to execute, for \$25, a release of all claims on account of his injuries, having been induced by fraud to believe that he was discharging only such claim as he might have had for loss of time. But the plaintiff, it was said, was "not attempting to avoid a contract which he had made, but is showing that he did not make the contract which he apparently had made." The written contract was held void ab initio, because the release which was actually executed was not the release that the plaintiff intended to execute.

The cases cited by respondent are not in point. In *Rued v. Cooper*, 119 Cal. 463, 51 P. 704, the plaintiff, as assignee of an insolvent debtor, sued to recover money which had been paid by said debtor under a void contract for the purchase and sale of stock on margin, and judgment for the defendant was reversed for the reason that there was no proof of any

agreement to settle a claim for the money illegally paid, or that the illegality of such claim was even known to or considered by the parties in any manner in executing the release involved in that case.

The case of *Richards v. Fraser*, 122 Cal. 456, 55 P. 246, 247, was an action to recover money fraudulently obtained from plaintiff by defendants, some of whom had been his co-partners. The defendants pleaded a release, but it was held that an offer to rescind and restore the consideration for the release was unnecessary because, under the facts, the plaintiff would in any event have been entitled to retain such consideration. Quoting with approval from *Gilson, etc., Co. v. Gilson*, 47 Cal. 597, the court said: "One who attempts to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain."

In *Baird v. Pacific Electric Co.*, supra, a judgment of the superior court was reversed because the court refused to permit the plaintiff to introduce any evidence, for the reason that release from liability had been pleaded by the defendant, the execution and genuineness of which had not been denied. The superior court apparently assumed that plaintiff was relying upon some defense which he could not be permitted to maintain without first tendering back to the defendant the money he had received in consideration of such settlement. But the appellate court could find nothing in the record to justify such assumption. The court said: "If his evidence would have disclosed a total incompetency to enter into a settlement, and a continuing and permanent disability in that respect, these releases became mere 'scraps of paper' (Civ. Code, § 38); and it is well settled that no obligation to repay money advanced on the settlement as a condition of controverting the agreements would exist. Or, even if the disability was only partial and temporary, and it should be shown in evidence that the settlement was obtained by fraud and deceit as to the contents of the agreements and their legal effect, or again, if a state of facts existed where, in his weakened mental state, the plaintiff was induced by fraudulent representations to sign these releases, in the belief that he was being paid so much on account, he could not be required to tender back the payments as a condition of offering evidence to defeat the agreed settlement."

[3, 4] In her petition for a rehearing, respondent contends that it was sufficient that the findings were to the effect that the release was void, and it is suggested that, for the purpose of affirming the judgment, the court should assume that evidence introduced at the trial was sufficient to support the finding that the accord and satisfaction was null and void. And while it is true that every intentment will be indulged to sustain a finding of

fact, especially in cases where the appeal has been taken upon the judgment roll alone, in the instant case the trial court expressly found that "said accord and satisfaction was null and void and of no effect for the reason that the same was procured by the defendant by fraud and deceit and by undue influence, then and there practiced upon the plaintiff by the agents, servants and representatives of the defendants."

It is therefore apparent that the plaintiff did avail herself of the right accorded her by law to sustain any legitimate defense as against the agreement of accord and satisfaction, and, upon the evidence so introduced, the court has made a complete and comprehensive finding, from which it appears that the contract was obtained through fraud, deceit, and undue influence, but the findings in the case at bar do not disclose the fact that the plaintiff was so devoid of understanding as to render her contract of release a nullity. Section 38 of the Civil Code is as follows: "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family."

[5] It was found by the court that plaintiff had explained to the defendant, his attorneys and representatives, that she was poor and destitute. The court also found that she was nervous and neurasthenic. Obviously, nervousness and neurasthenia do not constitute mental incompetency to such an extent as to render the transaction void ab initio, even though the transaction may be avoided by a timely rescission and tender of benefits received. We think the failure of the record to disclose a tender of the money received by plaintiff will necessitate a reversal of the judgment.

In her brief, respondent contends that on the day of trial she tendered to the appellant the sum of \$1,250 which she had received as a consideration for the release she had signed, but since that fact, if it is a fact, does not appear in the judgment roll, it cannot be considered here. In view of the fact that the case will be remanded for a new trial, respondent will not be deprived of relying on that defense, and may file a proper supplemental pleading in the trial court, if so advised.

However, we feel constrained to say that we have reached the conclusion, herein expressed, with some degree of reluctance, and we do not wish to be understood as placing the stamp of judicial approval upon such practices as are disclosed by the record in this case. The practice of an insurance adjuster, disregarding and ignoring counsel for the plaintiff, and dealing with the plaintiff herself, and importuning her to effect a settlement which may be wholly inadequate, should

meet with severe censure from the bench and bar of this state.

Judgment is reversed, and cause remanded for a new trial.

We concur: CARY, P. J.: BARNARD, J.

divorce decree was harmless, where other evidence was sufficient to support conclusion awarding child to father.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Mabel H. Kettelle against H. C. Kettelle in which a decree was entered for plaintiff granting her a divorce and awarding her the custody of a minor child. From a subsequent order awarding the custody of this child to defendant, plaintiff appeals.

Affirmed.

Max Schleimer, of Los Angeles, for appellant.

Walter T. Casey, of Los Angeles, for respondent.

PER CURIAM.

An appeal by the plaintiff from an order made in the above action awarding to the defendant the custody of Pearl Kettelle, a minor child of the parties.

The action was one for divorce and the custody of two children, the issue of the marriage. On September 15, 1926, an interlocutory decree was entered adjudging that plaintiff was entitled to a divorce from defendant. The decree awarded the custody of Pearl Kettelle to the plaintiff, who was also allowed the sum of \$125 per month for support, the payments to continue for one year. The court reserved the right to fix at the end of that period an amount to be paid by defendant for the care and support of Pearl Kettelle. The custody of the other child was awarded to the defendant. On September 28, 1927, a final decree of divorce was entered. The provisions of this decree followed those of the interlocutory decree, but the same was on November 22, 1927, modified on plaintiff's motion by providing that the defendant, commencing on December 1, 1927, should pay to plaintiff the sum of \$50 per month for the support of Pearl Kettelle. On December 8, 1927, the court made an order, directing plaintiff to show cause why the decree awarding her the custody of Pearl Kettelle should not be vacated and the custody awarded to the defendant. This order was based on the affidavits of defendant and others, stating matters with respect to plaintiff's conduct and her care of the child which tended to show that it was for the best interests of the latter that the custody be changed. The material portions of these affidavits were controverted by others filed by plaintiff and by oral testimony adduced by her at the hearing, after which the order complained of was entered.

One affidavit filed by defendant referred to acts of plaintiff before the entry of the interlocutory decree, and others to acts and occur-

110 Cal. App. 310

KETTELLE v. KETTELLE.

Civ. 7655.

District Court of Appeal, First District,
Division 1, California.

Dec. 9, 1930.

Rehearing Denied Jan. 8, 1931. Hearing Denied by Supreme Court Feb. 5, 1931.

1. Divorce ☞303(1).

Final divorce decree awarding mother custody of child, in accordance with interlocutory decree, did not prevent subsequent consideration of occurrences after interlocutory decree, where change of custody was not litigated upon entry of final decree.

2. Judgment ☞585(5).

Former judgment is not conclusive as to new rights acquired pending action which were not required to be litigated therein (Code Civ. Proc. § 1911).

3. Divorce ☞298(1).

Welfare of child is paramount consideration in determining its custody in divorce suit between parents.

4. Divorce ☞312.

Conclusion of trial court in divorce suit as to custody of child will not be set aside in absence of clear abuse of discretion.

5. Divorce ☞298(3).

Custody of child may be awarded to parent whose offense caused divorce, if best interests of child will thus be served.

6. Appeal and error ☞920(1).

On appeal from order based on affidavits, those affidavits in favor of prevailing party must be taken as true.

7. Appeal and error ☞1032(1).

Prejudice from error must affirmatively appear to warrant reversal.

8. Divorce ☞312.

In proceedings for order changing custody of child, error in admitting affidavit which related to acts of mother before interlocutory

rences between the entry of the interlocutory and final decrees. Plaintiff contends that these decrees adjudicated her fitness to have the custody of the child, and that the above evidence therefore was incompetent.

[1, 2] It has been held that to justify a modification of a divorce decree with respect to the custody of minor children there must be a change of circumstances after the original decree was entered. 19 Cor. Jur., Divorce, § 810, p. 350. Here, however, with the exception mentioned, the acts and omissions alleged followed the entry of the interlocutory decree, and the question whether the allegations, if true, rendered a change of custody for the best interests of the child, was not litigated upon the entry of the final decree. *Brown v. Brown*, 170 Cal. 1, 147 P. 1168, 1170. As stated in the case cited: "The general rule that a judgment is conclusive, not only as to that which is actually determined, but also as to every other matter which the parties might have litigated in the action, is not always applicable literally." And it does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated. *Brown v. Brown*, supra; *Metropolis, etc., Sav. Bank v. Barnet*, 165 Cal. 449, 132 P. 833. As provided by the Code, that only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto. Code Civ. Proc. § 1911.

[3-5] The paramount consideration in determining to whom the custody of a child shall be awarded in a divorce is the welfare of the child (*Bancroft v. Bancroft*, 178 Cal. 352, 173 P. 582); and the conclusion of the trial court in this respect will not be set aside in the absence of a clear abuse of discretion (*Dickerson v. Dickerson*, 108 Cal. 351, 41 P. 475). Nor, if it be for the best interest of the child, is there any rule preventing an award of its custody to the parent whose offense caused the divorce. *Matter of Cozza*, 163 Cal. 514, 126 P. 161, Ann. Cas. 1914A, 214; *Lampson v. Lampson*, 171 Cal. 332, 153 P. 238. As was said in *Bell v. Krauss*, 169 Cal. 387, 146 P. 874, 875: "Divorces are not granted for offenses against children, and the bestowal of the custody of a minor in a divorce action is not, unless otherwise provided by statute, an adjudication of the fitness of the parent who is for the time denied the right to retain possession of the child. It is nothing more than the expression of the court's belief that, under the circumstances then existing, the welfare of the child would be best subserved by placing said child with one of the parents rather than the other."

Here, so far as shown, there was no finding in any of the proceedings that either party

was an unfit person to have the custody of the child, the conclusion of the court apparently being that the welfare of the child under the circumstances existing at the time of the entry of the interlocutory decree would be better subserved by placing her in the custody of her mother while the other child was placed in the custody of his father. Subsequently, however, conditions having changed, it was the conclusion of the court that the best interests of the child required a change of custody. We cannot say from the evidence that its conclusion was unsupported.

[6] In the consideration of an appeal from an order based upon affidavits, this court is bound by the same rule which controls when oral testimony is presented for review. If there is any conflict therein, those in favor of the prevailing party must be taken as true. *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001.

[7, 8] While the affidavit covering the acts of the plaintiff previous to the entry of the interlocutory decree should, we think, have been excluded, nevertheless others related many similar instances of neglect which occurred thereafter. Prejudice from error is no longer presumed, but must affirmatively appear. *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 P. 238. The evidence was sufficient without this affidavit to support the court's conclusion; and after considering the whole record, including the evidence, we are of the opinion that no error is shown which would warrant a reversal of the order.

The order is affirmed.

110 Cal. App. 479

LINDSAY v. KLEIBER MOTOR TRUCK CO.
et al.
Civ. 7707.

District Court of Appeal, First District, Division 2, California.

Dec. 17, 1930.

1. Automobiles ⇐374.

Bailee of truck was not guilty of conversion, nor liable in replevin, until its lien for work thereon was discharged (Civ. Code, §§ 3051, 3051a).

2. Automobiles ⇐368.

Corporation dismantling and altering truck as directed by registered owner held not guilty of conversion.

3. Automobiles ⇐374.

Before bringing replevin, plaintiff was bound to demand, and pay or tender amount

of defendant's lien for work on, truck (Civ. Code, §§ 3051, 3051a).

4. Automobiles ⇨385.

Findings that purchaser of truck from plaintiff in replevin, after completion of work for which defendant claimed lien, bought another truck from defendant, resold it, and assigned contract to defendant, *held* immaterial (Civ. Code, §§ 3051, 3051a).

5. Automobiles ⇨374.

Assignment of truck sale contract to assignor's vendor *held* not payment for work for which assignee claimed lien on another truck (Civ. Code, §§ 3051, 3051a).

6. Automobiles ⇨374.

Plaintiff showing no wrongful taking of truck or tender of amount of defendant's lien for work thereon could not recover damages in replevin (Civ. Code, §§ 3051, 3051a).

Appeal from Superior Court, of Los Angeles County; F. C. Valentine, Judge.

Action by J. Walter Lindsay against the Kleiber Motor Truck Company, a corporation, and another. From a judgment against named defendant, it appeals.

Reversed.

Wilbert Morgrage and R. K. Barrows, both of Los Angeles, for appellant.

Liggett & Liggett, of San Diego, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendants and asked for judgment for the recovery of an automobile truck or for the value thereof in case a delivery could not be had. The defendant Maurice Haydis was not served and as to him the transaction was dismissed. The Kleiber Motor Truck Company, a corporation, answered, and a trial was had before the trial court sitting without a jury. The court made findings in favor of the plaintiff, and from a judgment entered thereon the corporation has appealed.

Some time prior to 1923 Maurice Haydis purchased under a conditional sales contract a motor truck from plaintiff. He operated it some time, and then he took it to the Kleiber Motor Truck Company and directed it to take out the engine and replace it with a new engine and to change it from a right-hand drive to a left-hand drive and make some other alterations therein. At that time the truck was under license for the year 1923. The record of the division of motor vehicles showed the legal owner to be J. Walter Lindsay and the registered owner to be M. Haydis. No claim is made that the defendant corpo-

ration at any time gave actual notice in writing to the plaintiff that it was about to make said repairs and alterations. The defendant proceeded to make the alterations and repairs and the same were completed in accordance with instructions and the truck was ready for delivery. However, Haydis left the truck remaining in the possession of the corporation and sold out his business. Thereafter he assigned his rights to the plaintiff on October 23, 1925. The assignment expressly mentioned the number of the new motor instead of the number of the old motor which had been removed. The plaintiff appeared at the office of the corporation, presented its assignment from Haydis, and asked for delivery of the truck. Neither at the time of the demand nor at any other time did the plaintiff make a tender of \$100 or any other sum. The demand was refused. Thereafter and before action was commenced the corporation took off the truck the new parts which it had theretofore installed, and after having done so it continued to hold the dismantled truck for its lien for work and labor done (not including material furnished) for the full sum of \$100 because, as it alleged, it had done and performed labor in a much larger sum. In his complaint the plaintiff alleged: "That at all times hereinafter mentioned, the plaintiff was and now is the owner of and entitled to the immediate possession of that certain three and one half ton Kleiber motor truck, Motor No. 2093b-51351, 1924 California license No. 61991." The trial court found the allegations to be true.

[1, 2] The defendant claims that the finding is not sustained by the evidence. The plaintiff also alleged a tender of \$100. The trial court found the allegation to be true. The defendant claims that said findings are not supported by the evidence. They are not. There is not even a conflict in the evidence. It is all one way. It shows that, acting on the directions of Haydis, the defendant did work and furnished materials to the extent of \$1,358.59, and that said sum was the reasonable value thereof. Both in its answer and during the trial the defendant claimed a lien of \$100, the full amount allowed by the statute. Civ. Code, § 3051a. It did not claim more. In the absence of the statute just cited, the defendant was entitled to a lien in the sum of \$1,358.59. *Lininger Imp. Co. v. Queen City Foundry Co.*, 73 Colo. 412, 216 P. 527; Civ. Code, § 3051. However, section 3051a of the Civil Code had the effect, under the facts of this case, of curtailing the amount of the defendant's lien to the sum of \$100. Until defendant's lien had been discharged the defendant was neither guilty of conversion nor was it liable in an action in replevin. 34 Cyc. 1403; 38 Cyc. 2030; *Lininger Imp. Co. v. Queen City Foundry Co.*, *supra*; *Cob-*

bey on Replevin, §§ 157-159; Sutton v. Stephan, 101 Cal. 545, 36 P. 106; Welker v. Appleman, 44 Ind. App. 699, 90 N. E. 35, 37; Mattingly v. Mattingly, 150 Md. 671, 133 A. 625. As everything the defendant did while acting under the directions of Haydis was lawful and within the terms of its contract of employment, no act in dismantling the truck or making alterations therein was in any sense an act of conversion. Lininger Imp. Co. v. Queen City Foundry Co., supra.

[3] Before commencing the action the plaintiff was bound to make a demand and accompany the demand with the payment, or tender of payment, of the lawful claim of lien made by the defendant. 34 Cyc. 1402-1404; 5 Cal. Jur. 169-170. Conceding that if a tender had been made the defendant might have been guilty of a constructive conversion, the record wholly fails to show that the tender was made. The plaintiff claims his complaint was a tender. A most cursory reading thereof shows it was not. But even though it was, the tender should have been made before the action was commenced. 34 Cyc. 1403; Cobbey on Replevin, § 520.

[4, 5] During the trial some evidence was introduced and later the court made some findings to the effect that after the work was completed on the truck Haydis bought another truck of the defendant which Haydis resold on a conditional sales contract and assigned the contract to the defendant. All those matters were entirely outside the issues made by the pleadings and said findings are nugatory. Furthermore, there is no evidence that the assignment was made or accepted in payment of the defendant's demand for which it claimed a lien. Said assignment was not therefore a payment. Palmer v. Emanuel, 77 Cal. App. 766, 770, 247 P. 609; Kane v. Eastman (Cal. App.) 288 P. 819.

[6] The defendant makes several points relating to the measure of damages. It complains because the judgment is not in the alternative. The plaintiff replies that the rule which requires that the judgment should be in the alternative is not inflexible and he cites and relies on Erreca v. Meyer, 142 Cal. 308, 75 P. 826; Seligman v. Armando, 94 Cal. 314, 29 P. 710, and he makes the claim that his action is very much like an action for conversion. In the two cases cited, both the taking and detention were wrongful. Conceding, without deciding plaintiff's claim as to the nature of his action, the claim is not an answer. As we have shown above, in the instant case there was no act of conversion. All that the defendant did down to the date of the trial it did as the authorized bailee of the registered owner. There was not, therefore, any evidence on which a conversion could be predicated. 38 Cyc. 2005; Hill v.

Finigan, 77 Cal. 267, 276, 19 P. 494, 11 Am. St. Rep. 270. Treated as an action in replevin, the plaintiff showed no wrongful taking. As he made no tender, there was no wrongful detention. He did not therefore lay any foundation for any damages as in an action for replevin. Mutch v. Long Beach Imp. Co., 47 Cal. App. 267, 190 P. 638; Hartnett v. Wilson, 31 Cal. App. 678, 161 P. 281; 5 Cal. Jur. 204 and 208.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

110 Cal. App. 486

PEOPLE v. CORDISH.
Cr. 1868.

District Court of Appeal, Second District,
Division 2, California.

Dec. 17, 1930.

Rehearing Denied Dec. 31, 1930. Hearing Denied by Supreme Court Jan. 15, 1931.

1. Criminal law ⇨878(4).

Acquittal of forgery *held* not to require acquittal of conviction of grand theft based on same transaction; offenses not being identical (Pen. Code, §§ 470, 532).

Acquittal was not required, since one who forges instrument may be convicted under Pen. Code, § 470, whether or not he obtains money, while one who uses false instrument and obtains money from another need not have forged the instrument in order to commit offense denounced by section 532; thereby indicating that the two offenses are not identical.

2. False pretenses ⇨7(1).

Where purchaser permitted dealer's agent to sign automobile sale contract in his name if he would not be liable, company purchasing contract from dealer did not obtain what it contracted for, as regards dealer's defense in prosecution for grand theft (Pen. Code, § 532).

3. False pretenses ⇨43(2).

In grand theft prosecution by selling forged automobile sale contract, sustaining objection to cross-examination of purchaser's agent whose duty was merely clerical, seeking to show whether purchaser of alleged forged conditional sales contract relied on false representations, *held* proper (Pen. Code, § 532).

4. Witnesses ⇨380(5).

In grand theft prosecution, impeachment of witness for people *held* proper.

The prosecution was based on the sale of an alleged forged conditional sale contract, and the witness had previously made statement that he had obtained such contract on authority of defendant, but on trial such witness had a lapse of memory. The witness having denied recollection of former statements, but having admitted that they were taken by stenographer, same were identified and introduced in evidence, and the witness thereafter admitted on trial that he had told truth in first instance.

5. Criminal law ☞371(3).

In prosecution for grand theft by sale of forged automobile sale contract, various like contracts negotiated by defendant *held* admissible to show fraudulent intent.

6. False pretenses ☞51.

Evidence in prosecution for grand theft *held* to warrant submission to jury.

7. False pretenses ☞41.

In prosecution for grand theft by sale of forged automobile sale contract, evidence showing concerted plan of defendant to obtain money through negotiation of false evidence of automobile sales *held* admissible.

The evidence offered to show concerted plan consisted of evidence of ingenious manipulation of serial, motor, and license numbers of automobiles and introduction of original records of various financing institutions of the purchase of other worthless contracts for consideration at various times.

8. Criminal law ☞726.

In prosecution for grand theft, replying argument of counsel for people *held* not improper.

Counsel for people, in answer to comment of defendant's counsel on absence of certain witnesses, stated that, had it been known prior to the trial what their testimony might have been, the witnesses would have been called, but that it was at all times the defendant's privilege to have had them called if their evidence tended to support his defense.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Nat Cordish was convicted of grand theft, and he appeals.

Affirmed.

Superseding opinion in 291 P. 251.

M. G. Phillips, W. J. Clark, and Clare Woolwine, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

CRAIG, J.

An indictment consisting of several counts was returned by the grand jury of Los Angeles county, charging the appellant and one E. K. Fleming with having forged certain contracts, and with having falsely and fraudulently taken moneys of certain named corporations. All counts were dismissed except one charging forgery and one charging grand theft. Fleming was acquitted of both offenses, and the appellant was found guilty of the crime of grand theft, and acquitted upon the other count. He appeals from the judgment and from an order denying a motion for new trial.

The first and principal point advanced is that the two offenses were so interrelated, though inconsistent, that an acquittal of one rendered legally impossible a conviction of the other. Specifically, the defendants were alleged in one count to have (1) forged the name of one William G. Schwindt to a purported contract for the purchase by Schwindt of an automobile from Mutual Motors, Incorporated; and (2) to have sold the worthless contract to the State Credit Corporation, for a valuable consideration, "well knowing the same was false, forged and counterfeited," and "with intent then and there to cheat and defraud the said State Credit Corporation, a corporation, William G. Schwindt, and others." The next count charged that the defendants did "steal, take and carry away" certain moneys of the personal property of the State Credit Corporation.

According to the evidence adduced, appellant was president both of the Mutual Motors, Inc., which dealt in automobiles, and of a real estate sales concern known as Mutual City, which were maintained in the same office and were in need of funds. The appellant employed one Arthur Green as a realty salesman, following a conversation wherein appellant stated that Mutual Motors might furnish a number of automobiles to Mutual City, in the names of financially responsible persons as ostensible purchasers, by obtaining their permission so to do. Appellant executed in blank several conditional sales contracts as president of Mutual Motors, in which Green thereafter inserted descriptive data relating to various automobiles, which contracts were negotiated by appellant's agents with finance companies as genuine securities or evidences of bona fide purchases of automobiles and agreements to pay cash therefor. In one such instance, which resulted in the present charges, Green explained to said Schwindt, the realty company's need of machines, and requested permission to so use his name. The latter tes-

tified: "I told him that if there wouldn't be any liability to me, and it would be a favor to him, I would allow him to place one car in my name. * * * I would agree to it if I didn't have any liability in connection with it." He did not testify that he authorized a sale in his name, or that he purchased an automobile, or sanctioned or knew of the issuance of a contract in his name, or that he ever consented to the signature of his name by Green. Thereafter Green inserted the description of an automobile, and signed the name "William G. Schwindt" as vendee, in one of the blank contracts previously executed in the name of Mutual Motors by appellant, as vendor, also filling in recitals of a cash payment of \$840, and twelve monthly installments of \$112.67, each falsely appearing to be due from Schwindt. Without Schwindt's knowledge or consent Green opened an account in a bank in the former's name, upon which a check was drawn in favor of the State Credit Corporation for the first payment, thus giving the transaction a semblance of validity. The check was dishonored by the bank and returned unpaid. Appellant executed an assignment of said contract to the last-mentioned company, wherein it was recited, in part: "For the purpose of inducing the assignee to purchase the within contract, the undersigned makes the following representations: (1) That the said contract is a bona fide one, and is actually signed by the person named therein * * * and that said property has been delivered into the possession of the party of the second part." It is not attempted to be asserted that Schwindt received the car. Upon representations and under the belief that this document was genuine, the credit company purchased the same and paid to appellant's motor company the moneys mentioned in the indictment, or the sum of \$1,928.06. It resulted that one of appellant's salesmen for the realty company was furnished an automobile belonging to the motor company upon which a fictitious and valueless contract had been sold to State Credit Corporation for moneys with which appellant's two enterprises were financed. Concisely stated, one of appellant's salesmen drove appellant's car, under the name of a third person, who, with the understanding that there should be no liability, had agreed to a transaction without real parties nor the transfer of any property, and upon which the credit company paid nearly \$2,000 for appellant's use and benefit. The jury found, in effect, by its verdict upon the forgery count that appellant did not sign nor cause the name of Schwindt to be signed without the latter's consent or knowledge. They did not find that he had forged the contract, and that knowing the same to have been forged that he did "utter, publish and pass the said contract for the payment of money * * * with intent then and there to cheat and defraud"; but they found that he

stole, took, and carried away certain moneys of the State Credit Corporation. The theory upon which the trial was conducted was that said moneys were obtained by false and fraudulent representations, through the uttering and use by appellant's agent or agents of such worthless contract.

[1] It is here insisted that, while the people were not required to specify in the indictment the means by which the crime of grand theft was committed, they elected to and did proceed at the trial upon the theory that it was committed by the uttering of a forged and false instrument, and that they are precluded by the doctrine of estoppel to urge an affirmance upon the ground that it was committed by false and fraudulent pretenses. The argument advances but a visionary distinction without a difference. Although the jury might not have believed that appellant authorized and directed the physical signing of the name of a particular person, it lay within their province to determine whether upon all of the evidence before them the defendant knowingly obtained moneys upon false evidences of indebtedness, which were forged and uttered by his agent. The jury were at liberty to conclude, as we must assume they did, that the proof of having obtained moneys by means of the authorized and intended false pretenses as to the value of a given document was sufficient, though it did not exclude every hypothesis upon which innocence of the actual forgery and uttering might be based.

Upon the same premise it is argued that the offense of uttering a false instrument "is exactly the same offense as that of obtaining money * * * by false representations as contained in the contract," and that an acquittal upon the first count is legally irreconcilable with a verdict of guilty upon the second. The separate charges were based upon different sections of the Penal Code. Section 470 provides: "Every person who, with intent to defraud, signs the name of another person * * * knowing that he has no authority so to do, * * * or falsely makes, alters, forges * * * any * * * contract * * *; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false * * * matters, * * * is guilty of forgery." Section 532 provides that: "Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, * * * is punishable in the same manner and to the same extent as for larceny of the money. * * *" It is apparent merely from reading them that one who forges, utters, and passes a false instrument may be convicted under section 470, whether or not he obtains money by such criminal acts; while one who by the use of a false document obtains money from another, know-

ing it to be false, need not have forged the same in order to have committed the offense denounced by section 532, and that the elements of the two offenses are not identical. An indictment may charge two or more different offenses connected together in their commission, of different statements of the same offense, in separate counts. Pen. Code, § 954. The defendant having been acquitted upon one count of an indictment containing alternative counts, it does not follow that the jury found all of the elements essential to the statement of that offense absent, but merely that they found absent elements distinguishing it from the offense alleged in the other count. This is the true test. *People v. Day*, 199 Cal. 78, 248 P. 250.

[2] A brief statement of appellant's contention that, notwithstanding the contract was not signed by the party of the second part, if another was authorized to sign it for him, the act of Green was the act of Schwindt, and the purchaser of the contract "obtained just what it expected to obtain," requires but slight consideration in view of the facts presented. There is no indication that any one other than appellant and his agent was cognizant of the true status of the transaction or was afforded any patent ground for distrust. A bona fide contract evidencing a valuable consideration, actually signed by the party named therein, who receives the specified property, is not akin to nor affected by an unauthorized signature to a fictitious evidence of liability upon which neither property nor consideration passes. The credit company was induced to accept and to pay cash for a purported security which the party therein named had not seen and of which he had no knowledge. It would be indeed a novel and fallacious theory by which such attempt to signify an obligation of Schwindt could be deemed a validation of the fraud depriving the purchaser of recourse, to the end that it might recover from him the cost of an automobile which appellant had simply changed from one hand to the other. There is no evidence tending to show that Schwindt ever learned that permission to place a car "in his name" had created a liability, nor that the credit company at any time relied upon any guaranty other than representations of appellant's agents as to the validity of the contract.

It is further suggested that the jury may have been confused by conflicting presumptions; that, since the evidence tended to show a custom of appellant to leave with agents contracts and assignments thereof, signed in blank, to be filled out "without his knowledge" when absent from the office, they may have inferred without warrant that these details were carelessly or surreptitiously performed by the agents. It is asserted that proof of execution of the documents in blank,

coupled with the presumption that the ordinary course of business was followed and that appellant knew the nature of the transactions, should not be allowed to prevail over the stronger presumption of innocence. We are neither justified by the record nor inclined to assume that the jury did so presume and that they ignored other inferences of guilt which could well have been drawn. Fine distinctions in the probative effect of presumptions may not in the face of ample instructions be assumed to have distracted the attention of the jury in their consideration of issues so important to the people and to the defendant. There is no room for apprehension that the verdict may have been influenced by the presumption of innocence being confronted with the presumption that the private transactions were fair and regular, since we think the evidence tended fully to controvert both presumptions.

[3] During cross-examination of a witness who had acted as secretary of the credit company, who did not negotiate with Cordish, and whose duties with respect to contract after their purchase were clerical and subordinate, he was asked certain questions to which objections were sustained. Typical of these was the question as to whether or not the identity of the contracting purchaser was material to the company, so long as an automobile in fact did exist as security, and the motor company as vendor had guaranteed the contract. The purpose of such inquiry was to elicit whether or not the State Credit Corporation relied upon the alleged false representations. It appeared that the witness was not in an executive capacity to dictate or control the policies or business activities of the company, and was not invested with discretion as to the acceptance or rejection of securities. Any answer which he could have given would have been hearsay, and a conclusion. Other questions as to conversations during directors' meetings, also to ascertain the reason for purchasing contracts, were objected to upon the ground that the witness was not qualified to state upon whom the purchasing company relied, and that his reply would be hearsay. It is insisted that, if he had been permitted to swear that contracts were purchased and paid for, regardless of their intrinsic value, no offense could have been chargeable to appellant. There was no showing that the credit company's manager who did conduct the negotiations but was not present at the trial conspired with Cordish or his agent to finance the realty or motor sales business upon fictitious securities, nor that such a scheme was suspected by the credit company. We think objections to an attempt to compel this witness to so testify were properly sustained. The argument that he was the only representative of the company available, and that he had produced and

identified its record, is not persuasive as to the competency of his testimony, with respect to matters beyond his own clerical sphere of employment and observation.

[4] Contentions that error was committed in allowing the district attorney to impeach a witness called by the people, that he was guilty of misconduct in so doing, and that the court erred in stating to the jury that the impeachment should be considered as evidence against the defendant, without instructing them to the contrary, are fallacious. The witness Green, who had previously made a statement that he obtained and acted upon the authority of Cordish in negotiating seven false and fictitious documents, suffered a lapse of memory and became adverse toward the prosecution while on the stand. Pressed for answers, his memory was refreshed by said statement, over objections by the defense, and finally he admitted that he had given prior inconsistent answers to material questions. We are unable to find in the record any statement to the jury by the court that the impeachment should be viewed as evidence. The defendant's counsel were informed by the court in ruling upon objections to impeaching questions that the witness' answer under oath that he had had no conversation with the defendant upon the subject "would aid the defense, and if it would aid the defense it would damage the prosecution." The jury were instructed that they should disregard and draw no inferences from the remarks of the court or counsel, and that they should consider the evidence only. We find no misconduct of a prejudicial character, nor error in the principles so announced. It follows that authorities cited by appellant in support of these contentions are not in point. We also think a proper and sufficient foundation for such evidence was established. Green, having at first denied any recollection of his former statements, admitted that they were taken by a stenographer, whereupon a transcript thereof was identified and introduced in evidence. The witness thereafter admitted that he had told the truth in the first instance, and reticently acknowledged that he had then made the statements contained in the transcript. This evidence was properly received.

[5] Following evidence of the preparation and negotiation of the subject-matter of this prosecution as above detailed, various like contracts which had been similarly supplied with names, descriptions, and fictitious values, and which had likewise been negotiated as of face value, were offered in evidence and admitted over objections of the defendant. They were not offered as evidence of other offenses, but for the purpose of showing the existence of a fraudulent intent, and a concerted plan of the defendant and others to finance the business by sales of worthless pa-

per, "for the purpose of overcoming the presumption that the act was innocently or accidentally done without the particular intent which constitutes an element of the offense," and the jury were so instructed. It is argued that these contracts were not admissible for the purpose of proving the corpus delicti or of showing the commission of other offenses, that Schwindt was liable under his contract for the amounts therein specified, and that the corpus delicti was not proved. However, as previously stated, Schwindt merely authorized the use of his name, though it does not appear in what manner he so intended or expected it to be used, with the express understanding that he should not "have any liability in connection with it." A large number of these purported "contracts," bearing names of persons who had not purchased automobiles, who had paid nothing, whom appellant had intended should not be liable thereon, and from whom nothing was due, furnished instances of a general financing scheme upon one of which Cordish was prosecuted. The people contended that others by lending their names in the accomplishment of appellant's criminal objective had conspired with him and were equally guilty, but the jury were properly instructed that such evidence should be accepted only for the purpose for which it was offered. There was substantial evidence tending to support a finding, as the jury must have found, that money was fraudulently obtained upon one such subterfuge, and the offer of others as evidence of a common intent and plan upon which it was negotiated was not error. "It is a familiar and established rule in this state that even evidence of another crime is pertinent, and will not be excluded if it tends logically, naturally, and by reasonable inference to establish any fact material for the people to overcome. *People v. Sanders*, 114 Cal. 230, 46 P. 153. Evidence of a material fact which tends to show intent or motive, even though it tends to establish another crime, is admissible." *People v. Kizer*, 22 Cal. App. 10, 133 P. 516, 518, 521, 134 P. 346.

[6, 7] The corpus delicti, i. e., the signing by Cordish of the so-called Schwindt contract and assignment thereof for the purpose and with the intent of enabling Green to complete the swindle, and appellant's knowledge of its perpetration, was sufficiently established to warrant submission of the case to the jury. Evidence was received over objections tending to show a concerted plan of appellant, Fleming, Green, and others, to obtain money for financing the two corporations through the negotiation of false evidence of automobile sales. As an asserted incident of their scheme, evidence of an ingenious manipulation of serial, motor, and license numbers was offered, and original records of various financing institutions of the purchase of oth-

er worthless contracts for a consideration at various times was introduced. Contentions that such evidence was inadmissible are therefore without merit. Criticism of its weight upon appeal is equally frivolous.

[8] The defendant's counsel in argument to the jury expounded at length upon the absence of certain witnesses, to which opposing counsel responded that, had it been known prior to the trial what their testimony might have been, they would have been called, but that it was at all times the defendant's privilege to have had them called if their evidence tended to support his defense. In the briefs upon appeal and in his petition for a rehearing in this court, appellant strenuously urged the argument of the district attorney upon this subject as prejudicial misconduct. As stated in our former opinion, we find nothing in the language of the people's counsel which may be so construed. At any rate the point is utterly without merit for the reason that, whatever the district attorney said which might otherwise be viewed as objectionable was in reply to argument on the same point by counsel for the defendant. The tenor of the latter's argument is indicated by the following excerpts: "Did the district at-

torney produce Mr. Marks to prove that he did not authorize Pond to sign his name to this contract? No, and why?" "If they do not produce evidence that is favorable to them, you have got to construe that the evidence would be against them." Rebuttal argument in such instances is not improper. *People v. McRoberts*, 1 Cal. App. 25, 81 P. 734.

The remaining points consist of exceptions to the construction placed upon certain evidence by the district attorney's deputies during argument, and to the sufficiency of the evidence as a whole. The statements so made were no more than exaggerations, and they were withdrawn, and the jury were instructed to disregard them. A careful examination of the record, which consists of some four thousand pages, fails to reveal any reversible error, and we think the evidence warranted the verdict and judgment rendered under the instructions given.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

SINSBAUGH v. CLARK.
Civ. 197.

District Court of Appeal, Fourth District,
California.

Dec. 10, 1930.

Rehearing Denied Jan. 2, 1931. Hearing De-
nied by Supreme Court Feb. 5, 1931.

1. Appeal and error ☞1002, 1011(1).

Conflicts in evidence are addressed to
jury or trial court.

2. Appeal and error ☞1002.

Appellate court could not disturb verdict
of jury because evidence was conflicting.

3. Appeal and error ☞930(1).

All reasonable inferences from evidence
must be resolved in favor of support of ver-
dict and judgment.

4. Appeal and error ☞989.

In determining whether or not there was
material evidence to sustain judgment for
defendant in automobile collision case, it was
only necessary for appellate court to sum-
marize evidence favorable to defendant.

5. Automobiles ☞244(11, 36).

In action for injuries sustained in colli-
sion of automobile at street intersection, evi-
dence justified jury's conclusion that defend-
ant was not negligent, and that driver of au-
tomobile in which plaintiff was riding was
negligent, and that such negligence proximi-
tely caused accident.

6. Automobiles ☞245(61).

Question of proximate cause of automo-
bile collision in which occupant of one of au-
tomobiles was injured was for jury.

7. Appeal and error ☞999(3).

Jury's finding in favor of defendant on
questions of negligence and proximate cause
of automobile collision was final.

8. Trial ☞295(1).

Where instructions taken as whole were
fair and jury was not misled, appellate court
would not reverse judgment because certain
phrases used might not be considered appli-
cable to facts in evidence.

Appeal from Superior Court, San Bernar-
dino County; F. A. Leonard, Judge.

Action by Parthenia D. Sinsbaugh against
Lillian B. Clark. From a judgment for de-
fendant, plaintiff appeals.

Affirmed.

Philip T. Lyons, for appellant.

Swing & Wilson, of San Bernardino, for
respondent.

MARKS, J.

This action grew out of a motor vehicle ac-
cident which happened about 4 o'clock in the
afternoon of December 18, 1928, in the in-
tersection of Colton avenue and Anderson street
in San Bernardino county. Colton avenue
runs east and west, and Anderson street in-
tersects it at right angles. Appellant was
riding south on Anderson street in an auto-
mobile driven by Miss V. M. Riddle. It came
into collision with another automobile being
driven east on Colton avenue by respondent.
Appellant and Miss Riddle were thrown to
the pavement by the impact and seriously in-
jured. They brought separate actions for
damages, which were consolidated and tried
together before a jury which returned a ver-
dict in favor of respondent. This appeal is
taken by appellant from the judgment en-
tered following the verdict.

Appellant maintains that the evidence is in-
sufficient to justify the verdict and judgment
and that the verdict is contrary to law and
the evidence; that errors of law prejudicial
to appellant occurred during the trial; and
that the court erred in giving instructions
proposed by respondent. The only error of
law occurring during the trial specified in her
brief is the refusal of the trial court to grant
her motion made at the close of the evidence
"for a directed verdict against the defend-
ant." There was no error in the denial of this
motion. We will not consider it separately,
as we must discuss the sufficiency of the evi-
dence to support the judgment under the oth-
er specifications of error.

The evidence shows that Miss Riddle was
a huckster, engaged in the business of selling
fruits, vegetables, and other such produce
from house to house, having done business
with appellant for over a year prior to the ac-
cident. Some days prior to December 18,
1928, appellant told Miss Riddle that she
wanted to purchase a milk goat. Miss Riddle
found such goats for sale near Loma Linda
and on the day of the accident was taking
appellant to see them. Miss Riddle would
have received a commission from the owner
of the goats if a sale had been consummated.

Colton avenue is a link in a main traffic ar-
tery leading from the city of Los Angeles
easterly through Los Angeles county and into
San Bernardino county, connecting the cities
of Colton and Redlands in the latter county.
Boulevard stop signs were posted on Ander-
son street both north and south of its inter-
section with Colton avenue. At the trial it
was stipulated by counsel for both parties
that, by an ordinance of San Bernardino
county, Colton avenue was designated as a
boulevard, and vehicles on Anderson street

were required to be brought to a full stop before entering the intersection. Upon this stipulation the case was tried on the theory that vehicles on Anderson street were required by lawful enactment to stop before entering Colton avenue. The ordinance does not appear in the record.

[1-3] We have carefully read the evidence in this case, having in mind the contention of appellant that it is insufficient to sustain the verdict and judgment. Counsel for appellant in his opening brief, and after quoting at length from the evidence upon this point, states his conclusions as follows: "From the foregoing, the most that can be said is, that there is a conflict of evidence as to whether the defendant (Miss Clark) or the driver of the car, Riddle, was negligent, or whether both of these parties were negligent." Our study of the case leads us to agree with this conclusion. Conflicts in evidence are addressed to the jury or the trial court. The jury resolved this conflict in favor of one party and against the other, and this court cannot disturb the verdict because the evidence was conflicting. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25. All reasonable inferences from the evidence must be resolved in favor of the support of the verdict and judgment. *Bandle v. Commercial Bank of Los Angeles*, 178 Cal. 546, 174 P. 44.

[4, 5] In reviewing a case of this kind, it is only necessary for us, in determining whether or not there is material evidence to sustain the judgment, to summarize the evidence favorable to the prevailing party. From the evidence in this case it appears that respondent, with her sister as a passenger, was driving her automobile east on her right-hand side of Colton avenue at a speed of not over 35 miles per hour. Upon reaching the intersection this speed was reduced to about 20 miles per hour. There is nothing in the evidence to force the conclusion that the street crossing was an obstructed intersection as defined in subdivision (b) paragraph 2 of section 113 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1927, p. 1436). The two vehicles entered the intersection at about the same time, with respondent upon the right of the Riddle car, which did not stop on Anderson street before entering the intersection. When it appeared that a collision was imminent, respondent swerved her car sharply to her right, and Miss Riddle kept on her course, driving the front of her automobile into the left side of the Clark car; the place of the impact being from about the rear of the driver's seat forward to near the front end. The collision occurred on the south-east quarter of the intersection east of the center line of Anderson street. Miss Riddle testified that she was proceeding between 15 and 20 miles per hour at the time of the collision; that at such speed she could stop her

car within 5 or 6 feet; that she proceeded between 30 and 40 feet after seeing respondent's car before the impact. Her testimony concerning her action just before the collision was as follows:

"Q. Who did you see coming? A. Miss Clark.

"Q. That is Lillian Clark; what was she coming in? A. She was coming in a nice looking car.

"Q. Was it an open or closed car? A. Closed car.

"Q. Where did you first see her? A. Why I saw her when she was about 50 feet away from us.

"Q. Where were you when you saw her? A. In the middle of the road.

"Q. What did you do? A. I put on the gas and tried to get across the road before she would reach me."

With this evidence before it the jury was justified in concluding that respondent was not negligent and that Miss Riddle was negligent in the operation of her automobile, and that such negligence was the proximate cause of the accident and the consequent injuries to plaintiff. The evidence we have summarized was sharply disputed in some particulars, but this at best created a conflict which the jury resolved in favor of respondent.

[6, 7] Appellant further contends that the evidence shows that respondent was guilty of negligence in the operation of her car just before the accident. Assuming this to be true and that the jury concluded that both respondent and Miss Riddle were guilty of negligence in the operation of their cars before the accident, it was still the province of the jury to determine which act of negligence was the proximate cause of the injury to appellant or whether or not the concurrent negligence of both drivers proximately caused the collision. "The question of proximate cause was one for the jury, and if that be true, their decision cannot be disturbed on appeal. *Newman v. E. E. Overholtzer Sons' Co.*, 182 Cal. 778, 190 P. 175; *Anderson v. Seropian*, 147 Cal. 201, 81 P. 521; *Dougherty v. Ellingson*, 95 Cal. App. 87, 275 P. 456." *Olden v. Babicora Development Co.* (Cal. App.) 290 P. 1062, 1069. The finding of the jury in favor of respondent on these questions is final. 19 Cal. Jur. 732.

[8] Appellant criticizes some of the instructions proposed by respondent and given by the court mainly upon the ground that clauses in some of them charge on questions of law not presented by the evidence. We have reviewed all of the instructions, and think that, taken as a whole, they were fair to all parties, and the jury was not misled by them. This being the case, we cannot reverse the judgment because certain phrases used might not be considered applicable to the facts in

evidence. *Marston v. Pickwick Stages*, 78 Cal. App. 526, 248 P. 930; *Wright v. Salzberger & Sons*, 81 Cal. App. 690, 254 P. 671; *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 264 P. 237; *Weaver v. Carter*, 28 Cal. App. 241, 152 P. 323; *Lower v. Hughes*, 80 Cal. App. 444, 251 P. 952. We conclude that the case was fairly tried, and that the record contains no error prejudicial to the rights of appellant.

Judgment affirmed.

We concur: CARY, P. J.; BARNARD, J.

110 Cal. App. 613

J. & W. C. SHULL v. DOERR et al.
Civ. 7700.

District Court of Appeal, First District,
Division 2, California.

Dec. 23, 1930.

1. Appeal and error $\S$ 935(1).

To support subsequent judgment, appellate court must assume that former judgment was properly set aside, as recited by findings and judgment.

2. Appeal and error $\S$ 714(5).

In determining whether judgment was properly set aside, statements of fact appearing merely in briefs cannot be considered.

3. Mortgages $\S$ 163(3).

Materialman's lien, filed in July, was subordinate to lien of mortgage, executed by owner to contractor and filed in previous February.

4. Mechanics' liens $\S$ 216(2).

Materialman who, at contractor's request, executed false receipt in full, thereby inducing mortgagee to accept mortgage, and causing owner's subsequent payment to mortgagee, held estopped to enforce lien.

It appeared that mortgagee agreed to purchase mortgage only if there were no liens on property, and that execution of receipt in question by materialman caused owner to discharge mortgage, thereby making it possible for purported lien of materialman to become only lien on property, and also caused mortgagee to buy mortgage from contractor, thereby removing burden from contractor, on whom it rightfully belonged.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by J. & W. C. Shull, a corporation, against F. P. Doerr, Silvio Osti, and others. From a judgment for defendant last named, plaintiff appeals.

Affirmed.

Leslie H. Kranz, of Los Angeles, for appellant.

Bigby & Boone, of Downey, for respondents.

STURTEVANT, J.

This is an action to foreclose a mechanic's lien. The plaintiff's complaint named F. B. Doerr and Silvio Osti and a number of fictitious individuals as defendants. The record discloses that summons was served on Doerr, that he did not answer, and that his default was entered. The record also discloses that summons was served on the defendant Osti, that he did answer, and that as to him a trial was had before the court sitting without a jury. The court made findings in favor of the defendant, and from a judgment entered thereon the plaintiff has appealed, and has brought up typewritten transcripts.

[1-4] The plaintiff claims that the trial court erred in vacating the judgment without vacating the default; that it also erred in setting aside the default after considerable lapse of time; and that no estoppel arose against the plaintiff by reason of the issuance by it of a certain receipt. We will discuss the foregoing points in the order stated. The attack on the motion to set aside the judgment and the claim that the default in name was not set aside are questions not supported by the record before us. In the clerk's transcript appear what purport to be two judgment rolls. The first judgment roll contains a copy of a judgment which purports to be a default judgment against the defendant Doerr and the defendant Osti, and is dated the 4th day of June, 1927. The transcript does not contain any attack thereon, nor any order vacating or setting it aside. In the second judgment roll appears a set of findings. Those findings recite that a former judgment was set aside. The judgment in the second roll contains a similar recital. The record is wholly silent whether the same was set aside by the stipulation of the parties or on motion, and if the latter, on what grounds, on whose motion, and at what time the order was made. In support of the judgment we must assume that at a proper time and in a proper manner the first judgment was set aside. In this connection we are not at liberty to look at certain statements of fact that appear merely in the briefs. The plaintiff's complaint appears to be in ordinary form. The contract for building the house was \$5,500. Early in 1924 Silvio Osti as owner and F. P. Doerr as contrac-

for agreed upon the contract. By its terms the owner executed to the contractor his promissory note in the sum of \$5,500 and executed a mortgage to secure its payment. Both instruments were delivered and the mortgage was recorded February 16, 1924. It is alleged that the plaintiff's claim for lumber and materials amounted to \$1,198.35. The record does not show the exact date of the completion. The claim of lien was filed July 30, 1924. That lien was subordinate to the mortgage lien. In his answer, defendant set forth certain denials and then he pleaded an estoppel. The estoppel so pleaded, among other things, consisted of the following facts: After the building had been completed Doerr proceeded to negotiate a sale of the note and mortgage that had theretofore been executed by the defendant. He applied to the Downey Finance Company as a prospective purchaser. That company stated that it would purchase the note and mortgage if there were no liens on the property and if there was no other defense to the note and mortgage. Upon the request of that company, Doerr applied to this plaintiff for a receipt in full. The plaintiff executed the receipt under date of May 10, 1924. Doerr then exhibited that receipt to the defendant. After examining the receipt, acting on the request of the Downey Finance Company, this defendant executed a written disclaimer in which he disclaimed that there were any offsets or other defenses to said note and mortgage. At the time of the assignment the defendant had made some small payments pursuant to the terms of his note. Acting on the information which he had, thereafter he proceeded to make his payments promptly to the Downey Finance Company and at the time of the trial had entirely paid off the mortgage lien. The plaintiff asserts that there could be no estoppel unless respondent in some manner relied on the said receipt to his financial detriment. That is true, but the evidence shows that the defendant did suffer the financial detriment. Every payment he made on the mortgage after seeing the receipt dated May 10, 1924, was such detriment. If the receipt had not been exhibited to him, his property was subject to the mortgage lien and in order to recover as on a mechanic's lien the plaintiff would have been compelled to buy up the mortgage lien. But having caused the receipt to be published, the defendant was lulled to sleep and was caused to pay off the note and mortgage and thus make it possible for the purported lien of the plaintiff to become the only lien. Furthermore, if the false receipt had not been published and if the defendant had been informed of the true facts, he never would have issued the written disclaimer. If that had never been issued the Downey company would not have purchased the note and mortgage and the

burden would have rested where it rightfully belonged, to-wit, on Doerr.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

110 Cal. App. 358

HUBBARD v. TURNER et al.
Civ. 4222.

District Court of Appeal, Third District,
California.

Dec. 11, 1930.

Vendor and purchaser — 340.

Purchaser of lot sold with reference to unrecorded map *held* entitled to recover payment, notwithstanding he knew map was unrecorded (St. 1907, p. 290).

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Action by P. H. Hubbard against Frank B. Turner and other. Judgment for plaintiff, and defendants appeal.

Affirmed.

James, Pace, Smith & Younkin, of Los Angeles, for appellants.

Howard F. Shepherd, of Los Angeles, for respondent.

PLUMMER, J.

The plaintiff had judgment for the return of money theretofore by him paid to the defendants for and on account of the purchase price of certain real estate under a certain writing purporting to be an agreement of purchase and sale. From this judgment the defendants appeal.

The findings of the trial court, sustained by the testimony, show the following: That on or about the 4th day of November, 1923, the said plaintiffs and defendants entered into a writing by the terms of which the defendants purported to sell, and the plaintiff purported to buy certain real property therein referred to as lot 18 of tract proposed to be numbered 4175, being a portion of lot 13 of subdivision of Rancho La Canada, as per map of said lot now on record in book 4 at page 351, Miscellaneous Records of Los Angeles County. The court further found that the map referred to was a private map, and then found as follows: "That said private map had not been, at that time, and was not until the 24th day of April, 1925, filed for record in the office of the County Recorder of the County of Los

Angeles." The court further found that the plaintiff knew, at the time he purchased the premises and executed the said agreement, that no map or plat of said tract had been recorded in the office of the county recorder of Los Angeles county; that said lot 18 of said proposed tract could not have been identified, and said description was not a sufficient description of any real property whatever, without reference to the map or plat of said tract thereafter recorded. The court in its findings referred to the act of the Legislature declaring void agreements such as the writing executed by the plaintiff and the defendants, and further found that both the plaintiff and the defendants knew, or should have known of the existence of the act of the Legislature requiring maps to be recorded. The court further found the amount which the plaintiff had paid on the purchase price of said lot, and awarded judgment for the repayment thereof.

It is but fair to counsel for appellants to state that in their closing brief they frankly call attention to the case of *White v. Jacobs*, 204 Cal. 334, 267 P. 1087, which practically disposes of the issues involved herein. In that case it is held (quoting from the syllabus): "Sale or offer for sale of lots of land by reference to an unrecorded map or plat is expressly prohibited by the statute of 1907 (Stats. 1907, p. 290), and contracts for such sales based thereon are illegal and void; and the fact that the purchaser, who is seeking to recover the money paid on account of such illegal and void transaction, knew that the map referred to therein was unrecorded constitutes no defense to the right to recover." To the same effect is the case of *Kozlowski v. Adams*, 102 Cal. App. 578, 283 P. 365. The circumstances here presented are identical in so far as the determination of this cause is concerned, with circumstances involved in the cases referred to, and basing our decision upon those cases, the judgment of the trial court must be affirmed. And it is so ordered.

All concur.

110 Cal. App. 762

A. NYDEGGER, Plaintiff and Respondent, v. Frank B. TURNER and L. B. McCright, Defendants and Appellants.
Civ. 4221.

District Court of Appeal, Third District,
California.

Dec. 11, 1930.

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Charles R. Dyer, of Montrose, and James, Pace, Smith & Younkin, of Los Angeles, for appellants.

Howard F. Shepherd, of Los Angeles, for respondent.

PER CURIAM.

The plaintiff had judgment against the defendants for the return of money paid under an alleged agreement of sale for a certain lot or tract of land in a certain tract proposed to be numbered 4175. This is a companion case with that of *P. H. Hubbard v. Frank B. Turner and L. B. McCright*, 294 P. 465, this day decided. The facts surrounding the execution of the purported contract for the sale of real estate are identical with those involved in the Hubbard Case. No plat or map of the proposed tract had been filed for record at the time of the execution of the purported agreement of sale. The authorities cited in the case of *Hubbard v. Turner and McCright* are controlling here, and necessitate an affirmation of the judgment. And it is so ordered.

110 Cal. App. 518

BONNER et ux. v. FINNEY.

Civ. 7706.

District Court of Appeal, First District,
Division 2, California.

Dec. 18, 1930.

1. Vendor and purchaser ⇨315(3).

Evidence in vendors' action for balance of purchase price held to sustain finding defendant, not plaintiffs, had agreed to obtain prospective lessee's signature to oil and gas lease.

2. Appeal and error ⇨204(3).

Objection to oral evidence to explain escrow instructions is waived where not made in trial court.

3. Evidence ⇨450(1).

Escrow instructions held ambiguous as to whether purchaser or vendors should obtain lessee's signature; hence parol evidence was properly admitted.

Original escrow instructions contained no reference to lease; first supplemental instruction merely stated signatures of lessor and lessee constituted approval of lease when signed by them, and second supplemental instruction merely stated that lease was to be signed by lessee and vendors.

4. Vendor and purchaser $\Rightarrow$ 301, 314(3).

Vendor may bring action at law for purchase price and need not allege or prove consideration was fair and adequate (Civ. Code, § 3307).

5. Vendor and purchaser $\Rightarrow$ 148, 303.

Placing deed in escrow as agreed constituted continuing tender of performance by vendors and was sufficient to support action for purchase price.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by W. Folsom Bonner and wife against Easter May Finney. From a judgment in favor of plaintiffs, defendant appeals.

Affirmed.

Carroll Allen, of Los Angeles, for appellant.

Roane Thorpe, of Los Angeles, for respondents.

SPENCE, J.

This action was brought by plaintiffs to recover from defendant the sum of \$6,500 as the balance due on the purchase price of certain real property. From a judgment in favor of plaintiffs, defendant appeals.

The original agreement between the parties was evidenced by an instrument in the nature of escrow instructions dated April 9, 1927, and designated "Buyer and Seller Instructions." This instrument was signed by the parties and deposited with the Title Guarantee & Trust Company. It provided for the payment of \$10,500 by the defendant and for the deposit in escrow of a deed executed by plaintiffs to be delivered to defendant upon payment of \$10,500. It further provided for the payment to plaintiffs of \$4,000 of the purchase price as soon as the title company could show title free and clear. No mention was made of any lease in the original instructions. Upon the trial it appeared that plaintiffs had deposited the deed with the escrow holder and had received \$4,000. Upon stipulation by the defendant "that the plaintiffs performed each and every act necessary and requisite to be done by them, except that they did not secure the signature of Mr. Brown to the lease as provided by the escrow instructions" and the further stipulation that the defendant had not paid the \$6,500, plaintiffs rested.

Under the allegations of the answer and cross-complaint defendant offered to show that the original agreement had been modified by supplemental instructions, which evidence was admitted. It appeared that on the day the original instructions were deposited supplemental instructions bearing the same date were signed and deposited with the escrow holder which read in part as follows:

"Mutually supplementing our instructions of this date, the payment of the \$4,000.00 by the grantee to the grantor of this escrow is contingent upon the grantor (Bonner) placing in escrow for grantee a lease dated April 9th, 1927, by and between Robert A. Brown Jr. and Chris E. Schirm, lessees; W. Folsom Bonner lessor, the signatures of the lessor and the lessee constitute their approval of said lease when signed by them, and your company is relieved from certifying to the regularity, validity or sufficiency of same being responsible for delivery only to Easter May Finney of this lease at the close of escrow. In the event that this lease is not signed by W. Folsom Bonner and placed in this escrow your company will not pay out \$4000.00 previously mentioned.

"[Signed] W. Folsom Bonner

"By J. G. Spangler

"[Signed] W. Folsom Bonner

"[Signed] Robert A. Brown, Jr.

"[Signed] Chris. E. Schirm

"The above is hereby approved, and I have initialed said lease, which constitutes my approval and acceptance of said lease.

"[Signed] Easter May Finney."

The lease above referred to was placed in escrow and was signed by plaintiffs and by Robert A. Brown, Jr., and Chris E. Schirm, the lessee named. This lease was an "oil and gas lease" which was quite lengthy, but omitted any proper description of the property. On April 12, 1927, further supplemental instructions were signed and deposited with the escrow-holder, which instructions read in part as follows:

"Mutually amending our instructions of April 9th, 1927, you will cancel and deface that certain lease dated April 9th, 1927, which does not disclose legal description and in lieu thereof Lessor W. Folsom Bonner and wife and Easter May Finney hand you a lease in favor of Robert A. Brown Jr., and Chris E. Schirm, dated April 9th, 1927, which you will deliver to Easter May Finney, at close of escrow, said lease is approved by us as evidenced by our signatures on same and your company is relieved from certifying to any acts contained in this lease or to its regularity, validity or sufficiency, being responsible for delivery only. Said Lease is to be signed by Robert A. Brown, Jr., and Martha J. Bonner, Grantee (Easter May Finney) hands you Cashier's check No. 540098 on the Bank of Italy, Long Beach Branch, in favor of Mrs. E. M. Finney and endorsed by her to your Company, and your Company is instructed to pay my Grantor the sum of \$4000.00 immediately in compliance with my original instructions as I have this day seen your search of title covering property in this escrow, showing vested in my Grantor who has placed in escrow a deed

in my favor which I approve. I fully understand that this escrow has not been completed and your Company is relieved from any liability or responsibility on account of my paying this money to my Grantor prior to the completion of this escrow.

"[Signed] Easter May Finney
"[Signed] W. Folsom Bonner."

This second lease was delivered to the escrow holder and signed by the plaintiffs. It was also signed by the lessee Schirm, but was never signed by the lessee Robert A. Brown, Jr.

[1] On the trial the main issue to which testimony was directed was whether the signature of the lessee Brown was to be obtained by defendant or plaintiffs, and a great amount of conflicting testimony was offered by both sides on this issue without objection. Upon this conflicting testimony the court found that the plaintiffs had not agreed to obtain the signatures of the lessees but that defendant had agreed to obtain said signatures. There was ample evidence to sustain these findings. The testimony offered by plaintiffs showed that they agreed to sign the lease at the request of defendant and solely for defendant's accommodation and convenience; that the lessees were unknown to plaintiffs and that it was not until after the original instructions had been signed that defendant approached them concerning the signing of the lease; that defendant asked plaintiffs to sign the lease, stating that she desired the driller to get to work prior to the termination of the escrow; that plaintiffs did not agree to obtain the signatures of the lessees, but, on the contrary, defendant stated that she would obtain these signatures.

[2, 3] Upon this appeal appellant contends that oral evidence was not admissible to explain or construe the escrow instructions as those instructions were not ambiguous. This objection may not be raised for the first time upon appeal and the objection is waived where the appellant fails to object to the testimony in the trial court. *Inner Shoe Tire Co. v. Tondro*, 83 Cal. App. 689, 257 P. 211; 2 Cal. Jur. 267, § 84. But aside from the waiver of the objection, we are satisfied that the escrow instructions were uncertain and ambiguous.

The instructions were informal and contained no definite terms imposing the obligation to obtain the lessees' signatures upon either plaintiffs or defendant. Appellant states that by the terms of the instructions there was no obligation on the part of the appellant to obtain the signature of the lessee Brown. It is likewise true that the terms of the instructions did not impose that obligation upon the plaintiffs. This issue could only be determined by resort to parol evidence and the court properly admitted such evidence and made its findings thereon.

[4] Appellant further contends that the respondents were not entitled to judgment for the contract price. Appellant argues that the respondents' remedy, if any, was in damages under section 3307 of the Civil Code, and that the judgment for the full contract price is a judgment for specific performance and is unauthorized by the pleadings, there being no allegation or proof that the consideration was fair and adequate. If this were an open question in this state, there might be merit in the position taken by the appellant, but it has long been settled that a vendor may bring an action at law for the purchase price in which action it is unnecessary to allege or prove that the consideration was fair and adequate. *Amaranth Land Co. v. Corey*, 182 Cal. 66, 186 P. 765; *North Stockton, etc., Co. v. Fischer*, 138 Cal. 100, 70 P. 1082, 71 P. 438; *Weisenberg v. Hirschhorn*, 97 Cal. App. 532, 275 P. 997; *Burg Bros. v. Bercut*, 73 Cal. App. 114, 238 P. 166; *Paramore v. Colby*, 45 Cal. App. 559, 188 P. 72.

[5] Appellant further contends that there was no delivery of the deed and consequently the purchase price did not become payable. In support of this contention appellant cites authorities to the effect that title does not pass when a deed is placed in escrow. These authorities are not in point. Under the cases above cited delivery of the deed was not essential. The placing of the deed in escrow constituted a continuing tender of performance on the part of plaintiff and was sufficient.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

LINDSEY et al. v. PACIFIC ELECTRIC RY. CO. et al.*

Civ. 80.

District Court of Appeal, Fourth District,
California.

Dec. 20, 1930.

Rehearing Granted Jan. 14, 1931.

1. Railroads ⇨309.

Duties and rights of interurban electric railroad in operating trains over crossing in rural territory were similar to those of company operating steam-propelled trains.

Right of way was owned by company which maintained depots for convenience of freight and passenger service, and maintained regular schedule of arrival and departure of freight and passenger trains.

2. Railroads ⇨313.

Failure of motorman of train to sound bell or whistle 80 rods from crossing was negligence per se (Civ. Code, § 586; Pen. Code, § 390).

Failure to give the required warning signal was a violation of certain provisions of law by defendant from which injury followed to another, and hence negligence.

3. Railroads ⇨330(2).

That crossing signals were out of order and continually operating did not absolve deceased, familiar with condition, from exercising due care.

Deceased must have known of defective condition of signals, as he had passed over crossing several times during period they were out of order.

4. Railroads ⇨328(3).

Failure of driver approaching unprotected crossing, view being obstructed, to alight from automobile and advance to ascertain if train is approaching, is contributory negligence.

5. Railroads ⇨350(16).

Where work train, not on regular schedule, followed regular passenger train on single-track road at interval of between 30 and 90 seconds, whether motorist, struck by work train, was contributorily negligent in not observing all precautions held for jury.

The passing of the passenger train in front of motorist was sufficient indication to him that tracks would remain clear for more than ninety seconds, so that quantum of care required of him as reasonably prudent man before proceeding onto tracks was question of fact for jury.

Whether automobile was moving at time when struck did not definitely appear from evidence, but eyewitnesses were positive deceased did not stop before the front of his truck was on the tracks or stopped so near thereto it was struck by train.

6. Appeal and error ⇨999(1).

Case being properly before jury, finding could not be disturbed.

7. Railroads ⇨350(16).

Whether approaching electric train was heard by deceased motorist held for jury.

8. Trial ⇨194(3).

Instruction that, if jury believed negative testimony of witnesses who heard no signal prior to accident, conclusion was warranted no signal was given held not erroneous as on weight of evidence.

Jury was elsewhere correctly instructed on burden of proof, credibility of witnesses, that jurors were sole judges of value and effect of evidence and not bound to decide in conformity with declarations of any number of witnesses not producing conviction in their minds, and that testimony of one witness entitled to full credit is sufficient for proof of any fact if it satisfied their minds, as against other witnesses not so satisfying them.

9. Appeal and error ⇨930(2).

Where word of common import is used in instruction, jury is deemed to have understood and applied to it ordinary meaning.

10. Trial ⇨296(3).

Instruction referring to whistle signal "immediately prior to accident" held not misleading or prejudicial in light of other instructions.

Jury must be held to have understood given instruction and applied to it its usual and ordinary meaning, as against contention that phrase was indefinite as to time and might be construed to refer to whistle, which was allegedly sounded when work train was about eight hundred feet from place of accident. "Immediately" is word of common use, the meaning of which is well understood and is variously defined as "without interval of time; without delay; straightway; instantly; at once; without lapse of time; without the intervention of anything; directly; forthwith."

[Ed. Note.—For other definitions of "Immediately," see Words and Phrases.]

11. Appeal and error ⇨1064(1).

Instruction that, if crossing bell was out of order and rang continuously to deceased's

knowledge, it gave no warning of approach of train, *held* not to warrant reversal.

Conclusion to be drawn from facts should have been left to jury, but instruction merely stated logical and obvious conclusion, a mere commonplace within general knowledge of jurors, and would not warrant a reversal.

12. Railroads ⇨347(11).

When admissible, evidence of deceased's habit as to stopping, looking, and listening at crossing must be limited to place of accident.

13. Death ⇨60.

Evidence of deceased's habit at railroad crossing is inadmissible, where there are eye-witnesses to accident.

14. Appeal and error ⇨1050(1).

Erroneous admission of deceased's habit at railroad crossing, in view of slight evidence thereof and positive testimony deceased did not stop, *held* not prejudicial.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Thelma Lindsey and others, by Lillian E. Lindsey, their guardian ad litem, and another, against the Pacific Electric Railway Company and another. From a judgment in favor of plaintiffs, defendants appeal.

Affirmed.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for appellants.

McNabb & McCloskey, of San Bernardino, and Kenneth C. Wiseman, of Los Angeles, for respondents.

MARKS, J.

This is an appeal from a judgment entered in favor of respondents for damages resulting from the death of Peady Gilbert Lindsey. The case was tried before a jury.

Respondents are the widow and minor children of Peady Gilbert Lindsey, deceased, who was killed at about 8:20 o'clock on the morning of March 20, 1928, in a collision between a truck which he was driving north on Hellman avenue and a west-bound work train of the Pacific Electric Railway Company operated by A. V. Ringo as motorman. The accident occurred at the crossing of the railway company's single track road over Hellman avenue, a public road in San Bernardino county. Hellman avenue runs north and south and is crossed at an acute angle by the railroad track, which runs from northeast to southwest on the company's right of way, which is privately owned. The roadway on Hellman avenue approaches the railway

crossing on an ascending grade of about 2 per cent. from the north and about 3½ per cent. from the south for about two hundred feet. At the time of the accident there was an earth bank about four feet high on the east side of Hellman avenue south of the crossing and on the right of way extending northeasterly along the southerly side of the tracks. On this bank, oats and weeds had grown to a height of about two feet. There was an orange orchard on private property to the southeast of Hellman avenue and the right of way so that the view of the tracks to the northeast of a traveler approaching the intersection from the south was thoroughly obscured until he had reached a point about ten feet south of the southerly rail. In approaching the crossing from the south in a truck similar to the one driven by the deceased the front wheels would have to be very close to the track before the driver could see four or five hundred feet of the tracks to his right. The usual cross-arm warning signal was maintained by the railway company north on Hellman avenue. It also maintained an electrically operated wigwag on the west side of Hellman avenue south of the crossing. This wigwag was out of order on the morning of the accident and operated continuously without regard to whether or not trains were approaching. This condition had existed for three or more days prior to the accident. The railway operated about twelve passenger trains and three freight trains traveling on regular schedule over the crossing each way every day. Deceased had passed the crossing every day, Sundays excepted, for several months, and was familiar with the conditions there existing including the defective operation of the wigwag.

On the morning of the accident two witnesses traveling south on Hellman avenue saw the wigwag working and stopped their automobile about fifty feet north of the crossing. They saw deceased approaching the crossing from a point about one hundred sixty feet south of it. He was driving his truck at a speed of not more than fifteen miles per hour, which was gradually decreased until the time of the impact. Whether or not it was moving at this time does not definitely appear. However, both witnesses were positive that he did not stop before the front of his truck was on the track or so near thereto that it was struck by the electric box car of the railway company. We conclude from the undisputed evidence of these witnesses that, while deceased may have listened for an approaching train, he could not look until he was in a position of danger on account of his obstructed view and did not stop his truck until it, or a portion of it, was in front of the approaching train. It should be noted that these witnesses heard the noise of the freight

train as it approached the Hellman avenue crossing.

Under the facts which we have stated appellants maintain with every show of confidence that the judgment cannot be sustained because the evidence shows that the deceased was guilty of contributory negligence as a matter of law, which will defeat a recovery on the part of respondents. They rely upon the familiar rule in California that, in a case where the view of the driver of an automobile was so obstructed that he could not see a train approaching on a track intersecting his path until his automobile was in grave danger, ordinary care and prudence required him to stop, alight, and walk ahead to a point where he could see down the tracks before he proceeded onto the crossing. Respondents seek to escape the rigors of this rule in the instant case by applying an exception to it which finds authority in other jurisdictions, but which has not been considered in any of the appellate courts in this state. They rely upon this rule, which we may summarize as follows: That where the driver of a vehicle on a public highway sees a train running on a regular schedule over a single track road pass in front of him, and then proceeds upon his way and is struck by a second train not running on a regular schedule which is following the first train very closely in point of both time and distance, an unusual circumstance is presented which removes the case from the general rule and makes the question of contributory negligence one of fact to be determined by the jury.

In the instant case it appears that the deceased came into collision with a work train of the railway company which was not running upon any schedule. It was preceded at a distance of from eleven to thirteen hundred feet by a passenger train running on regular schedule. Witnesses for respondents fixed the time elapsing between the passing of the two trains at from one to one and a half minutes. The passenger train was traveling at a speed of from fifty to fifty-five miles per hour and the work train at a speed of about forty miles per hour. Taking the distance separating the two trains as given by the witnesses for respondents and the number of feet the work train would travel in one second at forty miles per hour as furnished by the counsel for appellants and allowing for the reduced speed of the work train just before the accident, the time elapsing between the two trains passing the same point would be about thirty seconds.

There is no direct evidence in the record that the deceased saw the passenger train cross the intersection. However, the crossing was clearly visible for at least one-half a mile south on Hellman avenue. The deceased must be charged with seeing that which was plainly within his vision.

[1] The railway tracks crossing Hellman avenue were part of an interurban electric railroad connecting the cities of Los Angeles and San Bernardino. The right of way was owned by the railway company, which maintained depots for the convenience of its freight and passenger service. It maintained a regular schedule of arrival and departure of freight and passenger trains. The accident we are considering occurred outside of the limits of an incorporated city and in rural territory. Under these circumstances the duties and rights of the appellant railway company in operating its trains are similar to those of a company operating steam-propelled trains under similar circumstances. 22 Cal. Jur. 237.

[2] There is evidence in the record which would support the finding that no warning bell or whistle was sounded by the work train at a distance of at least eighty rods or less from Hellman avenue. Section 486, Civ. Code; section 390, Pen. Code. The violation of the provisions of law by a defendant from which injury follows to another is negligence per se. *Benjamin v. Noonan*, 207 Cal. 279, 277 P. 1045.

[3] We are of the opinion that the fact that the wigwag and crossing bell were out of order, so that they were in continuous operation regardless of whether or not a train was approaching, is of little importance in this case. The deceased must have known of the defective condition of these warning signals, as he had passed over the crossing several times during the period they were out of order. He must have known that their operation did not convey a true notice of the approach of a train, or that the track was clear. He knew that they could not be relied upon, and that he should use the same care to determine the approach of a train before attempting to cross the track that would have been required of him had there been no such warning device maintained at the crossing.

[4] It is well-settled law in California that when the driver of a vehicle approaches a railway crossing not protected by a flagman, gates, or signal devices, where his view of approaching trains is obscured and he cannot otherwise determine whether he can safely proceed, due care requires him to "stop, and get out of his automobile, and go forward on foot, to ascertain if a train is approaching." *Koster v. Southern Pacific Co.*, 207 Cal. 753, 279 P. 788, 794. It has been repeatedly held that under these circumstances the standard of ordinary care required of a motorist is so well and clearly established that his failure to observe and follow this standard constitutes contributory negligence as a matter of law and leaves no issue to be submitted to the jury. As was said in the case of *Christinger v. Southern Pacific Co.*, 169 Cal. 619, 149 P. 175, 177, where "the standard of con-

duct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard under the circumstances shown he is not entitled to have his case go to the jury."

[5] It remains for us to determine whether or not the instant case presents any new or added circumstances not appearing in those cases upon which the established rule is founded, which will release the rigor of the general rule by presenting facts not contemplated by it and thereby make the question of contributory negligence a question of fact for the jury instead of one of law for the court. The only fact suggesting itself which might accomplish this result is that of the work train, not on regular schedule, following a regular passenger train upon a single-track road at an interval of time not less than thirty or more than ninety seconds, would the fact that the regular passenger train had passed over the crossing in front of deceased and proceeded upon its way lull him into a sense of security and give him a sufficient promise of safety and assurance that another train would not follow in such a short space of time, that it would change the quantum of care required of him?

The only case directly in point to which we have been cited is *McGhee v. White* (C. C. A.) 66 F. 502, 504, decided by Mr. Justice Taft. The facts of this case are so exactly similar to those of the instant case that it would seem a waste of space to set them out here. The court said: "The work train had passed over the crossing not more than one and a half minutes before Kennedy was struck, and he had good reason to believe, therefore, that another train was not following within so short a time and distance. The shortness of time between the two trains * * * would indicate a distance of not more than a sixth or a seventh of a mile between the two trains, running at 20 miles an hour. This is very much less than the usual distance between trains running in the same direction, and is most dangerous. Kennedy might, therefore, reasonably presume that, in the 40 yards he had to go to reach the track, another train would not pass the crossing. At least, this circumstance prevents us from holding as a matter of law that his failure to look was contributory negligence."

There are many cases decided in other states which recognize the rule of contributory negligence in not stopping, looking, and listening at railroad crossings where the view is obstructed, in which the reasoning used lends support to the exception to the rule recognized in the *McGhee* Case.

In the case of *Bonnell v. D., L. & W. R. R. Co.*, 39 N. J. Law, 189, the driver of a vehicle upon a highway, on approaching a crossing, saw to his right the rear of a train headed away from him. Without doing anything

further for his own safety he proceeded upon his way, and was injured at the crossing by the train backing into him. In deciding the case, the court said: "But the plaintiff had looked when about one hundred yards from the crossing, and saw, as he supposed, a train going in the opposite direction, with the rear towards him. He was not required, by any legal rule, to look continually until he crossed the track. A man of prudence might have received a fixed impression, from the appearance of the train, that it was going away from the station. * * * He saw Fancher's wagon crossing just before him, and this circumstance was likely to confirm his belief that there was no train near. It was for the jury to weigh all these facts, and say whether his mistake and consequent feeling of security were unreasonable, and manifested a want of proper care. * * * There were inferences to be drawn from all the facts of this case, upon the question of contributory negligence, which were proper for the jury."

In the case of *Duame v. Chicago & N. W. Ry. Co.*, 72 Wis. 523, 40 N. W. 394, 7 Am. St. Rep. 879, the court used the following language: "The train, which consisted of the locomotive, two box cars, and a caboose, had come out on the main tracks from one of the side tracks, and run north across the street; and, when it had passed about two or three car-lengths north of the street, it stopped, and immediately backed down towards the street. * * * There was no flag-man at this crossing, and no one on the rear end of the train, to give warning to those about to cross the track at that place, and whether the bell was rung was a fact in dispute; witnesses for the defendant testifying that it was, and other witnesses testifying that they did not hear it. The deceased, in a one-horse vehicle, was driving west on Main street, towards his home, about seven miles in the country; and had approached within seven or eight rods of the crossing from the east, when the train passed over it, and went on north, out of his sight, and he continued on a trot towards the crossing, and, as his horse stepped on the track, the rear car of the train was very near it, and whether he attempted to back or turn around or pass over the evidence is uncertain, but his carriage came in contact with the rear car, and he was thrown under its wheels, and killed. * * * The evidence tending to prove the negligence of the employees of the defendant is very strong, if not conclusive; and we infer, therefore, that the court directed the verdict on the ground of the contributory negligence of the deceased. * * * As a general rule, and unaffected by other circumstances, the proposition urged in the brief of the learned counsel of the respondent, that one approaching a railroad crossing who may, by looking, have a timely view of an approaching train, is bound to look and listen for its approach, before attempting to cross

the track, and that a failure to do so is negligence, may be correct, and the circuit court most probably applied this strict rule to the plaintiff's case. We do not think that such a rule would be applicable to this case. There is a most important fact in this case, that materially modifies this strict rule, and makes it inapplicable, and that is that this train had just passed this crossing while the deceased was within a few rods of it and driving upon a trot, and had passed on out of his sight, and he had reason to suppose that it would continue on, it being upon the main track, like any other train upon its regular route, and had no reason to suppose that it would immediately return. The presumption was that it would go on, and not return. He was thus thrown off his guard. * * * He was entrapped by this unexpected return of the train, for its sudden return over the crossing without warning was to him a trap."

The case of *Palmer v. Detroit, etc., Co.*, 56 Mich. 1, 22 N. W. 88, also recognizes the exception to the general rule. The railroad track ran north and south, crossed by a street at right angles. Plaintiff was proceeding west on the street and saw an engine and tender going north over the crossing. When it passed he proceeded onto the crossing, watching for trains from the south, but not the north. He was injured by the engine and tender backing onto the crossing from the north, which he did not see until too late to avoid injury. It was held that under the circumstances contributory negligence was a question of fact for the jury.

In the case of *Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801, 805, the engine and tender of a train passed over a crossing followed closely by several cars which caused the injury complained of. In holding that the question of contributory negligence was one for the jury, the court said: "The interval of time between the passing of the engine and the coming of the train might, under the evidence, have been found by the jury to have been very short; and considering this fact in connection with the evidence that the whistle was sounded as the engine approached; that the bell was rung as the engine passed; that the cars, only six feet in height, came on without signal; that the view was obstructed; and that the intestate had no knowledge of the time of the train—the jury might conclude that the attention of the intestate was diverted, so that, without negligence on his part, he, for this reason, did not see the train in time to escape; that his conduct was influenced by the defendant's negligent acts, and he was thus thrown off his guard, so that without his having acted otherwise than as might have been excusable in a prudent man, under the circumstances, he was run down. Where the conduct of the defendant

was plainly negligent and caused the injury, and there is dispute or doubt as to the negligence of the plaintiff, the conclusion of one man, though learned in the law, should not be forced upon 12 men sworn to try the facts. If there was any evidence tending to show that the plaintiff's intestate was thrown off his guard by such means as might have such effect upon an ordinary prudent man—and we think there was some such evidence—it was not wrong to submit to the jury the question of contributory negligence."

In the case of *York v. Maine Central Ry. Co.*, 84 Me. 117, 24 A. 790, 792, 18 L. R. A. 60, the court said: "But sometimes there may be indications that nothing will pass along the railroad for some minutes at least. The gates (where there are gates) may be up,—a standing assurance to the traveler that no cars or engines are coming. *Hooper v. Railroad Co.*, 81 Me. 260, 17 A. 64. The retiring of a flagman from the crossing may inform the traveler that he may now cross safely. In view of the well-known and necessary rule requiring considerable space and time between successive trains, the passage of one train may be an indication that no other will pass the same way for some minutes. These and other acts upon the part of the railroad may throw the usually prudent traveler off his guard, and free him from the reproach of negligence in attempting to cross at such a time."

Other cases which lend support to the exception we are considering are *Bowen v. N. Y. Central Ry. Co.*, 89 Hun, 594, 35 N. Y. S. 540; *Phillips v. Milwaukee, etc., Co.*, 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521; *French v. Taunton, etc., Co.*, 116 Mass. 537; and *Scott v. St. Louis, etc., Ry. Co.*, 79 Ark. 137, 95 S. W. 490, 116 Am. St. Rep. 67, 9 Ann. Cas. 212. The following cases do not recognize the exception to the general rule that one must stop and look and listen before entering upon a railway crossing or be adjudged guilty of contributory negligence. *Bush v. Union Pacific Ry. Co.*, 62 Kan. 709, 64 P. 624; *Long v. Pacific, etc., Ry. Co.*, 74 Or. 502, 144 P. 462, 145 P. 1068, L. R. A. 1915F, 1151; and *Durbin v. O. R. & N. Co.*, 17 Or. 5, 17 P. 5, 11 Am. St. Rep. 778.

The rule that one approaching an unguarded railroad crossing where his view is obstructed must stop, look, and listen or be found guilty of contributory negligence is based upon the fact that the law has established a rule of conduct which the ordinarily prudent person must follow under given and fixed circumstances. Where different circumstances are presented, the reason for the rule fails. We believe that the passing of the passenger train in front of *Lindsey* was a sufficient indication to him that the tracks would remain clear for more than ninety seconds, so that the quantum of care required of him as a reasonably prudent man before

proceeding onto the tracks was a question of fact to be determined by the jury.

In the case of *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651, the court said: "The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. This proposition has been frequently declared by this court. [Citing cases.] The rule is general, and appellant presents a very long list of cases in which the rule has been stated. The effect of all is the same. If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. *McKune v. Santa Clara Co.*, 110 Cal. 480, 42 P. 980." *Seller v. Market-Street Ry. Co.*, 139 Cal. 268, 72 P. 1006; *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 596, 112 P. 53; *Gregg v. Western Pacific Co.*, 193 Cal. 212, 223 P. 553.

The following reasoning used in the case of *Vaca v. Southern Pacific Co.*, 91 Cal. App. 470, 287 P. 346, 349, is pertinent: "While a traveler about to cross a railroad track is generally charged with the duty of stopping and looking before crossing the tracks, in each particular case his discharge of that duty and his care or negligence is to be measured in the light of surrounding conditions and circumstances. It is true that he may not seek redress for an injury caused solely through his own carelessness, but in measuring his conduct a jury may take into consideration that the railroad company has created a condition which has caused the traveler to relax his own vigilance so that he is brought to his destruction or injury. *Scott v. San Bernardino Valley Co.*, 152 Cal. 610, 93 P. 677; *Runnels v. United Railroads*, 175 Cal. 528, 166 P. 18. It is only when the evidence is such that the court is impelled to say that it is not in conflict on the facts and that from these facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, that the law steps in and forbids the plaintiff a recovery. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 240, 116 P. 513. In *Smith v. Southern Pacific Co.*, 201 Cal. 57, 255 P. 500, the court uses this language: 'The rights and obligations of all persons using a public street are, in this respect, reciprocal. Each may rightfully expect that the other will, at the proper time, discharge his proper duty toward others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. But he frequently must, to some extent, depend on

others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time.' See, also, *Marini v. Southern Pacific Co.*, 201 Cal. 392, 257 P. 74, and *Clark v. Bennett*, 123 Cal. 275, 277, 55 P. 908."

[6] Applying these rules to the unusual facts and circumstances of this case, and having in mind the fact that the question of what would or would not constitute ordinary care on the part of deceased in approaching the crossing under these unusual facts and circumstances has not been fixed by a definite rule of law in this state, we therefore conclude that what was or was not ordinary care on his part was a question of fact properly left to the jury. The jury absolved deceased from the charge of contributory negligence. Its finding is final and cannot be disturbed by us.

[7] Appellants also attempt to predicate contributory negligence of deceased on the noise made by the work train in approaching the crossing. They argue that since this noise was heard by others it was or should have been heard by deceased and constituted sufficient warning of the approach of danger to require him to heed the warning and stop. Whether or not he heard or should have heard the noise was a question of fact for the jury. *Skaggs v. Willhour* (Cal. Sup.) 292 P. 649.

[8] Appellants complain of an instruction given by the trial court at the request of respondents, as follows: "Testimony of several witnesses near the crossing where deceased met his death, to the effect that they heard no whistle of the train of the Pacific Electric Railway Company which collided with the truck of the deceased, until immediately prior to the accident, is sufficient, if believed by the jury, to warrant the conclusion that no such signal was given prior to said time, and you are instructed that a failure to give due and timely warning of the approach of said train would be negligence on the part of said motorman and on the part of the Pacific Electric Railway Company."

They insist that this is an instruction on the weight and value of the evidence and therefore erroneous. In the case of *Keena v. United Railroads*, 197 Cal. 148, 239 P. 1061, 1063, it was said: "It is sufficient to say that the weight to be given to negative testimony often arises in railroad and other accident cases where it is claimed that signals were not given, and that in such cases, the question is purely for the jury, and it has frequently been held that negative evidence of this character is sufficient to sustain a verdict (*Jones on Evidence* [Horwitz], § 893, p. 400), even though it conflict with other

evidence to the effect that a warning was actually given. *Thompson v. Los Angeles Ry. Co.*, 165 Cal. 748, 134 P. 709." The case of *Badostain v. Pacific Electric Ry. Co.*, 83 Cal. App. 290, 256 P. 576, is to the same effect.

[9, 10] The instruction told the jury in effect that, if they believed the testimony of the witnesses who did not hear the warning whistle blown or the bell rung on the work train, they might conclude that no such warnings had been given. The jury was elsewhere correctly instructed on the burden of proof; credibility of witnesses; that the jurors were the sole judges of the value and effect of the evidence and are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds; and that the testimony of one witness entitled to full credit is sufficient for the proof of any fact if it satisfied their minds, as against the testimony of other witnesses which did not so satisfy them. Taken in connection with the other instructions, we think the effect of the instruction in question was to inform the jurors that, if the negative testimony of the witnesses who did not hear warnings given by the work train produced conviction of its truth in their minds, it would be sufficient to support the finding that such warnings had not been given. Appellants further complain of this instruction because of the use of the phrase therein, in referring to a warning whistle, of "immediately prior to the accident." They contend that this phrase is indefinite as to time and might be construed to refer to a whistle which the trainmen testified was sounded when the work train was about eight hundred feet northeasterly from the place of the accident. The word "immediately" is one of common use, the meaning of which is well understood. In Webster's International Dictionary it is defined as "without interval of time; without delay; straightway; instantly; at once." In Funk & Wagnalls Standard Dictionary it is defined as "without lapse of time; instantly; at once; without the intervention of anything." In the case of *Newkirk v. Gross*, 203 Ill. App. 79, when this word was used in an instruction, it was held to mean "instantly, directly, without delay, forthwith," and that its use could not have misled the jury. Where a word of common import is used in an instruction, the jury must be held to have understood it and applied to it its usual and ordinary meaning. We do not believe the use of this phrase could have misled the jury. While the verbiage of the instruction might have been improved upon, we conclude that, when it is considered with the other instructions, no prejudicial error followed from its being given to the jury.

[11] Appellants also complain of an instruction given at the request of respondents as follows: "If the jury find from the evidence

that the signal bell maintained at the crossing at the intersection of Hellman avenue with the tracks of the Pacific Electric Railway Company was out of order so that it rang continuously and had been ringing continuously for several days prior to the collision, whether a train was near the crossing or not, and that deceased used said crossing frequently while said bell was thus out of repair and that he knew of the bell's unreliability, then you are instructed that the ringing of said signal bell, or wig-wag bell, at and immediately prior to the attempt of the deceased to cross the track of the defendant Pacific Electric Railway Company, was no notice to him of the approach of the work-train which later collided with his truck."

They contend that this instruction was on the facts and invaded the province of the jury. The court told the jury in this instruction that, if the bell was out of order so that it rang continuously for several days without regard to approaching trains, and this fact was known to deceased, it gave him no warning of the approach of a train. This instruction gave no rule of law to the jury. That the ringing of the defective bell gave no warning to deceased was a deduction or conclusion drawn from the facts given in the balance of the instruction. Whether or not these facts were established by the evidence was correctly left to the jury. The conclusion to be drawn from them also should have been left to the jury. However, we fail to see how any other conclusion could have been drawn from these facts by one of average intelligence. The instruction merely stated a logical and obvious conclusion—"a mere commonplace within the general knowledge of jurors; and we do not think that either the giving or the refusing of such an instruction would warrant a reversal." *Kauffman v. Maier*, 94 Cal. 269, 29 P. 481, 18 L. R. A. 124; *Hirshfeld v. Dana*, 193 Cal. 142, 223 P. 451, 457.

[12-14] Appellants complain of the ruling of the court in permitting Elbert Lindsey, son, and Lillian E. Lindsey, widow, of deceased, over their objection, to testify to the habit of deceased when about to cross a railroad track. When Elbert Lindsey was on the witness stand the following occurred:

"(Q.) By Mr. Wiseman: Are you familiar with the habits of your father as to stopping and looking and listening at railroad crossings?

"Mr. Morris: I object to that as not in rebuttal, incompetent, irrelevant and immaterial.

"The Court: The objection is overruled.

"(A.) Yes sir.

"(Q.) What were his habits in that regard?

"Mr. Morris: Objected to as irrelevant and immaterial and incompetent. There is evidence here of what was done on this occasion.

"The Court: The objection is overruled.

"(A.) He would always stop and listen and look."

During the testimony of Mrs. Lindsey the following occurred:

"(Q.) Are you familiar with his habits, regarding his habits at railroad crossings? (A.) I am.

"Mr. Morris: I object to that as incompetent, irrelevant and immaterial, because the evidence shows that there were eye-witnesses to the accident.

"The Court: Objection overruled.

"(A.) He was very strict; he stopped, looked and listened."

It must be conceded that these rulings of the court were erroneous.

The evidence is open to objection on two grounds: First, because it is too general, and, second, because there were two eyewitnesses to the accident. When admissible, evidence of the habit of deceased should have been limited to habit at the place of the accident. Evidence at another place and under different circumstances has been held too remote. *Blackford v. Beckworth*, 90 Cal. App. 37, 265 P. 514. Evidence of habit is not admissible where there are eyewitnesses to an accident. The dicta in the case of *Wallis v. Southern Pacific Co.*, 184 Cal. 662, 195 P. 408, 15 A. L. R. 117, upon which the trial court seemed to have based its ruling in admitting this evidence, has not been followed in later cases. The admission of this class of evidence is now limited to cases where there are no eyewitnesses to the accident. *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 201 P. 599; *Chappell v. San Diego, etc., Co.*, 201 Cal. 560, 258 P. 73; *People v. Crossan*, 87 Cal. App. 5, 261 P. 531; *Blackford v. Beckworth*, supra; *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 P. 1083.

We have quoted all of the evidence in the record concerning the habit of deceased in stopping before crossing a railroad. As we have observed, two witnesses testified he did not stop, and no witness contradicted this evidence. After reading the record we have concluded that the deceased did not stop. The jurors are presumed to be reasonable human beings subject to reasonable mental reactions. We cannot see how a reasonable person would give the slight evidence of habit appearing in the record any serious consideration in view of the positive testimony of two witnesses that deceased did not stop before going on the tracks before the collision. We therefore conclude that under the facts and circumstances of the instant case, the admission of this evidence was not prejudicial error. While the evidence is sharply conflicting, there is sufficient material evidence in the record to support the

conclusion that the warning signals required by law to be sounded by a train approaching a street crossing were not given on the work train. This established negligence on the part of appellants, which the jury found was the proximate cause of the injury to deceased. Under the peculiar circumstances of this case we hold that the question of the contributory negligence of deceased was properly left to the jury. The verdict resolved this question against appellants. While there were technical errors of law committed in the giving of an instruction and in rulings on the admission of evidence, we do not consider them sufficiently prejudicial to warrant a reversal of the judgment.

Judgment affirmed.

We concur: CARY, P. J.; BARNARD, J.

110 Cal. App. 626

CITY OF BEVERLY HILLS v. ANGER et al.
Civ. 7297.

District Court of Appeal, Second District,
Division 1, California.

Dec. 24, 1930.

Rehearing Denied Jan. 19, 1931. Hearing Denied by Supreme Court Feb. 19, 1931.

1. Eminent domain ⇨262(4).

Jury's only duty was to find, as accurately as evidence permitted, market value as of date of condemnation for park.

2. Eminent domain ⇨222(4).

Instructions that, if property restricted to residence uses could not be profitably used therefor, jury could presume city council would change zoning ordinance held erroneous.

Such instructions on issue of value of land taken were erroneous because there could be no legal presumption that city council would cause realty to be zoned for income producing purposes, but at most presumption would be that council might, in exercise of its discretion, modify zoning ordinance to permit property zoned for residence purposes to be used for business and other income producing purposes.

3. Eminent domain ⇨222(4).

Instruction that, if property could not be properly used for residential purposes, deed restrictions to such purposes were ineffective, held erroneous.

Such instruction relating to value of land taken was erroneous, because, though circumstances might arise in which equity

would not aid grantor in enforcing restriction of property to residence uses, it did not necessarily follow that terms of deed relating thereto were without legal force or effect, and it was also erroneous because there was no evidence sustaining assumption.

4. Eminent domain ⇨262(5).

Erroneous instructions respecting presumption of change in zoning of property taken for park and enforceability of restrictions held not prejudicial to city.

Such erroneous instructions were not prejudicial, in view of other correct instructions respecting city's power to change zoning ordinances, and in view of amount of verdict for property taken.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by the City of Beverly Hills against Arthur Anger, A. F. Farrow and others, to acquire land for public park purposes. From a judgment for defendant last named and certain other defendants, plaintiff appeals.

Affirmed.

Richard C. Waltz, of Beverly Hills, and Hill, Morgan & Bledsoe, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents.

CONREY, P. J.

In this action, brought to acquire land for public park purposes, it was found that respondents were the owners of a part of the land sought to be taken. This land of respondents is known in the record as parcel 10, and is a lot having a frontage of 80 feet on Palm avenue and 150 feet on Santa Monica boulevard in the city of Beverly Hills. By verdict of a jury the market value of parcel 10 was determined to be the sum of \$18,000. Accordingly, that amount was awarded to respondents.

The plaintiff, in presenting its appeal from the judgment, contends that the court erroneously gave to the jury certain instructions, by reason whereof the jury was led to appraise at an unduly high market value the said parcel 10; in other words, that there was prejudicial error, amounting to a miscarriage of justice.

Parcel No. 10 was included within a subdivision of lands which, in the conveyances to lot purchasers, were made subject to certain restrictions designed to limit the use of the property to use for single family residences. These restrictions had not been released by any party to the records of title. Parcel No. 10 was also within territory which, by a city

ordinance of December 4, 1922, had been placed within a residential zone.

The instructions to which appellant takes exception are these:

(a) "If you find from the evidence in this case that the property herein in question cannot be beneficially used or sold for single residence purposes, but that the same, by reason of change in conditions, has become usable and valuable only for income purposes, such as apartments, hotels and/or business, then you are to presume that the city council in due and proper time will so change and modify the zoning ordinances of the city of Beverly Hills covering this property that the same will be zoned for such income producing purposes."

(b) "It is not the policy of the law to so zone property or territory as to prohibit the use or the sale thereof, and the law presumes that if and when changes take place that render the property not usable or unsalable for the purposes for which the same is sold, the authorities in due and proper time will so change such zoning ordinances as to let the property be used or developed and sold for the purposes for which it can be beneficially used and sold."

(c) "If you find from the evidence in this case that the property in question, by reason of changes, if any, that have taken place since the same was conveyed by the Rodeo Land & Water Company, has ceased to be single residential property, and that the same cannot be sold for that purpose or properly used for that purpose, then and in such event you are instructed that the restrictions contained in the original deed are no longer of any force or effect."

Appellant contends that there was no evidence tending to prove any of the facts which were the assumed basis of these several instructions. However, we need not go into that question very far. Let it be assumed that there was some evidence from which the jury might have found the facts to which the court referred in the instructions. Even so, was the law correctly stated?

[1] The only duty imposed upon the jury was to find and declare, as accurately as the evidence would permit, the market value of parcel 10, as of the date April 21, 1928. The existence of the restrictions to which we have referred had been proved. The fact that the land had been conveyed subject to the stated restrictions would have an influence (varying according to circumstances) upon the market value. The same observation applies to zoning ordinances. Respondents attempted to prove, by the testimony of witnesses, that parcel 10 had a high market value, partly due to a prospective or possible use for business purposes, which would re-

quire and cause a release of the existing restrictions which had confined the property to residence uses. Witnesses produced by the city testified to lower market values, and gave less weight to possible future use of the land for business purposes. It was, however, singly and only, the market value of the land as of the stated time that the jury was expected to ascertain and declare, in accordance with the evidence.

The instructions to which appellant has excepted do not have direct relation to the principal question presented to the jury. They relate to conditions, and changes in condition, of the property, which might lead to changes of legal status, which in turn, if they did occur, and if they became generally known, might tend to establish for the property a higher market value. And it could be claimed, at least with some plausibility that on the 21st day of April, 1928, already the prophetic minds of dealers in real property in the city of Beverly Hills were looking forward to that happy day when the trees and shrubs on parcel 10 would give way for apartment houses, hotels, and other business houses.

[2] We are of the opinion that the instruction (a) was erroneous in this, that there could be no presumption of law that for the reasons stated in the instruction the city council will cause the said real property to be zoned for "such income producing purposes." The utmost length of this instruction should have been that, in view of the supposed changes of conditions, the city council in the exercise of its discretion might modify, as indicated, its zoning ordinance, and that in estimating the market value the jury might consider this possible change of the ordinance and the reasonable influence on market value, of such possibility.

The foregoing observations apply, in similar manner, to instruction (b).

[3] Instruction (c) told the jury in effect that if, since the deed restrictions were placed upon parcel 10, such changes have occurred that the property cannot be sold as residential property, or properly used for that purpose, then the restrictions contained in the original deed "are no longer of any force or effect." We think that appellants are right in their claim that there is no evidence to sustain the finding assumed by this instruction, at least in this, that there is no evidence that this property could not prop-

erly be used for residential purposes. While circumstances might arise, such that equity would not aid the grantor in enforcing the restrictions, it does not necessarily follow that the terms of the deed relating thereto are of no legal force or effect. *Strong v. Shatto*, 45 Cal. App. 29, 37, 187 P. 159. The instructions, furthermore, failed to point out any relation of the stated legal proposition to the question of market value of the land, as of the date April 21, 1928, or at all.

[4] The question remains whether the particular instructions to which exception is taken, when read together with all of the instructions given, were, by reason of the errors assigned, so far prejudicial that they probably caused the jury to award to respondents a compensation substantially greater than otherwise would have been obtained. We are of the opinion that there was no such consequence. The jury was fairly and fully instructed upon the rules for determining market value and the rules for weighing the evidence relating thereto. Touching particularly upon the zoning ordinance and the deed restrictions, the court said:

"All zoning ordinances in the city of Beverly Hills can be repealed or modified or otherwise changed at any time by the city council of the city of Beverly Hills, subject to referendum by the people; that is, the registered voters of Beverly Hills.

"The deed restrictions placed by the Rodeo Land & Water Company against the property in question can be removed, modified or otherwise changed, at any time, by the consent of the owners thereof, with the consent of the Rodeo Land & Water Company."

The testimony of witnesses, qualified to give opinions upon market value of this property, fixed that value at prices varying from \$28,000 to \$9,240. This jury was instructed that it must not "strike an average" by computation, but must decide according to the weight of the evidence in the case, and there is no reason to doubt that it endeavored to obey this instruction. An examination of the record indicates that the verdict is one which fairly represents the reasonable result of the evidence.

The judgment is affirmed.

We concur: YORK, J.; HOLLZER, Justice pro tem.

110 Cal. App. 362

**DELOREY v. BOARD OF PUBLIC WORKS
OF LOS ANGELES et al.**

Civ. 7183.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1930.

Rehearing Denied Jan. 9, 1931. Hearing De-
nied by Supreme Court Feb. 9, 1931.**1. Municipal corporations ⇨158.**

Cause must be shown for removal of ap-
pointive officers of Los Angeles serving un-
der civil service, although term of office is not
fixed (St. 1925, p. 1028).

2. Municipal corporations ⇨178.

Mayor of Los Angeles could remove mem-
ber of board of public works without cause,
subject to assent of council (St. 1925, pp. 1056,
1099, §§ 72, 73, 230).

The mayor had right to remove member
of board of public works without cause
as against contention that, as member was
appointed for term of five years and the
power of removal given by Los Angeles
City Charter (St. 1925, p. 1028) contained
no provision that it might be exercised
without cause, it was necessarily implied
that removal should be only for cause after
notice and hearing, since the term of
the board member under section 72 (page
1056), was for five years except as other-
wise provided, and it was otherwise pro-
vided in section 73 (page 1056) that the
member might be removed by the mayor,
subject to approval of council.

3. Municipal corporations ⇨154.

That mayor of Los Angeles could exercise
improperly power to remove member of mu-
nicipal boards did not justify judicial legis-
lation to require mayor to show cause for re-
moval.

4. Municipal corporations ⇨178.

Member of board of public works of Los
Angeles, removed by mayor, was entitled to
compensation until council approved removal
(St. 1925, pp. 1056, 1099, §§ 72, 73, 230).

Appeal from Superior Court, Los Angeles
County; Henry G. Jorgensen, Judge.

Action by E. J. Delorey against the board
of Public Works of the City of Los Angeles
and others. From a judgment denying a writ
of mandate, plaintiff appeals.

Modified, and, as so modified, affirmed.

Hearing denied by Supreme Court; LANG-
DON, J., dissenting.

Hill, Morgan & Bledsoe, Charles P. McCar-
thy, L. E. Whitehead, and E. H. Delorey, all
of Los Angeles, for appellant.

Hewitt, McCormick & Crump, Leslie R.
Hewitt, Frank W. Stafford, and Frank M.
Smith, all of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

This is an appeal from a judgment in the
court below discharging an alternative writ
of mandate theretofore issued on application
of the plaintiff and denying the petition for a
peremptory writ.

July 1, 1928, appellant was appointed a
member of the board of public works of Los
Angeles for a five-year term and as such mem-
ber drew a salary of \$500 per month, payable
semimonthly. On September 16, 1929, John
C. Porter, the mayor of Los Angeles, notified
appellant in writing that he had that day re-
moved him from office as such member of the
board of public works subject to the assent of
the city council. Thereafter, and on the 27th
of September, the city council by an aye and
no vote of ten to four assented to such action
of the mayor. It was to compel the making
and certifying of a salary claim for the last
half of said month of September that appel-
lant brought the action in the court below,
and, from a judgment in favor of respond-
ents, this appeal is taken.

It is appellant's contention that his term
was fixed by law at five years, and that, the
power of removal given by the charter con-
taining no provision that it may be exercised
without cause, notice, or hearing, it is neces-
sarily implied that removal shall be *only for
cause*, after notice and hearing; that, hav-
ing been taken without notice, hearing or
cause, the action of the mayor and council was
invalid and appellant remained a member of
the board of public works, entitled to his sal-
ary; and that the court erred in not so find-
ing and adjudging. No case has been found
where this particular charter provision has
been construed, but counsel have cited numer-
ous authorities from other jurisdictions to
sustain their respective positions. Typical in
a general way as to one class of cases cited is
that of Hallgren v. Campbell, 82 Mich. 255, 46
N. W. 381, 383, 9 L. R. A. 408, 21 Am. St. Rep.
557, involving a street commissioner of the
city of Menominee, Mich., who had been ap-
pointed for the term of one year. The city
council, prior to the expiration of the term,
adopted a resolution providing that such com-
missioner "be and he is hereby removed from
office" and declaring said office vacant. No
notice was given the commissioner of the
charges against him. Section 3 of the charter
authorized the appointment by the city coun-
cil of several officers, among them the street
commissioners. Section 5 fixed the term of
such commissioners, as well as other officers,
at one year. Section 17 provided: "Any per-
son appointed to office by the council by au-
thority of this act may be removed therefrom
by a vote of the majority of the aldermen

elect. * * * In case of elective officers provision shall be made by ordinance for preferring charges, and trying the same, and no removal of an elective officer shall be made unless a charge in writing is preferred and an opportunity given to make a defense thereto." It was claimed that, because the section last quoted provided that elective officers could not be removed except for cause, the Legislature intended that appointive officers might be removed without cause. The court said: "In such a case the legislature may by express words confer upon the common council of a city the power to remove an officer without cause; but in the absence of such power given in express words the presumption must be that the legislature intended that every officer appointed for a fixed period should be entitled to hold his office until the expiration of such period unless removed therefrom for cause after a fair trial." It is true that section 3 of the charter referred to also provided for the removal of certain officers at pleasure, naming, them, but it did not include the street commissioner, although the same section provided for his appointment as well as that of other officers named. Other general classes of cases cited are where the statute or charter fixes the term of office and no power of removal is given the appointing officer or body (*People v. Jewett*, 6 Cal. 291; *Page v. Hardin*, 8 B. Mon. [Ky.] 648; *State v. Kuehn*, 34 Wis. 229), and where the term is fixed by one section of the charter and the power to remove for cause is given by another (*Matter of Carter*, 141 Cal. 316, 74 P. 997, 998; *Bannerman v. Boyle*, 160 Cal. 197, 116 P. 732).

The case of *Matter of Carter*, supra, involved the charter of the city of San Diego, which provided as follows, the italics being ours: "The mayor shall appoint all officers whose election or appointment is not otherwise specially provided for in this charter or by law. He shall have power to remove *for cause* any person holding office by his nomination or appointment, *and in case of such removal shall give written notice thereof, stating the cause, to the person removed*, and shall immediately notify the common council of his action and the reasons therefor." Charter of San Diego, art. 3, § 7, Stats. 1889, p. 661. The court held that the mayor was not exercising a judicial function under the language quoted, as the notices to be given were after the removal and merely for the purpose of informing the officer of the reasons for removal and of making a record.

In the case of *Bannerman v. Boyle*, supra, the charter of the city of San Francisco was under consideration. Bannerman was appointed by the mayor in 1909 as a member of the board of education to fill an unexpired term ending January 8, 1911. Without any notice or hearing, the mayor, on February 1, 1910, removed or attempted to remove him from office and appointed one Power to fill the

vacancy assumed to have been so created. Bannerman refused to vacate the office, and denied the validity of the act of removal. The charter of San Francisco in effect then (Stats. 1899, p. 241-367) provided in section 1 of chapter 1 of article 7 (page 317) that such board should consist of four directors appointed by the mayor for a term of four years, so classified that the term of one of them expired each year. Section 18 of article 16 (page 361) provided that any appointed officer might be removed by the mayor for cause. Speaking on the question of removal from office, the court says, at page 205 (of 160 Cal., 116 P. 732, 735) of the opinion: "Upon this question the great weight of authority is to the effect that where an officer is appointed for a fixed term and it is provided that he may be removed during the term 'for cause,' without other qualifying words, such removal cannot be made except after notice and a hearing."

The case of *State v. Brown*, 57 Mo. App. 199, is in the same general class as that of *Hallgren v. Campbell*, supra, and the court in commenting on the reason for the rule says: "It is fixity of tenure that destroys the power of removal at pleasure otherwise incident to the appointing power. *State v. Police Commissioners*, 14 Mo. App. 302. The reason of this rule is the evident repugnance between the fixed term and the power of arbitrary removal. The effect of this rule is, that the right to hold during a fixed term can only be overcome by an express grant of power to remove at pleasure. An inferential authority to remove at pleasure cannot be deduced, since the existence of a defined term, ipso facto, negatives such an inference, and implies a contrary presumption, i. e., that the incumbent shall hold to the end of his term, subject to removal for cause."

It is to be noted that, in all of the cases of the general classes mentioned, the terms of office are fixed in one section of the charter or other law, without any reservation of the right of removal, and the power to remove is given in another section. This brings us to the consideration of another class of cases where the tenure of office by the very terms of its creation is subject to the power of removal. In *Sweeney v. Stevens*, 46 N. J. Law, 344, a jailer who had been appointed by the board of freeholders for a five-year term was by the affirmative votes of two-thirds of the members removed from office before the expiration of the term. The statute under which both acts were taken reads: "* * * The board of freeholders shall appoint some proper person to be the jailer or keeper of the jail of said county, who shall hold his office for the term of five years, and until another be appointed in his stead; but such jailer may at any time be removed from office, by a vote of two-thirds of all the chosen freeholders of the said county, for the time being." The court, in speaking of such section, said: "This

language is plain, and seems clearly to authorize the removal of the defendant in the mode in which it has been attempted. We have been referred to no judicial decision, and are aware of none, which would justify our engrafting upon it any provisions to defeat the power that it appears to confer. The legislature, in creating the office, had the right to provide for its vacation in such manner as they saw fit, and in ascertaining what the manner is, we must take their language in its ordinary import."

In *State v. Somers*, 35 Neb. 322, 53 N. W. 146, the commissioner of health of the city of Omaha was removed from office before the expiration of the two years for which he was appointed. The section under which he was appointed, so far as material to his office, reads: "Said commissioner of health shall be appointed by the mayor, subject to the approval of a majority of the council, shall hold office for a two years from date of appointment, unless sooner removed or retired." The officer so removed brought a quo warranto proceeding to determine the right of the defendant, appointed in his place, to the office. The writ was denied, and the action dismissed; the court using the following language: "An examination of the several sections of the act shows that certain officers, like the board of public works, consisting of three members, are appointed for one, two, and three years, and there is a provision for filing specific charges against each of the members of such board, and removing the person adjudged to be guilty. Where an office is held in that way, there can be no removal except for cause. Where, however, the right of removal is reserved in the appointing power, without the necessity of making charges, it may be exercised in the discretion of the appointing power, even before the expiration of the term."

In the case of *Commonwealth v. Harriman*, 134 Mass. 314, an information in the nature of a quo warranto was filed by the Attorney General at the relation of Joseph M. Day to try the title to the office of judge of probate and insolvency for the county of Barstable. The relator was appointed to the office in 1858 to hold the office during the term of his good behavior therein, "unless sooner removed" in the manner prescribed by the Constitution. He was removed from office in 1882 by the Governor of the state, with the consent of the council, upon the address of both houses of the Legislature, and the defendant was appointed in his place. The language of the Constitution under which he was appointed and removed, so far applicable, is as follows: "All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this Constitution: provided nevertheless, the Governor, with consent of the Council, may remove them upon the address of both houses."

es." Const. Mass., c. 3, art. 1. It was contended by the relator that the only effect of the proviso was to give the power of removal by address for causes not covered by the provision of the Constitution for impeachment. In regard to this contention, the court said: "We are not able to see any just rule of construction by which we can thus limit and qualify the plain language of the proviso. The language is broad and general; in its terms it includes a removal for any cause which is deemed by the legislature and executive departments sufficient. If it had been intended to exclude from this provision the power to remove for misconduct in office, leaving that to be dealt with by impeachment exclusively, it would have been so stated. Neither this article nor the article on impeachment contains any indication that the power of impeachment was to exclude the power of removal by address. We must give to the proviso the broad meaning which its language imports. The article reaffirms the great principle asserted in the Declaration of Rights, that judicial officers shall hold their offices during good behavior; but it was deemed wise, as a check upon the absolute power and independence of the judicial department, to confide in the other two coordinate branches of the government the exceptional power of removing judicial officers by address when an exigency requires it, of which, from the nature of the case, they must be the sole judges. The obvious and natural meaning of the language used seems to us to require this construction, and our view is confirmed by the history of this provision." The court reinforces its conclusion by going into the history of the adoption of the amendment of the Constitution, which showed that the convention refused to adopt a proviso in practically the language quoted, but did adopt an amendment providing that no address for the removal of any judicial officer should pass either house of the Legislature until the causes of such removal were first stated and entered in the journal and served on the officer charged, "so that he may be admitted to a hearing in his defense in both houses." Such amendment, however, was rejected by the people. The court, on page 328 (of 134 Mass.) of its opinion, uses this further and very significant language: "The relator strongly contends that, upon this construction of the Constitution, the tenure of judicial office is not during good behavior, but at the will of the other departments of the government. It seems to us that this is arguing against the existence of a power clearly conferred, from the fact that it may be abused and perverted. There is no more danger of the abuse of the power of removal, if it includes the right to remove for impeachable offences, than there would be if it were confined, as the relator contends it should be, to cases of physical, mental or moral disability of a judicial officer, of which necessarily the removing power must be the sole judge."

Any power may be abused. The judiciary might corruptly declare any law or body of laws to be unconstitutional and invalid, and thus encroach upon the powers of the Legislature; yet no one doubts the right and duty of the judiciary to declare invalid any law which in its judgment violates the Constitution. In confiding to the two coordinate branches of the government this important and exceptional power of removing the judiciary, the people found a sufficient protection to the substantial independence of the judicial department in the constitutional guaranties thrown around it, in the fact that the removal can only be made by the concurrent action of both houses of the Legislature and of the Governor and Council, all of whom are directly answerable to the people at frequently recurring periods, and in the trust and confidence they may rightfully repose in their servants and agents that in the exercise of any power committed to them they will act in obedience to their oaths of office, and in the spirit of the fundamental principles of the Constitution."

It is to be remembered that officers appointed during good behavior come under the same rule as to the necessity of preferring charges, etc., as those appointed for a fixed term. Mechem on Public Officers, § 454.

The case of *Townsend v. Kurtz*, 83 Md. 331, 34 A. 1123, was one involving the title to the office of insurance commissioner of the state. Townsend was appointed as insurance commissioner under a statute providing that such officer "shall be appointed by the governor, treasurer and comptroller for the term of four years * * * and shall hold his office during the term for which he is appointed, or until his successor is appointed and qualified, unless sooner removed by the governor, treasurer and comptroller." Townsend qualified and entered upon the duties of his office. The following March the then Governor, comptroller, and treasurer adopted a resolution removing him from office. No charges were filed against him, and he was removed without prior notice or hearing. Faced with the great conflict in the decisions on the question, the court, on page 1127 (of 34 A., 83 Md. 331) of the opinion, says: "Without attempting the hopeless task of reconciling the authorities on all the questions, there is no conflict between them on some points. When the statute has given the appointing power authority to remove the appointee, although originally appointed for a definite term of years, it can be exercised. The point of divergence between the cases is as to how the removal can be accomplished when the law granting the power is silent on the subject. On the one side it is said that in such case it must be implied that the power can only be exercised for cause which admittedly requires notice, hearing, etc., while the other line of cases refuses to permit the court to interpolate words that the legislature did not see fit to

use. As we see our lawmakers have declared the various causes for which certain officers may be removed, and have thereby declared they can only be removed for cause, but have in this instance been silent on the subject, we think the safer rule to be to hold that they have thus manifested an intention not to limit the governor, treasurer, and comptroller to any particular cause or causes for removal of the insurance commissioner, and have thereby practically left it to their discretion, which, of course, must be honestly and fairly exercised."

[1] Taking up the charter of Los Angeles (Stats. 1925, p. 1028), we find that the people adopting it so framed it that out of the army of officers and employees needed to carry on the very extensive and complicated functions connected with the government of a great city they have retained the right to elect only the following: Mayor, city attorney, controller, members of the board of education and of the city council. All others are appointive, and different methods of both appointment and removal are provided. The city clerk is appointed by and "may be removed by the Mayor, subject in both appointment and removal to confirmation by the Council and to the Civil Service provisions of this charter." Section 44. The city engineer is appointed by the board of public works, and holds office "at the pleasure of the board." Section 49. The purchasing agent is appointed and may be removed by the mayor, subject in both appointment and removal to confirmation by the council and to the civil service provisions of the charter. Section 55. The treasurer is likewise appointed and removed. Section 58. The city prosecutor is appointed by the mayor, subject to confirmation by the council (section 51), but the section of the charter relating to appointment is silent on the question of removal. No terms of office are fixed for the above appointive officers, but section 11 provides that, "in case of appointive officers the appointing power shall have power of removal, except that where confirmation is required for appointment the consent of the confirming body shall be required for removal, and where the officer is appointed subject to the civil service provisions of this charter, such removal shall be in accordance therewith, except as elsewhere specifically provided in this charter." No term being fixed as to such officers, there could be no question of repugnance between tenure of office and the power of removal; but as to those under civil service rules there must be cause shown, although otherwise they would be holding at the pleasure of the appointing power.

The mayor is "the executive officer of the city and shall exercise a careful supervision over all its affairs." Section 40 (1). It is his duty annually to communicate by mes-

sage to the council a general statement of the condition and affairs of the city (Section 40 (2), and it is his duty "to be vigilant and active in the enforcement of the ordinances of the city; to exercise a constant supervision over the acts and conduct of all officers and employees" (Section 40 (3). It is apparent from the foregoing that the mayor is the active and responsible head of the city government, notwithstanding the fact that, by reason of necessity, the administrative work is performed under the immediate supervision and direction of the various departments of the city, one of which is the department of public works with which we are here concerned. It is reasonable to suppose that it was the intention of the Legislature and the citizens of Los Angeles, having placed such a responsibility on the mayor, to provide him with administrative officers with whom he was satisfied, without requiring him to go to the extreme of preferring charges, notice, and hearing, etc., in order to remove them. And so the charter seems to read. Considering the fact that the appointment is made by the responsible executive head of the city government, with the approval of a majority of the council, it is probable that the character and ability of the men appointed to the important administrative boards of the city would in all cases be such that the only dissatisfaction the mayor would have with any of them would arise from a difference in views as to the policies of handling the work of the particular department. The framers of the charter undoubtedly realized and intended that in such matters the mayor should have the right at all times to have heads of departments in sympathy with his policies of administration, and, to prevent any abuse of such right, limited the power to remove an incumbent only by requiring the assent of a majority of the body concurring in the appointment. The plain language of the charter indicates such an intention, and there seems to be nothing that calls for the interpolation of words to change it.

[2] The Los Angeles City Charter, under which the appointment and removal in question here were made, provides for the establishment of a board of public works consisting of five members, and that "the members of the Board of Public Works shall be appointed and shall organize and conduct the business of the board in the manner provided in Sections 72, 73, 74, 75, 76, 77, 78, 84 of this charter relating to citizen boards." Section 230, Stats. 1925, p. 1099. The sections of the charter above referred to relating to appointments are as follows: "Sec. 72 [page 1056]. The terms of the commissioners * * * shall be five years, except as otherwise provided in Sec. 73 * * *" "Sec. 73 [page 1056]. The members of each of the boards * * * shall be appointed, and

may be removed by the Mayor, subject in both appointment and removal to the approval of the Council by a majority vote."

The term to which the members of the board are appointed is not "five years," but five years *unless sooner removed* by the mayor with the approval of the council. Sections 72 and 73. Such is the clear language of the two sections read together, as they must be. Section 72 says the term shall be five years except as provided in section 73, and such section provides that the members of each board "may be removed by the mayor", etc. So the term is five years if the member is not removed prior to that time in the manner provided in the section. The language of sections 72 and 73 applies to all the administrative boards for whose acts the mayor, as executive of the city, is directly responsible. It does not say removed *for cause*, or removed after *charges preferred*, but "*shall be appointed and may be removed by the mayor, subject in both appointment and removal to the approval of the council by a majority vote.*" It is an express grant to the mayor, the responsible executive head of the city government, of the general power of removal; the only limitation being that such act is subject to the approval of the council. "The grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice." *Eckloff v. Dist. of Columbia*, 135 U. S. 240, 10 S. Ct. 752, 34 L. Ed. 120. The grant of power concerning which the United States Supreme Court used such language was to "remove from office," and the court said if that was all the legislation "there would be no question," but there was a contention made that the unrestricted right of removal so given was limited by the provisions of prior statutes. Is there anything in the charter that places any additional or further limitation on the right granted here, other than the one requiring the approval of the council? It is clear that there is nothing in the section cited, unless the five-year tenure is to be so construed. In the instant case there is no repugnance between the fixed term and the power of removal, because, as we have pointed out, the fixed term is itself expressly made subject to that power; so there is no reason for adding words to language that is unequivocal.

[3] Appellant contends that the rule urged by respondents would destroy the scheme of the charter, which provides for the expiration of terms of members of the different boards at different times so that, if a new member is appointed at the expiration of each term, there would still be on the board experienced members. The answer to that is that we cannot assume that any responsible executive would so jeopardize his administration by any such foolish act; and, even though one might be so unwise, still that of itself is

no reason why the courts should make the charter foolproof in that regard by judicial legislation. The remedy, if one is needed, is with the people who elect the mayor and whose charter it is.

It also is urged that, if the contention of respondents is sustained, it will mean the making of all of the officers personally subservient to the mayor, bring back the spoils system, and make the government of the city a one-man affair. The people in adopting the charter were satisfied, however, to place the responsibility on the mayor elected by them, subject only in the exercise of the power of removal, so far as the members of the various departmental boards are concerned, to the approval of a majority of the council, an independent branch of the city government whose members are themselves elected by the people; and it is not for us to assume that such officers are not interested in conscientiously executing the trust reposed in them. And, even if they were not, we could not close our eyes to the existence of a power so clearly conferred simply because it might not be exercised in the way it should.

[4] It would seem, however, that the act

of removal was not complete until assented to by the council. That occurred September 27, and until then appellant was a member of the board and entitled to compensation as such. So far as the record shows, therefore, the lower court should have issued a peremptory writ of mandate to respondents to compel the payment of the salary due appellant for the intervening twelve days. In that particular the judgment of the lower court will be modified, and such court is instructed to issue a peremptory writ of mandate to the respondents board of public works of the city of Los Angeles, Hugh J. McGuire, Arthur Eldridge, A. W. L. Dunn, and James Hyde, members of said board, and Horace B. Ferris, as secretary and chief accounting employee of said board, commanding them to certify and file the salary claim of appellant for the sum of \$200, being his salary from September 15 to September 27, 1929, and to respondent John S. Myers, controller of said city, commanding him to issue a pay check or warrant to pay said claim. As so modified, the judgment is affirmed.

We concur. WORKS, P. J.; IRA F. THOMPSON, J.

MULDER v. CITY OF LOS ANGELES.

Civ. 6128.

District Court of Appeal, Second District,
Division 1, California.

Dec. 26, 1930.

Rehearing Denied Jan. 12, 1931. Hearing Denied by Supreme Court Feb. 19, 1931.

1. Municipal corporations ☞751(1).

Where city licenses person to do act dangerous in itself or has notice that licensee acted negligently and left street in unsafe condition, city will be responsible, though not ordinarily liable for licensee's acts.

2. Municipal corporations ☞751(3).

City cannot by license abdicate powers or surrender duty, but must exercise general supervisory duty as to streets.

3. Municipal corporations ☞751(1).

City is not liable for licensee's acts unless it is negligent in respect to its own duty.

4. Municipal corporations ☞751(3).

City permitting street work by individual, must maintain supervision reasonably guarding against negligence which would leave street in dangerous condition.

5. Municipal corporations ☞839.

Knowledge of board of public works as to street work being done held equivalent to notice of dangerous condition created by proposed changes (St. 1923, p. 675).

The board of works knew that work was to be done as requested in accordance with recommendation of city engineer and knew that such recommendation did not contain provision for protecting property in ravine against damage which reasonably might have been expected to result. This was equivalent to notice of dangerous condition which would be created by proposed changes if permitted to be done without some provision for suitable drainage.

6. Municipal corporations ☞733(2).

Though street improvement is municipal affair, absence of charter provision or ordinance creating liability for negligence does not exonerate city.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Fred Mulder against the City of Los Angeles to recover damages for negligence of the defendant whereby property of the plaintiff was injured. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Jess E. Stephens, City Atty., and Frederick Von Schrader, Deputy City Atty., both of Los Angeles, for appellant.

S. C. Schaefer, of Los Angeles, for respondent.

CONREY, P. J.

From the findings of the trial court the following facts appear: The plaintiff was the owner of lot 1 in tract No. 2138, at San Pedro, in the city of Los Angeles. Lot 1 is on the south side of Third street, in the block next east of Cabrillo street. The intersection of Second and Cabrillo streets is northwesterly from plaintiff's lot, and is on ground higher than plaintiff's lot, so that the surface flow of water runs southeasterly from said Third street intersection, down through a ravine in which plaintiff's land is located. At the time of said injury, on or about March 1, 1926, and during a usual and common rain-storm, dirt, sand and debris were washed down from and off of Second street and said Second street intersection, and were deposited upon plaintiff's property, with resultant damage, so that the dwelling house of plaintiff was made uninhabitable. The destruction of plaintiff's property was caused by negligence of the defendant, in that the defendant did not properly make, keep, or maintain the public streets, and did not properly or adequately protect the same. Prior to said rain-storm the defendant city had raised and changed the grade of Second street and had made an embankment across Cabrillo street at Second, and thereby had interfered with the natural flow of storm waters, which therefore did not reach the plaintiff's land, and also by the same means of interference the defendant caused said storm waters, with their burden of dirt, sand, and debris, to be cast upon plaintiff's property.

The complaint alleged, and the answer did not deny, that Second and Cabrillo streets are public highways, and that each of them is maintained, improved, and controlled by defendant the city of Los Angeles, except that the defendant, in its separate and affirmative defense, alleged that defendant has never improved Second street at its intersection with Cabrillo. It is conceded that the work done at that place was not done by the city in connection with any formal street improvement proceeding. From the evidence on which plaintiff relies, it appears that about one year before the rainstorm of March 1, 1926, the board of public works had granted to one Butterfield permission to make certain fills, in accordance with a report and recommendation received from the city engineer. The work thus authorized included the filling of Second street at Cabrillo "an additional ten feet." The engineer's report did not recommend, and the board did not require, that, in connection with the making of this fill

and embankment, any precaution or measure should be provided, to take care of the storm surface waters. The fill, as made by Butterfield, was composed of sea sand, covered with adobe. When the storm came, of March 1, 1926, the storm water collected behind said fill, accumulating until it overflowed, so that great quantities of sand and debris were carried down, filling the land below, including plaintiff's lot, and greatly damaging the plaintiff's house.

From the judgment entered awarding damages to plaintiff, defendant appeals, and contends that on the facts shown, and for six separately stated reasons, no municipal liability is cast upon it. The second and third points rest upon the assumption that the damage was caused by flooding from the natural runoff of the surface waters. But the court found, upon sufficient evidence, that the direction and quantity of the natural run-off had been disturbed and changed by the acts of the defendant. The fourth point, in substance, is that the storm of March 1, 1926, was of an extraordinary and unprecedented character which the defendant was not bound to anticipate. But the court found, on sufficient evidence, that said storm was "a usual and common rainstorm."

[1-4] The first and fifth points as stated in appellant's brief are that the city is not liable for the acts of a permittee, and that the granting of the permit by the board of public works was a tort, for which the municipality is not liable.

Article XXIII of the Charter of the City of Los Angeles provides for a department of public works, to be under the management and control of the board of public works, which board (section 231) "shall have all the powers and perform all the duties that are now or may hereafter be conferred or imposed by law upon the street superintendent." Also it is provided (section 233, subd. 1), that said board "shall have and exercise all the powers and duties possessed by the city under this charter, and all the powers and duties that are now or may hereafter be imposed by general laws of the state upon the council or any board or officer of the city under special assessment, as well as all other proceedings relating to:" (Here follow designations of sundry special proceedings concerned with contracts for public improvements of streets, crossings, public places and rights of way and property belonging to the city.) It is further provided (section 234) that "the Board of Public Works shall have charge, superintendence, and control, except as otherwise specifically provided in this charter: Of the construction and maintenance of all streets and other places and property enumerated in subdivision 1 of section 233 of this charter; of all work and improvement in, on, over or under all such streets, places and property; of the design, construction and

maintenance of all sanitary and storm sewers and drains of the city, and all connections therewith." Our attention has not been directed to any exceptions provided in the charter, which would modify or prevent the application of the foregoing provisions of section 234 to the proceedings under review in this case. The board of public works was authorized to exercise on behalf of the city its power and control over these public streets and works of improvement therein. It had authority to permit street work to be done, particularly when recommended by the city engineer, not only under special assessment proceedings or city contracts for compensation, but where the same was proposed to be done without cost to the city or adjacent property owners. But in such case we are of the opinion that the duty of the city to make reasonable provision against damage to private persons or property arising out of such work, and its liability for failure to use reasonable care therein, was not different from the duty and liability which would be imposed where the work was done directly by the city through its street work employees under direction and control of the board of public works.

We adopt as a correct statement of law the following text-book quotation found in appellant's brief: "So, where a city licenses a person to do an act dangerous in itself, or if it has, or ought to have, notice that its licensee has acted in a negligent manner and left its streets in an unsafe and a dangerous condition, it will be responsible therefor. But with these exceptions, it is not, ordinarily, liable for the acts of its licensees. While a municipal corporation is not liable in ordinary cases where it rightfully licenses third persons to use its streets, still, it can not, by a license, abdicate its powers or surrender its duty, and it remains bound to exercise a general supervisory duty. It is not, however, liable for the acts of its licensees unless it is negligent in respect to its own duty, and it is, therefore, usually necessary, in order to charge the municipality, to show much more than negligence on the part of its licensee." Elliott on Roads and Streets (4th Ed. 1926) vol. II, p. 1053, § 816. It is worthy of note that in the instant case the license or permission was not merely for some special use of the street as an incident to some private interest of the licensee, but was a permission granted to make changes in the street itself, and so became a part of the action of the city in relation to street construction work.

On the facts shown by the evidence in the case at bar it was the duty of the city through its department of public works, when it elected to permit the work in question to be done by Butterfield, to maintain over his work such supervision as would reasonably guard against any negligence which would leave

the street in an unsafe and dangerous condition. The city was not authorized to abdicate its powers or surrender to a private person its duty to exercise proper supervision of the work which it permitted to be done.

[5] By statute it is provided that municipalities shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, in all cases where the governing or managing board or officer having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition, and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition, or to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition. Stats. 1923, p. 675, Deering's Gen. Laws (1923 Ed.) Act 5619. The board of works knew that this work was to be done, as requested and permitted in accordance with the recommendation of the city engineer, and knew that said recommendation did not contain any provision for protection of property in the ravine against damage which reasonably might have been expected to result from the work as proposed to be done. Such knowledge, in view of the physical situation of the streets and adjacent property, was equivalent to notice of the dangerous condition which would be created by the proposed changes if permitted to be done without some provision for suitable drainage. To hold otherwise would be to presume that the board had the right to act without even attempting to exercise its intelligence in passing upon a subject of substantial importance.

Generally, on the subject of municipal liability for damages in actions of this character, we refer to the opinion of this court in *Dick v. City of Los Angeles*, 34 Cal. App. 724, 168 P. 703.

[6] Finally, it is contended by appellant that, because the control and improvement of public streets is "a municipal affair," and because there is no charter provision or ordinance of the city creating liability for such negligence as was shown in this case, therefore that there is no legal foundation for the judgment. There is, we may assume, no doubt that the matter of improving streets is a municipal affair, upon which the charter of the city, in so far as it speaks, is paramount to general laws. *Civic Center Association v. Railroad Commission*, 175 Cal. 441, 445, 166 P. 351. Whether the city could by charter thus exempt itself from liability for negligence, we are not now called upon to determine. But, even if the city by its charter could divest itself of subjection to the general law of liability for negligence in relation to street improve-

ments, we are not aware of any provision in the charter, whereby the city of Los Angeles has attempted to exempt itself from the general law in relation to such liability.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

110 Cal. App. 648

PEOPLE v. ROSE.

Cr. 1594.

District Court of Appeal, First District,
Division 1, California.

Dec. 26, 1980.

Rehearing Denied Jan. 10, 1931. Hearing Denied by Supreme Court Jan. 22, 1931.

1. Criminal law $\S$ 1159(5).

Jury's determination, in prosecution for grand theft, that defendant was not authorized to speculate with his customer's money, based on conflicting evidence, *held* controlling on appeal.

2. Larceny $\S$ 65.

Evidence *held* to sustain conviction of grand theft.

3. Larceny $\S$ 15(3).

Where customer ratified defendant's unauthorized purchase of corporate stock, defendant *held* properly charged with unlawful misappropriation of stock by improperly pledging stock in carrying out private speculation.

4. Larceny $\S$ 65.

Evidence *held* to justify finding that market value of stock was in excess of \$200, and hence misappropriation thereof constituted grand theft.

5. Criminal law $\S$ 371(1).

Where question of intent becomes material issue in criminal case, evidence of other contemporaneous acts of similar character are admissible to prove intent.

6. Criminal law $\S$ 371(2).

Evidence that defendant misappropriated other money *held* admissible, in prosecution for misappropriation of corporate stock, on question of defendant's fraudulent intent.

7. Larceny $\S$ 68(1).

Requested instruction for directed verdict in prosecution for grand theft *held* properly refused, where evidence was conflicting.

8. Criminal law $\Rightarrow$ 829(1).

Refusing instruction, legal principles of which were embodied in court's instructions, *held* not error.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Harold E. Rose was convicted of grand theft, and he appeals.

Affirmed.

Albert J. McGuire and Leo A. Elkins, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

KNIGHT, J.

Appellant was indicted for the crime of grand theft, the specific charge being that he unlawfully took, stole, and carried away the personal property of Mrs. Blanche Thomas, consisting of 50 shares of the capital stock of the American International Corporation, of the value of \$4,000. Upon trial before a jury he was found guilty, and this appeal was taken from the judgment of conviction and the order denying his motion for a new trial.

One of the grounds urged for reversal is that the evidence is legally insufficient to sustain the judgment. The essential facts are as follows: Mrs. Thomas wanted to invest some money in corporate stock, and being entirely inexperienced in such matters she subscribed for a weekly publication edited by appellant, which purported to furnish information as to the condition of the stock market. After taking the publication for a few months she called on appellant at the offices of the publication, as a result of which she was induced to invest \$1,000 in the stock of a company known as the "Coast Foundation." Shortly afterwards she again conferred with him and was then advised to purchase Rainier Pulp & Paper Company stock, which she agreed to do; and for such purpose she mailed appellant a check for \$2,000. She did not receive an acknowledgment of the receipt of the check, and after waiting nearly two weeks phoned appellant about the matter, and was informed, so she claims, that the delay was due merely to carelessness on his part, and that he would send her a statement at once. The next day Mrs. Thomas received a letter from him inclosing a statement of account issued by a brokerage firm showing that with her money appellant had opened an account with said firm in his own name and had purchased on margin the stock of a different company, namely, 50 shares of the capital stock of the American International Corporation; that the full purchase price thereof was \$3,868.75, against which there was

a credit payment of \$2,000, and that the balance due was \$1,868.75. The letter in which the statement was inclosed read as follows: "As a matter of convenience in making purchases and sales, I placed the \$2,000 received from you on July 25 in an account at J. J. Barneson & Co., as per statement enclosed herewith. This letter will act as your receipt for the funds and evidence that the account is held by me in trust for you. Should this manner not meet with your approval, I will be pleased to assign and transfer the account to you at any time. * * *" Then, after describing the nature of the business of the American International Corporation and the promising future predicted for it, the letter continued: "If you are satisfied with the manner in which I have planned to handle your account, I will arrange with the broker so he will mail to you direct statement of the account at regular intervals, so you may be familiar with it at all times. Trusting that all I have done in this regard meets with your hearty approval, and assuring you that I will handle the account in the same manner as if it were my own funds instead of yours. * * *" In response thereto Mrs. Thomas mailed appellant a second check for \$2,000, to cover the balance due on the stock. The letter accompanying the check was dated August 8, and read as follows: "So many appointments were made yesterday that I had to keep, by the time I arrived in that part of town the bank was closed. I hope the delay has not caused any confusion as to the plans you may have formed. Please find enclosed the check for two thousand dollars and believe me, gratefully yours. * * *" About this time she informed appellant that she intended to sail for Australia within a few days to be gone several months, and she requested him to suspend the sending of any further mail until she returned. Accordingly she left during the early part of September, and, as will hereinafter appear, did not return until the following December. Upon the receipt of the second check for \$2,000 appellant applied the same as a final payment on the purchase price of the American International Corporation stock; but within a few days thereafter, through the account he had opened in his name with said firm, purchased on margin the stock of several other corporations, pledging as security for the payment thereof the American International Corporation stock belonging to Mrs. Thomas. In October there was a "break" in the stock market, and said brokerage firm sold the pledged stock in liquidation of the balance due on said account. In December Mrs. Thomas returned, and after several unsuccessful attempts to make an appointment with appellant for the purpose of obtaining possession of her stock he finally told her that while she was away her stock was lost in the crash of the market.

[1, 2] The main disputed issue of fact before the jury was whether Mrs. Thomas authorized appellant to speculate with her money or securities. In this regard Mrs. Thomas testified that at no time, nor under any circumstances, did she authorize him to purchase any stocks whatever on margin, nor to invest in any other stock than the Rainier Paper & Pulp Company stock; nor to pledge her stocks for any purpose whatsoever; and that whatever appellant did in that regard was done without her knowledge, consent, or authority. On the other hand, appellant testified that she turned the money over to him for "trading purposes," and that before doing so it was understood that he would purchase the stocks on margin; that he assumed, therefore, that he had authority to use her money and securities as he saw fit, and that, if he was mistaken in such assumption, there was no intent on his part to defraud, and that consequently he cannot be held criminally responsible for the loss. It will be readily seen, however, that appellant's testimony did no more than to raise a conflict as to the main issue in the case, and since the jury accepted and acted upon the testimony of Mrs. Thomas, which, along with the other facts established, is legally sufficient to sustain the conviction, its determination of the matter is controlling on appeal.

[3] Appellant further contends that, if he committed any offense at all, it consisted of the misappropriation of the money Mrs. Thomas gave him to purchase Rainier Pulp & Paper Company stock, and not the American International Corporation stock which he purchased therewith. The evidence shows, however, that Mrs. Thomas ratified the purchase of the American International Corporation stock by sending him the balance due on the purchase price thereof; and that subsequently, after the stock had been fully paid for, and without the consent, knowledge, or authority of Mrs. Thomas, so she claims and as the jury found, he pledged the same in carrying on his own private marginal stock speculations. Therefore he was properly charged with and legally convicted of the unlawful misappropriation of said stock. *People v. Riccardi*, 50 Cal. App. 427, 195 P. 448; *People v. Plum*, 88 Cal. App. 575, 263 P. 862, 265 P. 322. The cases cited by appellant in support of his theory do not touch the point. They were decided prior to the 1927 amendment, and dealt merely with the technical distinction between larceny, embezzlement, and obtaining money under false pretenses, all of which were merged in the crime of theft under the 1927 amendment. *People v. Plum*, *supra*.

[4] It is further contended that the prosecution failed to prove the value of the stock at the time of the alleged misappropriation

thereof. There appears to be no direct testimony on this point, but the statement of account and the testimony given in connection therewith shows that on July 24th, the date the stock was purchased, it had a market value of \$3,868.75; and it was further shown that in October, when the market "broke" and the pledgee sold the stock, it still had a market value of about \$40 a share. Such evidence was ample, therefore, to justify the jury in finding that, at the time the stock was unlawfully pledged by appellant in August, its market value was in excess of \$200; and that therefore the misappropriation thereof constituted grand theft.

[5, 6] At the time Mrs. Thomas sent appellant the first \$2,000 to purchase the Rainier Paper & Pulp Company stock, she also forwarded to him an additional \$250 on behalf of her nephew, with directions to purchase therewith certain oil stocks; and over the objection of appellant the prosecution was allowed to introduce evidence tending to show that appellant appropriated the money, temporarily, at least, to his own use. We find no error in admitting the testimony, because the rule is that, where the question of intent becomes a material issue in the case, evidence of other contemporaneous acts of a similar character are admissible to prove such intent (*People v. Lorden*, 62 Cal. App. 501, 217 P. 117; *People v. Sindici*, 54 Cal. App. 193, 201 P. 975); and appellant was here claiming that there was no fraudulent intent on his part in dealing with Mrs. Thomas' property as he did.

Appellant asserts that the court compelled him to argue his motion for a directed verdict in the presence of the jury, which he claims operated to his prejudice. An examination of the record discloses, however, that no arguments whatever, by either side, were made at the time the motion was presented, the court having restricted the proceeding to a mere statement by counsel for appellant of the grounds of the motion, immediately following which the motion was denied. In that state of the record no ground for complaint appears to exist.

[7, 8] Nor do we find any error in the refusal of the court to give appellant's instructions. The first was an instruction to return a verdict of not guilty, which, in view of the conflict of evidence, was properly rejected. And the legal principles embodied in the remaining two were given in another form in the court's charge. No error appearing in the record, the trial court was justified in denying the motion for a new trial.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

110 Cal. App. 452

MURPHY v. F. D. CORNELL CO.
Civ. 7432.District Court of Appeal, First District,
Division 1, California.
Dec. 16, 1930.**1. Bills and notes** ⇨534.

Attorney's fees in action on note are in nature of special damages under contract, and allowance thereof to losing party is improper.

2. Costs ⇨205.

Where items claimed as costs appear to be proper charges, verified memorandum of costs is prima facie evidence that costs were necessarily incurred.

3. Costs ⇨207.

Cost of levying attachment on lands with approximately \$100,000 in actions on notes aggregating \$7,447.50, held not necessarily shown to be in bad faith, in view of incumbered condition of lands.

4. Appeal and error ⇨984(1).**Costs** ⇨12.

Determination of items allowable for costs is largely within trial court's discretion, reviewable only for abuse.

5. Costs ⇨207.

Item designated expense of obtaining description of property attached should have been stricken from cost bill, in absence of evidence of necessity (Code Civ. Proc. § 1033).

6. Costs ⇨169.

Generally, expenditures incurred by prevailing party for own benefit in preparation of his case are not taxable.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by W. S. Murphy against the F. D. Cornell Company. From a portion of the judgment awarding attorney's fees to plaintiff, and from an order refusing to tax certain items of costs, defendant appeals.

Affirmed as modified.

Kirkbride, Wilson & Brooks, of San Mateo, for appellant.

Alfred Aram, of San Jose, for respondent.

PER CURIAM.

An appeal by the defendant from a portion of the judgment in the above case awarding attorney's fees, and from an order refusing to tax certain items of plaintiff's costs in the action.

The complaint set forth separate causes of action on two promissory notes and also common counts for work and labor. The first note was for \$4,947.50, with interest, which was executed by defendant corporation to the plaintiff. The second note, which was for \$2,500 with interest, was executed by O. L. Bergen and Persis Bergen to the defendant, and by the latter indorsed to plaintiff as security for the first note. The court entered judgment against defendant on the first note for the principal and interest due; on the second no recovery was allowed except for attorney's fees in the sum of \$500; and on the common counts judgment was entered for the defendant.

Plaintiff filed a cost bill, from which it appears that he attached real and personal property of the defendant in several counties. The items of which defendant complains, and which among others he moved to tax, were a sum alleged to have been expended in the levy of the attachment upon a number of parcels of land in Riverside county, namely \$261.10, and the expense of "obtaining a description of property for attachment" in the sum of \$36.70.

[1] The note upon which the attorney's fee was allowed contained the following provision: " * * * And in case suit is brought hereon or attorney be employed or expenses incurred to compel the payment hereof, a reasonable sum in addition as attorney's fee." It is clear from this provision that an attorney's fee might be allowed in a proper case where suit was brought to compel payment and an attorney employed; but such fees are in the nature of special damage under the contract (Prescott v. Grady, 91 Cal. 518, 27 P. 755; De Jarnatt v. Marquez, 127 Cal. 558, 60 P. 45, 78 Am. St. Rep. 90); and it has been held that an allowance of attorney's fees to the losing party—which was the case here—is improper. (McArthur v. John McArthur Co., 39 Cal. App. 704, 179 P. 700; Hering v. Simon, 77 Neb. 60, 108 N. W. 154.)

In support of the motion to tax costs, affidavits were filed by the president of defendant corporation and its counsel. These affidavits were not denied. According to the same, plaintiff attached eighty parcels of real property belonging to the corporation in Riverside county aggregating several thousand acres, the value of defendant's interest therein being approximately \$100,000. The affidavits alleged that the amount and value of the property attached was disproportionate to the amount sued for, and that the same was attached pursuant to a threat by plaintiff's counsel to destroy the corporation if the claims were not paid. It also appears therefrom that the greater portion of the land attached is subject to a deed of trust and mortgages, and that several hundred acres had

been sold and full payment made therefor by the purchaser.

[2-4] While it has been held that, where the items claimed as costs do not appear on their face to be necessary, and their correctness is challenged by the affidavit of the contesting party, the burden is then upon the claimant to prove that the charges are proper, and, if he fails to introduce evidence to that effect, they should be stricken out (*Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 P. 536; *Senior v. Anderson*, 130 Cal. 290, 62 P. 563; *Whitaker v. Moran*, 23 Cal. App. 758, 139 P. 901), nevertheless, where the items appear to be proper charges, a verified memorandum of costs is prima facie evidence that the same had been necessarily incurred (*Fay v. Fay*, 165 Cal. 469, 132 P. 1040; *Ray v. Clark*, 57 Cal. App. 467, 207 P. 501). Here the cost of levying the attachment was prima facie a proper charge; and, considering the incumbered condition of defendant's land as shown by the affidavits, it does not necessarily appear that the expenditure was made in bad faith or for the purpose of obstruction. The question was primarily one for the trial court, the determination of the items allowable for costs being left largely to its discretion; and, unless an abuse of discretion is shown, such determination will not be disturbed on appeal. *Welch v. Alcott*, 178 Cal. 530, 174 P. 34; *Puppo v. Larosa*, 194 Cal. 721, 230 P. 440. In view of the facts, we cannot say that the allowance of this amount by the court was an abuse of discretion.

[5, 6] As regards the item of \$36.70, there is nothing in the record as to how the description of the property was obtained, and the necessity for this expenditure was controverted by the affidavits mentioned. For aught that appears, the information may have been obtained by plaintiff or his counsel from the public records, in which case the charge would be clearly improper. As in the analogous case of a claim by a successful plaintiff for the cost of obtaining a replevin bond from a surety company, such a charge was not necessarily incurred within the meaning of section 1033 of the Code of Civil Procedure (*Williams v. Atchison, Topeka & Santa Fe Ry. Co.*, 156 Cal. 140, 103 P. 885, 134 Am. St. Rep. 117, 19 Ann. Cas. 1260); and, in the absence of evidence showing its necessity, the same should have been stricken from the cost bill (*Miller v. Highland Ditch Co.*, supra; *Whitaker v. Moran*, supra). It is generally held that expenditures incurred by the prevailing party for his own benefit in the preparation of his case are not taxable in the action, among such expenditures being the preparation of a map (*Miller v. Highland Ditch Co.*, supra), the expenses of an expert accountant (*Faulkner v. Hendy*, 79 Cal. 265, 21 P. 754), and the fees of a surveyor for obtaining data

for the preparation of maps (*Bathgate v. Irvine*, 126 Cal. 135, 58 P. 442, 77 Am. St. Rep. 158).

The judgment is accordingly modified by deducting therefrom the allowance made for attorney's fees, namely, \$500. The order appealed from is also modified by striking therefrom the item of \$36.70 claimed as the expense of obtaining a description of property for attachment, and as so modified is affirmed. It is further ordered that appellant recover its costs on appeal.

110 Cal. App. 587

OGBURN v. ATCHISON, T. & S. F. RY. CO.
et al.
Civ. 513.

District Court of Appeal, Fourth District,
California.

Dec. 20, 1930.

Rehearing Denied Jan. 14, 1931. Hearing Denied by Supreme Court Feb. 16, 1931.

1. Railroads — 350(23).

Where motorist on city street observed wigwag and crossing bell at crossing with obstructed view were not operating, and she stopped, looked and listened, though not alighting, question of contributory negligence held for jury.

Evidence favorable to motorist disclosed that motorist had seen wigwag at crossing for years and knew device operated when train was coming; that when she stopped wigwag did not move and bell did not ring; that she listened but heard no train or warning signal; that she looked both ways, view being obstructed by trees which prevented motorist from seeing more than ten or twelve feet of tracks from where she stopped; that she started car forward in low gear and was proceeding at low speed when struck, and that she did not see train until within three or four feet of track, and became frightened at seeing train so close at hand. Train was "drifting" without use of steam, which may have lessened its noise.

2. Railroads — 350(22).

Whether motorist was contributorily negligent in failing to stop motor of automobile without muffler to hear train held for jury.

Motorist testified both windows of car were open; that car did not seem to make much noise; that she was listening for noise of train; and that car did not bother her. It could not be said, as matter of law, that this fact prevented motorist

from hearing train, especially in view of other evidence that train was drifting and no bell or whistle was sounded.

3. Railroads ☞ 350(28).

Evidence held not to show, as matter of law, that motorist placed no reliance upon warning device at crossing; hence did not take case out of "guarded crossing rule."

On cross-examination, motorist was being interrogated upon her custom in stopping and crossing during preceding five years, testified that she stopped whether wigwag was operating or not, and in answer to question, "You don't rely on wigwag but would rather trust your own senses in that connection?" answered in affirmative. In other portions of testimony, it appeared affirmatively that on occasion in question motorist did rely upon warning device in part, although she stopped, looked, and listened, notwithstanding device was not operating.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Ruth Ogburn against the Atchison, Topeka & Santa Fé Railway Company and another. From a judgment of nonsuit, plaintiff appeals.

Reversed.

E. B. Drake, of Los Angeles, for appellant.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for respondents.

BARNARD, J.

This is an action for damages for personal injuries received by the plaintiff in a collision between an automobile driven by her, and a railroad train operated by defendants. A nonsuit was granted by the trial court on the sole ground of the contributory negligence of the plaintiff, and the only question here presented is whether such negligence may be imputed to her as a matter of law, under the facts shown.

Viewing the evidence in the light most favorable to appellant, the following facts appear: The accident occurred at a point where the single track of the respondent railroad crosses Seventeenth street in the city of Santa Ana, which point is within a mile of the railroad company's depot in said city. The appellant was driving westerly in a Ford coupé on Seventeenth street, a paved and busy street, about 3 o'clock in the afternoon. Her car was struck by a train operated by the respondents, consisting of a steam engine and five cars, which was entering Santa Ana from the north, at a speed of about forty miles per hour, and, as testified by the engineer, the engine was not "work-

ing steam" but was "drifting." There was evidence that no bell was rung, and that no whistle was blown until the train arrived at a distance from the crossing, which one witness estimated as one and one-half times the length of the courtroom (see section 486 of the Civil Code). The respondent company had installed at this crossing a warning signal commonly known as a wigwag, which, when properly working, gave warning of approaching trains by oscillating a disk back and forth and ringing a bell. The appellant, a young lady about thirty years of age, testified that her hearing and sight were good; that she had crossed this crossing frequently for five or six years; that as she approached the crossing on this occasion, she stopped for three or four seconds when about ten or twelve feet from the first rail; that she looked both ways and listened and looked at the bell (the wigwag) and did not see or hear anything; that no whistle was blown or bell rung on the train; and that she was unable to see up the track to her right because of certain trees. It appears that beginning about ten or twelve feet to the right of the point where she stopped, and extending northerly along the railroad track, was a walnut grove of large trees, heavy with fruit, the branches of which came within three or four feet of the ground and extended to within five or six feet of the first rail of the railroad track. The appellant testified that she had seen the wigwag at this crossing for about five years and that she knew how the device operated when a train was coming; that when she stopped, she looked at the wigwag and it did not move, nor did the bell ring; that she next looked both ways and then started her car forward in low gear and was proceeding at a speed of three or four miles an hour when she was hit; that as she proceeded, she first looked down the track to the south, and, seeing nothing, turned and looked to the north; that when she was within three or four feet of the track and saw the train it seemed right there; and that she was scared and turned her wheel and just then the train struck her car, causing the injuries complained of. On cross-examination, appellant testified that she first looked at the wigwag when about fifty feet from the track and continued to watch it as she approached; that she saw it was not going, and came to a stop; that she then looked at the wigwag, which was not moving; that she then looked to the north and south; that she could not see through the leaves of the walnut trees; that on previous trips across this crossing she always came to a complete stop whether the wigwag was going or not; that as she started forward in low gear, she was listening for trains to blow their whistles or other noise; that the first intimation she had of the approach

of the train was when the front wheels of her automobile were on the first rail of the track, at which time the train was fifty or sixty feet away; that she heard no sound from the approaching train; and that after starting up in low gear, she looked first to the south and then to the north, at which time the front wheels of her car were three or four feet from the first rail. She further testified that the windows of her automobile were open, and that, because the trees were so thick on this occasion, she stopped and "looked good."

Respondents argue that appellant was guilty of contributory negligence in not stopping the engine of her automobile while she was attempting to listen for sounds of an approaching train, and also in stopping at a place where, on account of the trees, she could not see more than ten or twelve feet up the track. They rely upon the general rule that the driver of an automobile before crossing a railroad track, which is in itself a warning, must stop, look, and listen, even to the extent, if necessary, of getting out and walking ahead to a point where he can assure himself that no train is approaching. *Young v. Pac. Elec. R. Co.*, 208 Cal. 568, 283 P. 61; *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651; *Koster v. Southern Pacific Co.*, 207 Cal. 753, 279 P. 788; *Jones v. Southern Pacific Co.*, 34 Cal. App. 629, 168 P. 586; *Chrissinger v. Southern Pacific Co.*, 169 Cal. 619, 149 P. 175; *Griffin v. San Pedro, etc., Co.*, 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842. The rule has been established, by such cases as these, that, where "the standard of conduct is so obvious as to be applicable to all persons and the plaintiff has failed to measure up to that standard, under the circumstances shown, he is not entitled to have his case go to the jury." In *Koster v. Southern Pacific Co.*, 207 Cal. 753, 279 P. 788, 792, the court after reviewing a number of cases said: "In all cases in which judgments have been upheld, either the injured party stopped, looked, and listened, or took every opportunity to learn of the approach of the train that a cautious person should have taken in the circumstances of the situation." In that case, the court calls attention to the fact that, under the circumstances there existing, a traveler had an open space of approximately twenty-one feet six inches in which to make observation for an approaching train. Although the appellant, in the instant case, did stop, look, and listen, and thereafter proceeded slowly, in low gear, and with considerable caution, and although her opportunity for observation up the track in the direction from which this train came was very limited on account of the proximity of the trees to the rails, it may be conceded that she failed to meet the utmost requirement of the general rule above stated, in that she did not alight and walk ahead.

We think, however, that under the circumstances this case falls within what may be called a partial modification of the strict stop, look, and listen rule above referred to, and that it comes rather within the rules laid down in the guarded crossing cases. In the case of *Koch v. Southern Cal. Ry. Co.*, 148 Cal. 677, 84 P. 176, 177, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795, a case involving a crossing where the railroad company maintained gates and signal bells, although it was held that the plaintiff had failed to exercise any care whatever for his own safety, the court said: "The case thus presented is not one as to the degree or amount of care which should be exercised by one about to cross a railroad under the invitation to proceed given by the open gates, but whether under such circumstances a man may fail or decline to exercise any care whatsoever, treating the open gates as a positive assurance of safety. Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient, will always be a matter for determination by the jury. But where, as here, the unconflicting evidence shows that he exercised no care whatsoever, it becomes a question of law to say whether or not such a plaintiff's case shall be submitted to the jury. * * * Nor is it the law that when a railroad company adopts safety gates or any other appliance for the protection of the public, the public is thereby absolved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and while the quantum of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates, themselves, are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions, as did the plaintiff in this instance. * * *"

In *Gregg v. Western Pacific Railroad Co.*, 193 Cal. 212, 223 P. 553, 557, a case in which a flagman who was kept at a crossing to warn the public of approaching trains was absent from his post, it was held that the case fell within the rules controlling guarded crossings, and a judgment of nonsuit was reversed. There the injured party testified that he had checked his speed to five or six miles an hour, had listened and also looked, so far as the conditions appeared to him to require it, for trains that might be approaching. His view was somewhat obstructed, and a street car had just crossed the railroad, its conductor having previously walked forward to make observation for approaching trains. The plaintiff had assumed from the absence of the watchman that it was safe to cross the track. The court said: "It is true, as has often been stated, that a railroad crossing is itself a place of danger and is an effectual warning of danger, which

must always be heeded, and the exercise of ordinary care in traveling over such place is not excused by the negligent omission of the railroad company itself to exercise reasonable care. But it is also true that a railway company will not be permitted to encourage the public to relax its vigil as to the dangers that lurk in railroad crossings by assurances that the danger has been removed or minimized by the adoption of safety devices and measures and at the same time hold a person to the same quantum of care as if no such safety measures had been provided." And further: "If a reasonably prudent person situated as appellant was situated, and seeing what he then saw and knew, would have been justified in acting upon appearances as appellant assumed to do, or, if reasonably prudent men would disagree as to whether appellant exercised ordinary care in the premises, then the case should have gone to the jury. The invitation to cross, the failure to ring the bell or sound the whistle, as required by the provisions of section 486, Civil Code, are elements which must be considered with all the other facts and circumstances of the entire case."

In *Marini v. Southern Pacific Co.*, 201 Cal. 392, 257 P. 74, 75, the railroad company had maintained gates and signal bells at a crossing for many years. The appellant often used the crossing and learned to depend upon the signals and gates. At the time of the accident, the towerman was telephoning and failed to lower the gate or sound the bells as the train was approaching. The appellant claimed that his view of the approaching train was obstructed, and before crossing the tracks he stopped his automobile to shift into intermediate gear and did not proceed until he had looked and listened. The court, in reversing a judgment of nonsuit, and holding that under the circumstances the question of contributory negligence on the part of appellant was one for the jury, said: "In the instant case the fact that appellant did not drive blindly and heedlessly into danger, without any care whatsoever for his safety, is made plain by his uncontradicted testimony that he stopped to shift into intermediate gear and was proceeding cautiously over the tracks when the accident occurred. In such case, as above stated, the question of whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury."

In *Vaca v. Southern Pacific Co.*, 91 Cal. App. 470, 267 P. 346, 349, which was a case where a crossing bell erected by a railroad company to warn persons of the approach of trains did not ring on the occasion in question, the court, in discussing the question of contributory negligence on the part of the plaintiff, used the following language:

"While a traveler about to cross a railroad track is generally charged with the duty of

stopping and looking before crossing the tracks, in each particular case his discharge of that duty and his care or negligence is to be measured in the light of surrounding conditions and circumstances. It is true that he may not seek redress for an injury caused solely through his own carelessness, but in measuring his conduct a jury may take into consideration that the railroad company has created a condition which has caused the traveler to relax his own vigilance so that he is brought to his destruction or injury. *Scott v. San Bernardino Valley Co.*, 152 Cal. 610, 93 P. 677; *Runnels v. United Railroads*, 175 Cal. 528, 166 P. 18. It is only when the evidence is such that the court is impelled to say that it is not in conflict on the facts and that from these facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, that the law steps in and forbids the plaintiff a recovery. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 240, 116 P. 513.

"In *Smith v. Southern Pacific Co.*, 201 Cal. 57, 255 P. 500, the court uses this language: "The rights and obligations of all persons using a public street are, in this respect, reciprocal. Each may rightfully expect that the other will, at the proper time, discharge his proper duty towards others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. But he frequently must, to some extent, depend on others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time." See, also, *Marini v. Southern Pacific Co.*, 201 Cal. 392, 257 P. 74, and *Clark v. Bennett*, 123 Cal. 275, 277, 55 P. 908, and we think in the present case the question of the contributory negligence of plaintiff under the circumstances disclosed was a question for the jury."

As was further said in *Gregg v. Western Pacific R. Co.*, supra: "The extent to which a traveler may rely upon the assurance of safety arising from the absence of a flagman from his post of duty on the presumption that it is safe for him to cross a railroad track which he is familiar with, is generally held to be a question of fact for the jury."

[1] Under the circumstances of this case, a lesser degree of care was reasonably to be expected from the appellant than would have been the case had the wigwag signal not been installed and used at that particular crossing. While the presence of this automatic device did not relieve her from exercising such care for her own protection as was reasonable under the circumstances, the

precise measure of the care still legally required of her has not been established by law, but depended upon the circumstances there existing. Appellant took certain precautions for her own safety. Although she observed that the wigwag was not working, she stopped, looked, and listened. She not only looked several times at the wigwag, but she looked up and down the track, and continued to look and listen as she proceeded in low gear, at a speed of about three or four miles per hour. The circumstances were somewhat unusual in the limited space, before reaching the track, that permitted a clear view in the direction from which the train was coming. Taking the view of the evidence most favorable to the appellant, she saw the train when her car was three or four feet from the track, and her inability to stop then may have been due to her fright at seeing the train so close at hand. This is not only the more probable, but may have been the more excusable, since no bell was rung, no whistle was blown until the train was right upon her, and the train was "drifting" without the use of steam, which may have lessened its noise. We think there is here presented a question of fact, as to whether such precautions as were taken by appellant were reasonable under the circumstances, which should have been submitted to the jury.

[2] Respondents argue that appellant was guilty of contributory negligence as a matter of law, in not stopping the motor in her car while listening for sounds of an approaching train, since she testified that she did not have a muffler on her car. We are asked to take judicial notice of the fact that an automobile without a muffler, particularly a Ford, creates an excessive amount of noise. Appellant testified that both windows of her car were open; that the car did not seem to make much noise; that she was listening for the noise of the train; and that the Ford did not bother her. The noise made by such a motor would vary, depending upon its condition and the speed at which it was running. It cannot be said as a matter of law that this fact prevented appellant from hearing the train, especially in view of the other evidence that the train was drifting, and no bell or whistle was sounded. This is but a part of a question of fact which was for the jury.

[3] Respondents also earnestly insist that this case comes within the more strict general rule above referred to, and not the guarded crossing rule, it being argued that appellant testified that she did not rely upon the wigwag at this particular crossing, but always stopped, irrespective of whether or not the wigwag was operating, and, therefore, that the effect would be the same as if the signal was not there. In support of this, respondents

rely upon the following testimony given by appellant:

"Q. Your testimony now is that in all the five years previous that you have crossed that crossing that you always come to a complete stop? A. Yes, sir.

"Q. Whether the wigwag was going or not? A. Yes, sir.

"Q. But on the previous occasions you hadn't hesitated as long as on this occasion? A. Some of them possibly not that long and others longer. The trees were so thick this time I stopped and looked good.

"Q. Were the trees any thicker than they were the week before when you had gone through there? A. No, possibly not.

"Q. Did you stop any longer the week before? A. Not any longer.

"Q. Had you ever come to that crossing when the wigwag was working? A. Yes, sir.

"Q. But when the wigwag wasn't operating you stopped just the same? A. Yes, sir.

"Q. And you don't rely on the wigwag to warn you of the approaching train, but you would rather trust your senses in that connection? A. Yes, sir."

The last question comes very near to being a catch question. If appellant had relied on the wigwag, under the decisions above quoted, she would have been guilty of contributory negligence. It will be noted that in this testimony, which occurred on cross-examination, she was being interrogated upon her custom over the preceding five years. The last question and answer, particularly relied upon by respondents in this connection, referred to this custom, and the witness did not say that she did not rely at all upon the wigwag on this particular occasion. Not only is it a fair construction of her testimony that it was not her custom to rely entirely upon the wigwag, a thing she should not have done, but in other portions of her testimony it affirmatively appears that on this occasion she did rely upon it in part. She testified that she looked at the wigwag before she stopped and continued to watch it as she approached the tracks, and that when she stopped she looked first at the wigwag and observed it was not moving. With the inferences that may legitimately be drawn from her testimony, we think it may not be held, as a matter of law, that she placed no reliance at all upon the warning device, and that it may not be conclusively presumed that the effect was the same as if the signal had never been there.

We are of the opinion that the facts of this case present a question which should have been submitted to the jury. The judgment appealed from is reversed.

We concur: MARKS, Acting P. J.; WAR-MER, Justice pro tem.

110 Cal. App. 631

PEOPLE v. DUFFY et al.
Cr. 1141.

District Court of Appeal, Third District,
California.

Dec. 24, 1930.

Rehearing Denied Jan. 8, 1931. Hearing De-
nied by Supreme Court Jan. 22, 1931.

1. Criminal law ⇨576(4).

That defendants changed pleas of not guilty to guilty and of guilty back to not guilty, under circumstances, constituted good cause for delay in not bringing defendants to trial within 60 days (Pen. Code, § 1382).

The circumstances disclosed that the information was filed on June 12, 1930, and that defendants were given opportunity of being tried on June 30, but that by changing their pleas from not guilty to guilty, and then on July 11 changing their pleas from guilty to not guilty, they themselves caused long delay in bringing case to trial by preventing district attorney from holding prosecuting witness.

2. Criminal law ⇨693.

Objection to foundation for introduction of transcript of testimony taken at preliminary examination made before attempt to lay foundation *held* premature.

3. Witnesses ⇨227.

Contention that district attorney's testimony could not be considered because he was not sworn as witness *held* unavailing, where no objection was taken before verdict.

4. Criminal law ⇨1144(12).

In absence of objections to admissibility of transcript of testimony given on preliminary examination, witness was presumed to have been duly sworn.

5. Criminal law ⇨1036(1).

Objection that transcript of evidence taken at preliminary examination was not properly authenticated *held* waived, where not made at trial.

6. Criminal law ⇨564(1).

Testimony that defendant stopped prosecuting witness in Sacramento county and forced him to drive across bridge into Yolo county, where robbery was committed, *held* sufficient to show commission of crime in Sacramento county.

The testimony was sufficient to show commission of crime in county of Sacramento, since it was the natural inference therefrom that the defendant stopped the prosecuting witness with the intent of robbing him and taking his automobile.

7. Criminal law ⇨406(4).

Testimony of defendant given at preliminary examination *held* admissible as admission.

8. Robbery ⇨24(1).

Evidence *held* to support conviction of robbery in second degree.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Leonard Duffy and another were convicted of robbery in the second degree, and they appeal.

Affirmed.

Gilford G. Rowland, of Sacramento, and Robert P. Cahen, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the people.

Mr. Presiding Justice FINCH delivered the opinion of the court.

This is an appeal by the defendants from judgments of conviction of the crime of robbery of the second degree. The appellants contend that they were not brought to a speedy trial within the meaning of section 1382 of the Penal Code.

The information was filed June 12, 1930. On June 20, both defendants entered pleas of not guilty and the cause was set down to be tried June 30. On that day both defendants changed their pleas from not guilty to guilty and asked the court to admit them to probation. The court referred their applications to the probation officer, with direction to make an investigation and to report thereon on July 11. On the latter day the probation officer made an adverse report, and the defendants were permitted to change their pleas from guilty to not guilty, and the cause was continued to July 14 to be then set for trial. On July 14, by consent of the defendants, their trial was set for July 17. On the latter date, with the consent of the defendants, the cause was continued to August 1 to be then reset for trial. On August 1, by consent of both parties, the trial was set for August 7, and on that date, by consent of the parties, a continuance was granted to August 11, at which time the cause was to be reset for trial. On August 11 defendants' counsel made a motion for a dismissal of the cause, and, on the denial of the motion, the defendants waived a jury trial. Thereupon, at the same session the court suggested August 15 as the day for trial. Counsel for defendants said: "The quicker it would be tried the better." The court then said: "Well, I think we can set it for the 14th." Counsel for the defendants replied: "That will be satisfactory." On August 14 counsel for defendants moved

for a dismissal on the ground that the defendants had not been brought to trial within sixty days after the filing of the information. On July 17 the district attorney asked for a continuance on the ground of his inability to find the prosecuting witness, saying he would have had such witness present if he had known that the pleas were to be changed from guilty to not guilty, and further stating that: "The complaining witness stayed in town three weeks for the purpose of attending this trial. After the plea of guilty on the part of these defendants, he had reason to believe the case was over and therefore he left town." Counsel for the defendants said: "The fault is not with the district attorney, * * * and under the circumstances, I would not oppose a continuance and giving the district attorney's office a reasonable opportunity to find their witness."

When the cause was called on August 7 the district attorney stated that he had been unable to locate the complaining witness; that "we held the complaining witness here for a period of * * * nearly three weeks. He was a man who at the time worked for the Piggly-Wiggly stores * * * he was fired from the Piggly-Wiggly stores and left * * * without giving any notice or any forwarding address. * * * I told him myself he didn't need to wait around here because there had been a plea of guilty; we told him we were through with him"; that the district attorney began trying to locate the witness on July 11, the day on which the defendants changed their pleas from guilty to not guilty, and that the witness had been gone about a week at that time.

Section 1382 of the Penal Code provides: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

[1] In this case it appears that good cause was shown for continuing the case beyond the period of sixty days. The defendants were given the opportunity of being tried on June 30, but by changing their pleas from not guilty to guilty, and then on July 11 changing their pleas from guilty to not guilty, they, themselves, caused a long delay in bringing the case to trial and prevented the district attorney from holding the prosecuting witness. It is a sufficient answer to a motion to dismiss a criminal case on the ground of not being brought to trial within sixty days to show that there was good cause for the delay. *People v. Clayton*, 89 Cal. App. 405, 264 P. 1105; *People v. Grace*, 88 Cal. App. 222, 263 P. 306; *People v. Brock*, 87 Cal. App. 601, 262 P. 369, 263 P. 544; *Murphy v. Superior Court*, 53 Cal. App. 6, 200 P. 483.

294 P.—32

[2] The prosecuting witness is a man named Rogers. His testimony given at the preliminary examination was read in evidence at the trial, as was also that of another witness named Quinn. Appellants contend that the admission of such testimony is erroneous for the reason that there was an insufficient showing of diligence in finding Rogers, that there was no showing whatever for the admission of the transcript of Quinn's testimony, and that the transcript was not properly authenticated. At the beginning of the trial the district attorney said: "The court is well aware of the fact that we have not been able to produce Rogers here, he having left this vicinity, and for that reason the People are going to offer the transcript of the record of the preliminary hearing, and for that reason I wish to be sworn and—Mr. Green. To which production we desire to object on the grounds that the district attorney has not laid a sufficient foundation to enable them to introduce the record of the preliminary examination, and on the further ground it is incompetent, irrelevant and immaterial. The Court: Well, he was about to make a further showing at this time."

This objection having been made before any attempt to lay a foundation for the introduction in evidence of the transcript was premature and cannot be given any effect. The district attorney thereupon testified to facts showing due diligence in his effort to find Rogers, and he was cross-examined at length by counsel for the defendants.

[3] The record does not show that the district attorney was sworn as a witness and the appellants contend for that reason that no consideration can be given his testimony. In a note to *State v. Morrow*, 63 Wash. 297, 115 P. 161, Ann. Cas. 1912D, pages 570, 572, it is said: "It is generally held that where a witness testifies without having been sworn, the verdict will be set aside if the error is not discovered until after the verdict. * * * Where, however, a witness is permitted to testify without having been previously sworn, and that fact is known at the time, the defect must be taken advantage of at once, and a failure to do so is such acquiescence in the testimony as will preclude objection after verdict." In addition to the cases cited in support of this statement, the following are in point: *Rhodes v. State*, 122 Ga. 568, 50 S. E. 361; *State v. Melancon*, 163 La. 435, 112 So. 37; *Karakutza v. State*, 163 Wis. 293, 156 N. W. 965; *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046; *Barnes v. State*, 61 Tex. Cr. R. 37, 133 S. W. 887.

[4] The transcript does not show that Rogers was sworn, and appellants contend that therefore it was error to admit the transcript of his testimony. In the absence of any objection made on this ground at the trial, it will be presumed that such witnesses were duly sworn. *People v. Fisher*, 223 N. Y. 459,

119 N. E. 845. The only objection which appellants made to the introduction of the transcript at the preliminary examination is as follows: "We don't object to the introduction of the part of the transcript relating to the testimony of the * * * complaining witness himself, but so far as the testimony of any one of the defendants that might appear there we object to that on the grounds that the district attorney is endeavoring to make these witnesses—the defendants a witness against themselves."

[5] It appears from the record therefore that the testimony given by Rogers and Quinn at the preliminary examination was admitted in evidence without objection. The appellants, having failed to object at the trial to the transcript of the evidence taken at the preliminary examination on the ground that it was not properly authenticated, must be held to have waived such objection, because, if the objection had been made at that time, the district attorney could doubtless have supplied the necessary proof.

It must be conceded that the case of the people was not carefully presented, but it does not appear that the irregularities of which appellants complain constitute prejudicial error.

[6] It is urged for a reversal that there was no evidence that the crime was committed in Sacramento county. The prosecuting witness testified that while riding in his automobile he met the defendants about at Fourth and L streets, in the city of Sacramento; that the defendant Thompson "got in front of the car at the crossing and I slowed down * * * one fellow got into the back seat

and he got in front, I drove them across the bridge (the bridge across the Sacramento river, which is the dividing line between Sacramento and Yolo counties) * * * they just said to drive across, you see; when they told me to stop the car * * * Thompson, he says, 'You know what this means' and they took me out of the car and he hit me a knock at first and then went through my pockets and took my coat off * * * the other man came out second and he says, 'Let's give him the works' and the other fellow says 'No, he hasn't got much money, we got his car so let's beat it' * * * I had about \$2.50, that is all." The defendants drove the automobile of the prosecuting witness to the town of Vallejo, where they were arrested. The foregoing testimony is amply sufficient to show the commission of the crime in the county of Sacramento, it being a natural inference from the testimony of the prosecuting witness that the defendants stopped such witness at Fourth and L streets with the intent of robbing him and taking his automobile.

[7] Appellants seem to contend that it was error to admit in evidence their testimony given at the preliminary examination. It is deemed sufficient to say that such evidence, like any other admissions made by the defendants, was admissible in evidence against them.

[8] Enough has been said to show that there is no merit in the appellants' contention "that the judgment is contrary to the evidence and the evidence is not sufficient to justify the judgment."

The judgments against both defendants are affirmed.

110 Cal. App. 288

WHEATLAND v. MALONEY et al.
Civ. 178.

District Court of Appeal, Fourth District,
California.

Dec. 6, 1930.

Rehearing Denied Dec. 20, 1930. Hearing De-
nied by Supreme Court Feb. 2, 1931.

1. Process ⇨4.

When complaint is filed, service of "sum-
mons" is not necessary prerequisite to de-
fendant's right to employ attorney and to ap-
pear and defend action.

The "summons" duly served is simply a
mandate requiring appearance of defendant un-
der penalty of having judgment entered for fail-
ure to do so.

[Ed. Note.—For other definitions of
"Summons," see Words and Phrases.]

2. Attorney and client ⇨63.

Generally, securing attorney's services is
matter of private contract.

3. Libel and slander ⇨129.

To recover statutory attorney's fee, de-
fendants in libel and slander actions need not
move for dismissal based on plaintiff's failure
to file statutory bond (St. 1871-72, pp. 533, 534,
§§ 1, 7).

St. 1871-72, p. 533, § 1, refers to ne-
cessity of bond by plaintiff in libel action,
and section 7 allows defendant \$100 for
counsel fees in case action is dismissed or
defendant recovers judgment.

4. Libel and slander ⇨129.

Dismissals, referred to in statute allow-
ing defendant in libel action \$100 for counsel
fees if action is dismissed, are dismissals gen-
erally as provided by statute (St. 1871-72, p.
534, § 7; Code Civ. Proc. § 581).

5. Libel and slander ⇨129.

To recover statutory attorney's fee where
libel action is dismissed, defendant need not
file general appearance, provided he has em-
ployed attorney (St. 1871-72, pp. 533, 534, §§
1, 7).

6. Libel and slander ⇨129.

Filing of complaint in libel action sets in
motion provisions of statute allowing defend-
ant \$100 counsel fees in case of dismissal (St.
1871-72, pp. 533, 534, §§ 1, 7).

7. Libel and slander ⇨129.

Defendant in libel action, in case of dis-
missal, is entitled under statute to \$100 coun-
sel fee if he has employed attorney to defend
action and has paid or agreed to pay him at
least \$100 (St. 1871-72, pp. 533, 534, § 1, 7).

8. Appeal and error ⇨907(3).

In absence of reporter's transcript or bill
of exceptions, appellate court must assume
evidence established facts necessary to judg-
ment.

9. Appeal and error ⇨931(1).

All intendments are in favor of judgment.

10. Libel and slander ⇨129.

Defendants in libel action which plain-
tiff dismissed held entitled, under statute, to
\$100 attorney's fee, notwithstanding plaintiff
subsequently filed new complaint substantially
identical with that previously dismissed (St.
1871-72, pp. 533, 534, §§ 1, 7).

Recovery of attorney's fee was author-
ized, since attorneys employed by defend-
ants to defend first action would be with-
out authority to represent them in subse-
quent action, even though based on same
cause of action and identical in form, un-
til they were again authorized to repre-
sent defendants, and filing of new com-
plaint instituted another action, although
it was identical with dismissed action.

Appeal from Superior Court, Orange Coun-
ty; G. K. Scovel, Judge.

Action by E. M. Wheatland against M. C.
Maloney and others, doing business under the
fictitious name of the C. Company. The ac-
tion as originally begun was dismissed by
plaintiff, and a new action instituted. From
a judgment awarding defendants attorney's
fees in the action previously dismissed, plain-
tiff appeals.

Affirmed.

Hearing denied by Supreme Court; SEA-
WELL and PRESTON, JJ., dissenting.

R. T. Walters, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana,
for respondents.

WARMER, Justice pro tem.

The admitted facts, so far as pertinent here,
are as follows: On February 11, 1930, plain-
tiff filed his complaint alleging libel against
the defendants, M. C. Maloney et al. The
complaint sets out the alleged libelous mat-
ter, alleges its falsity, and prays for judg-
ment for damages. The clerk, without requir-
ing the bond provided for in the Act of March
23, 1872 (St. 1871-72, p. 533), filed the com-
plaint and issued summons, but no summons
or notice of any kind was ever served on the
defendants or any of them. On February 17,
1930, a dismissal of the action was entered
by the clerk on the written order of plain-
tiff's attorney, at which time no appearance
of any kind had been made. Plaintiff, at
the time of the dismissal above referred to,

immediately filed another complaint identical with the complaint in the action that had just been dismissed, at which time plaintiff gave the statutory bond, and thereupon caused summons to be issued and served. Said action is now pending. On February 20, 1930, the defendants filed a notice of motion that they would move the court to enter judgment against the plaintiff in the sum of \$100 for attorney's fees in said action theretofore dismissed. The principal point presented is, where a complaint in a libel action has been filed by the clerk and summons issued in the case without requiring the statutory bond and same has been dismissed by the clerk on order of plaintiff's attorneys before service of summons or appearance of the defendants or any of them, does the statute authorize the recovery by the defendants therein of the sum of \$100 attorney's fees allowed by law, or does the dismissal of said action under said circumstances defeat such right?

[1, 2] When a complaint is filed, service of summons is not a necessary prerequisite to the right of the defendant to appear and defend such action. The summons duly served is simply a mandate requiring the appearance of said defendant in said action under penalty of having judgment entered for failure so to do. A defendant, who knows an action was pending against him, could proceed to retain counsel and begin the preparation of his defense to said pending action. If defendant has a right to appear in an attack upon an alleged cause of action after complaint filed, then he has a right to appear by attorney. Having such a right in a pending action presupposes his right to retain or employ such an attorney. The securing of the services of an attorney is, generally speaking, a matter of private contract.

The statute to be construed is the Act of March 23, 1872, and, so far as pertinent here, section 1 thereof refers to the requirement for the giving of a bond by plaintiff in a libel action. Section 7 thereof is as follows:

"7. In case plaintiff recovers judgment, he shall be allowed as costs \$100, to cover counsel fees, in addition to the other costs. In case the action is dismissed, or the defendant recover judgment, he shall be allowed \$100, to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly."

[3-7] Where the defendant in a slander action employs an attorney and pays said attorney at least the sum of \$100 and said attorney gives notice of motion to dismiss said action and plaintiff dismisses the action before the time set for the hearing of said motion, defendant is entitled to recover a judgment for \$100 against plaintiff, as provided by said statute. *Caffey v. Mann*, 3 Cal. App. 124, 84 P. 424. In slander and libel actions it is not necessary in order to entitle the defend-

ants to recover an attorney's fee that he move for a dismissal of the action on account of the failure on the part of plaintiff to file a bond as provided for by statute. The dismissals referred to in said statute are the dismissals generally as provided by section 581 of the Code of Civil Procedure. Neither is it necessary for a defendant to file a general appearance in an action to recover an attorney's fee where it appears that he employed an attorney to defend such action. The filing of a complaint in a libel action sets in motion the provisions of the statute and gives to the defendant the right to a counsel fee of \$100 in the event of a dismissal in said action. *Hills v. Shaffer*, 96 Cal. App. 520, 274 P. 388. The defendant in a libel action when the same has been dismissed is entitled to recover \$100 to cover attorney's fees under the terms of the statute, conditioned only upon two facts: First, that he has employed an attorney to defend against the action filed; second, that he has paid or agreed to pay a sum in at least the sum of \$100 for such service. *Hills v. Shaffer*, supra.

[8] In the case at bar the record shows a notice of motion to enter judgment in favor of the defendants and against the plaintiff in the sum of \$100 for attorney's fees, after the dismissal of said action. Said motion was granted and judgment was entered, and, from the judgment so entered, this appeal is prosecuted. There is no reporter's transcript of the proceedings taken and had in the trial court or bill of exceptions, and we must therefore assume that the evidence was sufficient to show that the defendants had employed attorneys to defend said action and that they had paid or agreed to pay a sum in at least the amount of \$100 for the services of said attorneys in said action.

[9] All intendments are in favor of the judgment. *Hind v. Oriental Products Co., Inc.*, 195 Cal. 655, 235 P. 438; *Shannon v. Tooker*, 167 Cal. 484, 140 P. 10. Appellant urges that in the instant case the filing of another complaint alleging libel in the identical terms of the original complaint, that had been dismissed, takes the instant case out of the application of the above rule.

[10] In the case at bar said action was dismissed on an order of the plaintiff. Upon said dismissal being filed, the action that had been instituted by the filing of the complaint therein ceased to exist, and the authority of the attorneys employed to defend against such action, that had been dismissed, terminated. The attorneys so employed would be and were without authority to represent the defendants in a subsequent action based upon the same cause of action, even though the same was identical in form, until the said attorneys were again authorized to represent the defendants in the new action filed. The filing of the new or second complaint instituted another action, even though identical in form, to the same extent as though the new or sec-

and complaint had been based upon an entirely distinct state of facts and stating an absolutely different cause of action. The statute is plain, clear, and not ambiguous, and throughout uses the term "action," and imposes the penalty upon the dismissal of the action. We perceive no reason why the filing of a second action should defeat the purpose of the statute.

For the foregoing reasons, the judgment is affirmed.

We concur: CARY, P. J.; MARKS, J.

110 Cal. App. 761

E. M. WHEATLAND, Plaintiff and Appellant,
v. John S. BAKER, Julia M. Baker, Lotus H. Loudon, and Hazel Del Loudon, John Doe I, John Doe II, Jane Doe I, Jane Doe II, A. Corporation, B. Corporation, Richard Roe I, Richard Roe II, Mary Roe I, Mary Roe II, Doing Business under the Fictitious Name of C. Company, Defendants and Respondents.
Civ. 176.

District Court of Appeal, Fourth District,
California.

Dec. 6, 1930.

Hearing Denied by Supreme Court Feb. 2, 1931.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Hearing denied by Supreme Court; SEAWELL and PRESTON, JJ., dissenting.

R. T. Walters, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

WARMER, Justice pro tem.

This is an action in which plaintiff seeks to recover damages for libel. The question presented on this appeal is precisely the same as

presented in the case of *Wheatland v. Maloney et al.* (Cal. App.) 294 P. 499. On the authority of *Wheatland v. Maloney*, this day decided, the judgment is affirmed.

We concur: CARY, P. J.; MARKS, J.

110 Cal. App. 762

E. M. WHEATLAND, Plaintiff and Appellant, v.
W. O. HART and J. F. Craemer, Doing Business as the News Press, Publishers, W. O. Hart and J. F. Craemer, Individuals, John Doe I, John Doe II, Jane Doe I, Jane Doe II, A. Corporation, B. Corporation, and Richard Roe I, Richard Roe II, and Mary Roe I, Mary Roe II, Doing Business under the Fictitious Name of C. Company, Defendants and Respondents.
Civ. 177.

District Court of Appeal, Fourth District, California.

Dec. 6, 1930.

Hearing Denied by Supreme Court Feb. 2, 1931.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Hearing denied by Supreme Court; SEAWELL and PRESTON, JJ., dissenting.

R. T. Walters, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

WARMER, Justice pro tem.

In this action plaintiff seeks to recover damages for libel. The question presented on this appeal is precisely the same as presented in the case of *Wheatland v. Maloney et al.* (Cal. App.) 294 P. 499. On the authority of *Wheatland v. Maloney*, this day decided, the judgment is affirmed.

We concur: CARY, P. J.; MARKS, J.

In re WHITING'S ESTATE.

BARRETT et al. v. FRANCIS et al.

Civ. 7608.

District Court of Appeal, First District,
Division 2, California.

Dec. 15, 1930.

Rehearing Denied Jan. 14, 1931. Hearing De-
nied by Supreme Court Feb. 9, 1931.

1. Wills ⇨223.

Contest of will after probate is limited to rights given by statute as to time, grounds, and persons, and Legislature may repeal or amend statute at any time.

2. Wills ⇨260.

Will contest instituted within one year after probate *held* within time, notwithstanding amendment shortening time to six months (Code Civ. Proc. § 1327; St. 1929, p. 860).

The will was admitted to probate October 30, 1928, at which time under Code Civ. Proc. § 1327, petitioners had one year within which to contest. The contest was filed October 28, 1929, which was within the year; but St. 1929, p. 860, shortening the time to contest will after probate to six months, went into effect on August 14, 1929.

3. Statutes ⇨267(1).

Statutes are not construed as retroactive to affect right of action already accrued unless such intent is expressly declared or necessarily implied.

4. Statutes ⇨271.

Code provisions as to retroactive construction apply to amendments to Code (Civ. Code, § 3; Code Civ. Proc. § 3; Pen. Code, § 3; Pol. Code, § 3).

5. Wills ⇨260.

Trial courts *held* to have jurisdiction to entertain will contest, even though limitations had run.

Even if limitations had run, the court would have jurisdiction to entertain the contest and make a binding order and judgment, in the absence of the interposition of the limitation statute.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Susan Whiting, also known as Susan H. Whiting, deceased, in which Don Carlos Barrett was appointed executor. Petition by Charles H. Francis and another to revoke the probate opposed by the executor and Anita Haub Barrett and another. From judgment dismissing the petition, petitioners appeal.

Reversed.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

Joseph L. Taaffe and John J. Taaffe, both of San Francisco, for appellants.

Thomas & Sullivan and Barrett & Barrett, all of San Francisco, for respondents other than John Miles Crouse.

M. M. Getz, of San Francisco, for respondent John Miles Crouse.

PRESTON, Justice pro tem.

Susan Whiting died testate in San Francisco, Cal., on October 11, 1928, being a resident thereof at the time of her death and leaving an estate therein. After proper proceedings had, her will was admitted to probate in the superior court of the city and county of San Francisco on October 30, 1928, and Don Carlos Barrett was appointed executor thereof, who immediately qualified and ever since has been and now is the executor of said estate.

On October 28, 1929, Charles H. Francis and Harry Whiting Francis, claiming to be sole surviving heirs of Susan Whiting, deceased, filed in said superior court a petition to revoke the probate of said will on the grounds of incompetency, undue influence, insane delusions, and that the will was not executed or published by decedent.

The executor and the devisees and legatees named in the will demurred to said petition and moved to dismiss same upon the following grounds, among others: (1) That the court was without jurisdiction to hear or determine said petition to revoke the probate of said will of said deceased; (2) that the petitioners were barred by the provisions of section 1327 of the Code of Civil Procedure, as amended in 1929 (St. 1929, p. 860).

The trial court sustained the demurrer, dismissed the petition, and entered an order and judgment to that effect. From this order and judgment the petitioners, Charles H. Francis and Harry Whiting Francis, prosecute this appeal.

[1, 2] Section 1327 of the Code of Civil Procedure, as it stood prior to the amendment of 1929, provided: "When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. * * * The amendment of 1929, among other things, shortened the time to contest a will after probate to six months. This amendment went into effect on August 14, 1929.

When Mrs. Whiting died, and at the time her will was admitted to probate (October 30, 1928), petitioners had, under section 1327, Code of Civil Procedure, as it then stood, *one year after probate within which to contest her will*. The contest was filed October 28, 1929—two days short of one year after the will was admitted to probate, but within two

months and fourteen days after the amendment of 1929 to said section 1327, Code of Civil Procedure, became effective.

Respondents contend that: "When the amendment became effective on August 14, 1929, it became the law as to all petitions for revocation of probate thereafter filed, whether such probate was allowed before or after August 14, 1929, both as to the time of filing and as to the class of persons entitled to file."

Appellants, on the other hand, contend, among other things, that they had a full six months after the effective date of the amendment to section 1327, Code of Civil Procedure, within which to contest will and, therefore, their petition was filed in time.

The right to contest a will after probate is purely statutory; no such right existed under the common law. 40 Cyc. p. 1240. Therefore a contest after probate is limited to the rights given by the statute as to time, grounds, and persons, and the Legislature may repeal or amend the statute at any time.

The question is therefore, narrowed to this: When did the 1929 amendment of section 1327, Code of Civil Procedure, become effective so far as appellants' right to contest the will of Mrs. Whiting, after probate, is concerned? Or, in other words, when did the statute (section 1327, Code Civ. Proc.), as amended in 1929, begin to run with reference to the time within which appellants could contest the will? Was it from August 14, 1929, the effective date of the amendment, or from October 30, 1928, the date the will was admitted to probate?

The general rule applicable in such cases is pertinently stated by Mr. Wood in his work on Limitations, as follows (section 12): "If before the statute bar has become complete the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time past is effaced, and the new law governs. That is, the period provided by the new law must run upon all existing claims, in order to constitute a bar. In other words, the statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar. * * *" See, also, *Crothers v. Edison Electric Co.* (C. C.) 149 F. 606; *Swamp Land District No. 307 v. Glide*, 112 Cal. 85, 44 P. 451, 452, and cases there cited; 16 Cal. Juris. 406; *Nelson v. Nelson*, 6 Cal. 430; *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737.

In *Swamp Land District No. 307 v. Glide*, supra, Mr. Justice Henshaw, in considering a similar situation as we have in the case at

bar, said: "But a man has no vested right in the running of the statute of limitations until it has completely run and barred the action; and, when a change in the statute is made during the time of its running, that time is not a credit to the defendant, under the new law. *The whole period contemplated by the new law must lapse, to bar the action* [italics ours]. Such are the general rules applicable alike to criminal and civil actions, unless the new act itself expresses a contrary intent."

Therefore, if the general rule, above stated, is to be applied to the amendment, appellants would have six months after the effective date thereof within which to file their contest, and, having filed their contest on October 28, 1929, were clearly within time.

On the other hand, if the Legislature intended that the amendment to section 1327, Code of Civil Procedure, should become effective on August 14, 1929, *as to all petitions for revocation of the probate of wills filed after August 14, 1929, whether such wills had been admitted to probate before or after August 14, 1929*, then appellants' time to contest said will began to run when it was admitted to probate (October 30, 1928) and expired six months thereafter and before appellants' contest was filed. This last interpretation of the amendment would give it a retrospective operation.

[3] It is a well-settled principle of statutory construction that, while the legislature has power to pass retroactive laws which do not impair the obligations of contracts or affect injuriously vested rights, it is equally true that statutes are not to be construed as intending to have a retroactive effect, so as to affect a right of action already accrued, unless such intent is expressly declared or necessarily implied from the language of the enactment. *Williams v. Johnson*, 30 Md. 500, 96 Am. Dec. 616; *James v. Oakland Traction Co.*, 10 Cal. App. 785, 796, 797, 103 P. 1082; *Greer v. Blanchard*, 40 Cal. 197, 198; *Gates v. Salmon*, 28 Cal. 320, 321; *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48; *Willcox v. Edwards*, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; *Estate of Richmond*, 9 Cal. App. 402, 99 P. 554; *Montecito County Water Dist. v. Doulton*, 193 Cal. 398, 224 P. 747; *Vanderbilt v. All Persons*, 163 Cal. 507, 126 P. 158; *East Bay Municipal Utility Dist. v. Garrison*, 191 Cal. 680, 218 P. 43; 36 Cyc. 1205; *Bascomb v. Davis*, 56 Cal. 152; *Estate of Fries*, 187 Cal. 150, 156, 201 P. 112; *Estate of Parker*, 200 Cal. 132, 141, 251 P. 907; *State Commission in Lunacy v. Welch*, 20 Cal. App. 624, 630, 129 P. 974; *Endlich on the Interpretation of Statutes*, p. 362; *Jones v. Summers* (Cal. App.) 286 P. 1093; *Krause v. Rarity* (Cal. Sup.) 293 P. 62.

In the Matter of *Clyde E. Cate*, etc., 207 Cal. 443, 279 P. 131, 133, Mr. Justice Richards said: "It is a canon of interpretation that statutes are not to be given a retrospective

operation unless it is clearly made to appear that such was the legislative intention."

[4] The rule of construction above announced is not alone supported by the foregoing authorities and many others that could be cited, but the Legislature of this state has expressly prescribed certain rules of interpretation which reflect the general legislative policy of this state upon the question of the effect of legislation repealing or amending statutes upon rights of action which have accrued prior to the enactment of such legislation. Section 3 of the Civil Code contains the express provision: "No part of it [Civil Code] is retroactive, unless expressly so declared." A similar provision is found in section 3, Code of Civil Procedure; section 3, Penal Code, and section 3, Political Code, and *this rule applies to the amendments to the Codes as well.* Estate of Frees, *supra*; Sharp v. Blankenship, 59 Cal. 288; Central Pac. R. R. Co. v. Shackelford, 63 Cal. 261; Bank of Ukiah v. Moore, 106 Cal. 673, 680, 39 P. 1071; Estate of Richards, 133 Cal. 524, 527, 65 P. 1034; McKay v. Lauriston, 204 Cal. 557, 566, 269 P. 519; In the Matter of the Application of Cate, *supra*; People v. Allied Architects' Ass'n, 201 Cal. 437, 257 P. 511.

We have carefully read the 1929 amendment to section 1327, Code of Civil Procedure, and find no language contained therein that would give any intimation that the Legislature intended that said section should have a retrospective operation.

[5] The amendment under consideration does not take away the right to contest a will after probate, but merely limits the right of contest to persons of a certain class and shortens the time from one year to six months within which a contest after probate must be commenced. *The right to contest under the new statute is the same as under the old; therefore there is no merit in respondents'*

contention that the trial court was without jurisdiction to entertain the contest. Even though the amendment be held to be retroactive, still the court would have jurisdiction to entertain a contest filed after the lapse of six months and make a binding order and judgment in the absence of the interposition of the six months' statute. The situation would be similar to a suit on a promissory note that was barred by the statute of limitations—the court would have jurisdiction to render judgment against the maker of the note if the statute of limitation be not interposed.

Respondents further contend that this case falls within the rule announced in such cases as Moss v. Smith, 171 Cal. 777, 155 P. 90; People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148; Willcox v. Edwards, *supra*; Freeman v. Glenn County Telephone Co., 184 Cal. 508, 194 P. 705, and Chenoweth v. Chambers, 33 Cal. App. 104, 164 P. 428. An examination of those cases will show that the statutes involved had been repealed entirely, without a saving clause, or amended so that the cause of action upon which they were founded were entirely removed from the operation of the old law, either specifically or by necessary implication. Those cases are readily distinguishable from the case at bar. See Krause v. Rarity, *supra*.

As above stated, in the case at bar the right to contest after probate has not been taken away, but the time within which the contest should be filed has been shortened from one year to six months.

From what has been said, it follows that we are of the opinion that the contest of appellants was filed within time and that the order and judgment should be reversed, and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

211 Cal. 183

SPEARS v. STATE BAR OF CALIFORNIA.

L. A. 12292.

Supreme Court of California.

Dec. 29, 1930.

1. Attorney and client ☞4.

Refusal to admit attorney to practice may be properly based on fact that he made false statements in affidavits accompanying application.

2. Attorney and client ☞4.

Applicant for admission to practice law must make full disclosure of any criminal charges preferred against him.

This is true regardless of whether there be conviction, acquittal, or dismissal of charges. A justification for failure to perform such duty is not to be found in excuse that applicant has been advised that such disclosure is not necessary, nor by argument that, charges having been dismissed, in effect no charges were preferred and applicant therefore is justified in stating no charges were in fact preferred.

3. Attorney and client ☞7.

Burden of establishing good moral character rests upon applicant for admission to bar.

4. Attorney and client ☞7.

Scope of investigation of moral character of applicant for admission to bar is wider than investigation to ascertain whether he has been convicted of offense or disbarred (Code Civ. Proc. § 287, subd. 5).

5. Attorney and client ☞7.

Committee of bar examiners held justified in refusing to recommend applicant for admission to practice law, in view of evidence.

Proof of applicant's moral character was not satisfactory, for, although committee had on file letters of recommendation testifying to good character of applicant, it also had letters which unqualifiedly and unequivocally stated that in writers' opinion applicant was not such a person. As to final disposition of charges which had been preferred against applicant, the committee had only the word of the applicant, which, in view of falsity of affidavits filed by him, they were entitled to consider as at least questionable.

6. Attorney and client ☞7.

Court will refuse to exercise power in contravention to adverse recommendation of committee of bar examiners unless applicant

makes convincing showing that adverse recommendation was not based on sound premises and valid reasoning, though powers of committee are merely recommendatory, and not binding upon Supreme Court.

In Bank.

Application by Isaiah H. Spears to review an order of the Committee of Bar Examiners of the State Bar denying application for admission to practice on certificate from another state.

Application for admission denied.

Lyon, Fleming & Robbins and Charles W. Lyon, all of Los Angeles, for petitioner.

O'Melveny, Tuller & Myers, of Los Angeles, for respondent State Bar.

PER CURIAM.

Petitioner moves this court for an order admitting him to practice law as an attorney and counselor at law in all of the courts of this state notwithstanding the refusal of the committee of bar examiners to recommend him for admission.

The record which has been certified to this court discloses the fact that on or about April 26, 1929, petitioner herein made application in writing to the State Bar of California for admission as an attorney and counselor at law. This application was accompanied by the required certificate of the clerk of the Supreme Court of the state of Oklahoma, showing that applicant was admitted upon motion on March 20, 1916, to the Supreme Court of Oklahoma, that applicant at the date of said certificate was a member in good standing of said Oklahoma bar, and that no disbarment proceedings had ever been filed against him. The application was also accompanied by the required letters of recommendations by judges, attorneys, and former clients of the applicant. Petitioner also filed with the state board of bar examiners in support of his application a sworn affidavit in which he stated, among other things, "that affiant has never been charged before any court with crime amounting to either felony or misdemeanor involving moral turpitude."

The record also shows that previous to the date of this application, and on or about March 9, 1926, petitioner herein had made application in writing to the District Court of Appeal, Second Appellate District, for admission as an attorney and counselor at law. In support of this application, two separate sworn affidavits were filed by petitioner to the effect "that affiant has never been charged before any court with crime amounting to either felony or misdemeanor involving moral turpitude." The first affidavit was sworn to by petitioner before a duly qualified and acting notary public of the county of Tulsa,

state of Oklahoma, and the second affidavit was sworn to before a duly qualified and acting notary public of the county of Los Angeles, state of California. Petitioner was absent from the state for a time subsequent to this application, and apparently it was never acted upon by the District Court of Appeal.

An oral hearing upon petitioner's last filed application was held by the committee of bar examiners on December 7, 1929, at which hearing it developed that the sworn affidavits accompanying the applications were not in fact true, for the reason that upon three and possibly four separate occasions petitioner had been charged with a crime amounting to either felony or misdemeanor involving moral turpitude.

At said oral hearing the petitioner herein admitted that in September, 1909, he was charged before the criminal court of record for the county of Escambia, state of Florida, in an information containing three counts, with the crime of "receiving and aiding in the concealment of stolen property, knowing it to have been stolen," with the crime of forgery, and with the crime of uttering forged paper. Upon the trial he was convicted on the second and third count, and sentenced upon the second count to be confined by imprisonment in the county jail at hard labor for a period of one year, and sentenced upon the third count to be confined by imprisonment in the county jail at hard labor for a period of three months. The judgment of said criminal court of record was thereafter reversed by the Supreme Court of Florida and a new trial granted principally on the ground that the evidence was not sufficient to justify the verdict. *Spears v. State*, 59 Fla. 44, 51 So. 815. According to petitioner, no new trial was had, but the charges against him were dismissed. At said hearing the petitioner also admitted that in 1923 or 1924 he had been charged before the district court of and for the county of Tulsa, Okl., with the crime of misappropriation of guardianship funds, that in 1926 he was charged before the United States commissioner at and in the county of Tulsa, Okl., with the crime of violation of the Mann Act, and that in 1927 he was charged with the crime of issuing a fictitious check. Petitioner explained to the committee of bar examiners his version of the circumstances leading up to the filing of these charges, and declared that each of them after a full hearing had been dismissed.

Subsequently on March 1, 1930, the committee of bar examiners made its findings and recommendation in the matter of said application and adopted its resolution that the application of petitioner herein for admission on motion to practice law in the state of California be denied. Petitioner thereafter moved this court for admission despite the adverse recommendation of said committee.

[1] In several cases in this state involving the same proceeding the holding has been that, where an attorney at the time of his application for admission has made a false affidavit, knowing it to be untrue, the fraud of the attorney has been established and his license has been revoked. *In re Mash*, 23 Cal. App. 692, 153 P. 961; *In re Lasley*, 61 Cal. App. 59, 214 P. 284; *In re Holland*, 96 Cal. App. 655, 274 P. 559; *In re Jacobsen* (Cal. App.) 287 P. 131; *State Bar v. Hull* (Cal. App.) 284 P. 492. Obviously, if the license of an attorney already admitted to practice may be revoked by reason of the fact that he made false statements in the affidavits accompanying his application for admission, a refusal to admit an attorney applying for an order admitting him to practice may be predicated upon the same offense.

[2] At the threshold of the discussion it should be stated as definitely settled in this state that, irrespective of the outcome of any charges preferred against an applicant for admission to practice law in this state, whether he be convicted, acquitted, or the charges dismissed, a duty rests upon said applicant to make a full disclosure of such charges to the committee charged with the duty and the responsibility of investigating his fitness to practice law in this state. We are aware that this requirement calls for a high degree of frankness and truthfulness on the part of the attorney making application for admission to practice law in this state, but no good reason presents itself why such a high standard of integrity should not be required. This duty to make a full disclosure is an absolute duty, and a justification for a failure to perform it is not to be found in the excuse that an applicant has been advised by some person, no matter how high in official position that person may stand, that such disclosure is not necessary, nor by the sophistic argument that the charges having been dismissed or the disbarment proceedings dropped, in effect no charges were preferred or proceedings instituted, and applicant is therefore justified in stating under oath that no charges were in fact preferred or proceedings for disbarment instituted. *In re Jacobsen*, supra.

[3, 4] It should be noted that the burden of establishing good moral character rests upon the applicant. It should also be noted that the scope of investigation of applicant's moral character is wider than an investigation by the committee of bar examiners to ascertain whether or not applicant has been convicted of an offense constituting a felony or misdemeanor, or whether he has in fact been disbarred in another state. Subdivision 5 of section 287 of the Code of Civil Procedure, which enumerates the causes for which an attorney may be removed or suspended, provides that " * * * in the event

that such act shall constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension from practice therefor." If conviction is not a condition precedent to disbarment or suspension, it is much less a condition precedent to a refusal to admit to practice.

In *Re Wells*, 174 Cal. 467, 163 P. 657, 660, this court said, Mr. Justice Shaw writing the opinion: "It is contended on behalf of the applicant that upon an attorney's application for admission the court cannot reject him for want of good moral character, unless it appears that he had been guilty of acts which would be cause for his disbarment or suspension. We think this proposition cannot be sustained. On his admission on certificate he must produce 'satisfactory evidence of good moral character.' *The burden is on him to do this.* In a proceeding to disbar an attorney the burden is on the accuser to prove moral turpitude. The requirement on his admission is to prevent the accrediting of untrustworthy persons as fit to receive the confidence attending upon the relation of attorney and client. The inquiry may extend to his general character as well as to particular acts. *It is broader in its scope than that in a disbarment proceeding.* The court may receive any evidence which tends to show his character for honesty, integrity, and general morality, and may no doubt refuse admission upon proofs that might not establish his guilt of any of the acts declared to be causes for disbarment." (Italics ours.)

Petitioner admits the falsity of the three affidavits executed by him and filed in support of his application, but alleges that he misunderstood the language of the affidavits and believed that the statement "charged before any court with crime amounting to either felony or misdemeanor involving moral turpitude" meant "charged with and convicted of" or "guilty of." He alleges that at the time of the filing of said affidavits he had in mind that he would be required to appear personally at a hearing of the committee of bar examiners, at which time he intended to disclose to the committee the fact that he had been charged with crime in the states of Florida and Oklahoma, at the same time explaining to them the circumstances surrounding the filing of said charges against him, and alleges that at said hearing before the committee of bar examiners he did in fact voluntarily disclose the fact that he had been on the various occasions hereinbefore referred to charged with said offenses.

Had the false statement occurred in but one affidavit, the explanation of applicant that he misinterpreted the phrase "charged with" to mean "charged with and convicted of" or "guilty of" would, perhaps, be credible. But the fact that the false statement was

made under oath in three separate affidavits renders less plausible applicant's explanation that he misinterpreted it. It is difficult to believe that, the matter having been brought to his attention on three separate occasions, no doubt entered his mind as to what was the correct meaning of the statement which he was subscribing under oath. Furthermore, the explanation that at the time he filed his affidavits he had in mind that, at the hearing at which he would appear personally, he would divulge the former charges filed against him, is indicative that there was a doubt, at least, in his mind that his interpretation of the phrase "charged with" was correct.

However, the record does bear out applicant's contention that, in response to an inquiry from the member of the committee interrogating the applicant as to whether there was anything further reflecting upon applicant's character which the committee should know, applicant did make a voluntary disclosure to the committee of bar examiners of the charges filed against him as hereinbefore set out. This undoubtedly tends strongly to support applicant's claim that he had no intention of willfully deceiving the committee. The record, however, also discloses that, in the interim between the filing of the false affidavits by applicant and the date of the oral hearing, information had come into the possession of the committee of bar examiners to the effect that applicant had in fact been charged with the commission of a felony in an information filed in Florida and had been convicted. There were in fact on the date of the oral hearing two letters in the files of the committee of bar examiners derogatory to applicant's good moral character. One of these letters was from a former member of the bar of this state and now a member of the Oklahoma bar, who voluntarily wrote to the committee advising them that a thorough investigation should be made of applicant's previous record. The other letter was a response to a letter from the committee inquiring with reference to the former conviction of applicant. The record does not indicate that applicant at the time he gave the information with reference to his previous record was aware that the committee was in possession of this information. In the absence of such showing, we are inclined to accept as true, therefore, that, whatever may have been applicant's intentions at the date of the filing of the false affidavits, at the date of the oral hearing he did not intend to perpetrate a fraud upon the committee and subsequently upon this court by withholding information which might have a bearing upon the committee's recommendation.

[5] However, conceding for the sake of argument that applicant by a full and voluntary disclosure of his previous record thereby

purged himself of the imputation of fraud which arose from the filing by him of a false affidavit, nevertheless, we are of the opinion that, although this phase of the case be entirely eliminated from consideration, the committee of bar examiners were entirely justified in refusing to recommend the applicant for admission to practice law in this state.

As stated in *Re Wells*, supra, the burden of establishing his good moral character is upon an applicant for admission. Although the committee of bar examiners will make as thorough an investigation as possible, they are not required to undertake the burden of disproving an applicant's allegations of good moral character. And if the proof offered by an applicant falls short of convincing the committee of bar examiners, it is their privilege and their duty to refuse to recommend such applicant for admission to the bar of this state.

An analysis of the proof offered by applicant shows that there is at least a question as to applicant's moral character. In other words, the proof offered is not satisfactory. Although the committee of bar examiners has on file letters of recommendation testifying to the good character of applicant and affirming that the writers thereof have found him to be honest, trustworthy, and a man of integrity, it also has on file letters which unqualifiedly and unequivocally state that in the writers' opinion applicant is not such a person. In addition to these contradictory letters, there exists the conceded fact that on four separate occasions applicant has been charged with the commission of a crime. As to the final disposition of these charges, the committee has only the word of applicant, which, in view of the falsity of the affidavits filed by him, they were entitled to consider as at least questionable. Considering the number and seriousness of the charges, a definite obligation rests upon applicant to attempt some showing in reference to them. Documentary evidence of the dismissal of the charges should be available to applicant or a showing made by him that he is unable to secure such proof. The record also shows that applicant in his replies to questions relative to these charges appeared to consider them of small moment. It was, perhaps, this attitude on his part which influenced the committee to refuse to recommend him for admission.

[6] While the powers of the committee of bar examiners are merely recommendatory and not binding upon this court, nevertheless, the committee of bar examiners was expressly created by statutory enactment for the definite purpose of relieving the court of the onerous duty of examining applicants for admission and investigating their fitness both as to legal learning and moral character to

practice law in this state, and this court, recognizing this fact, will refuse to exercise its power in contravention to the adverse recommendation of the committee of bar examiners unless a convincing showing is made by the applicant to the court that such adverse recommendation is not based upon sound premises and valid reasoning.

The petitioner herein has failed to make such a showing, and his motion for an order admitting him to practice law in this state, notwithstanding the refusal of the committee of bar examiners to recommend him for admission, is therefore denied.

211 Cal. 164

HULL v. RAY,

L. A. 10709.

Supreme Court of California.

Dec. 24, 1930.

Rehearing Denied Jan. 22, 1931.

1. Appeal and error ⇨1097(1).

Law as declared by appellate court on first appeal became law of case.

2. Sales ⇨127.

Buyer's notice of rescission of sale of cattle, although stating inadequate reason therefor, held sufficient to support action to rescind for adequate reasons known to seller.

It appeared that buyer had orally demanded delivery of bill of sale and warranty of title, and that seller's refusal thereof warranted rescission, in view of Civ. Code, § 1689; that at same time buyer offered to restore cattle, and attempted to rescind contract; and that notice of rescission, although it failed to mention bill of sale and warranty of title, did not mislead seller, who had been informed by correspondence and by allegations of complaint of real grounds for rescission.

3. Contracts ⇨271.

Notice of intention to rescind contract need not be formal and explicit, but is sufficient if clearly showing such intention.

4. Sales ⇨130(2).

In buyer's action to rescind cattle sale, issues concerning validity of resale by buyer as agister, and his lien for feed and care, being incidentally involved, held properly litigated.

It appeared that complaint expressly alleged that seller's refusal to accept return of cattle required buyer to give them

feed and care, and that to satisfy his lien therefor, as provided by Civ. Code, § 3052, buyer exercised right of agister and sold cattle at public sale, which seller claimed was illegal.

5. Appeal and error ⇨1138.

Where issues, although deemed improper by defendant, were expressly pleaded and properly litigated, and evidence apparently fully developed, resubmitting issues *held unnecessary*.

It appeared that defendant had ample opportunity to produce witnesses, if he chose, to testify on issues in question; that there was no reasonable probability he could refute plaintiff's evidence; that case had been tried twice, and had been before three appellate courts; and that resubmission of issues would increase, rather than lighten, burdens of defendant.

In Bank.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by John S. Hull against Carl Ray. A judgment for plaintiff was reversed by the Court of Appeal (287 P. 547), and the cause was taken to the Supreme Court on an order of transfer.

Judgment of Superior Court affirmed.

Scarborough, Forgy & Reinhaus, of Santa Ana, for appellant.

Sloane & Sloane, of San Diego, M. B. Wellington, of Santa Ana, and Harrison G. Sloane of San Diego, for respondent.

SEAWELL, J.

This appeal is taken from a judgment entered in favor of plaintiff and respondent whereby a sale of twenty head of Jersey cattle made to respondent by appellant for a consideration of \$3,500 was adjudged rescinded. The respondent's offer to restore said cattle to the possession of appellant was rejected by him, and said cattle were subsequently sold by respondent for a sum less than the accrued charges incurred for their care and keep.

[1] This case received the attention of the District Court of Appeal some time ago (Hull v. Ray, 80 Cal. App. 284, 251 P. 810), where the facts are quite fully set forth. The law as therein declared is the law of the case. Judgment went for appellant herein, and a reversal was ordered because of irreconcilable findings on certain issues which in no wise affect the merits of the instant appeal.

[2] All of said cattle appear to have been blooded stock and to have been registered, except four. The court held upon the first ap-

peal, in construing the contracts of the parties, which consisted of two instruments, that the appellant failed and refused to deliver a bill of sale of said stock to respondent transferring said four unregistered head of cattle and failed and refused to deliver written warranty of title to any of said property sold, and that said failure and refusal constituted a breach of contract and furnished grounds for rescission by respondent pursuant to section 1689, Civil Code. The court also held that respondent's claim that the failure or refusal of appellant to procure the transfer of registration of the blooded cattle upon the books of the American Jersey Cattle Club constituted grounds of rescission was untenable. The cause was retried, and judgment went for respondent. Upon appeal to the District Court of Appeal, Third Appellate District, 287 P. 547, the judgment was reversed, and the cause comes to this court upon an order of transfer. The principal reason for said transfer was to give further consideration to the conclusion reached by the learned author of the opinion to the effect that the notice of rescission was insufficient to support the action of rescission. The District Court of Appeal, upon a second consideration of the case, again found that the bill of sale and warranty of title was not executed; that respondent had fully performed all of the covenants on his part and had orally demanded of the appellant the delivery of the stipulated instruments, which demand was refused, and at the same time he offered to restore the cattle to appellant and attempted to rescind the contract. Pursuant to his purpose, respondent served upon the appellant a written notice of rescission containing the following language: "You will please be advised that John S. Hull does hereby rescind that certain contract of sale * * * [describing the same]. This rescission is made by reason of the failure of said Carl Ray to deliver to the said John S. Hull a certificate of the American Jersey Cattle Club, showing transfer of the said cattle, and by reason of the said Carl Ray's failure to correctly certify to the date of service to certain of said cattle." The notice fails to mention the appellant's failure to execute or deliver said bill of sale and warranty of title.

The trial court found that the contract was rescinded by the respondent on May 5, 1923, together with an offer to restore. The first sentence of the notice would have been sufficient on the question of rescission had the respondent not undertaken to specify the grounds of rescission. Inasmuch as he specified certain grounds which were not sufficient grounds and failed to specifically state the obvious grounds, to wit, failure to deliver or tender a good and sufficient bill of sale and warranty of title, the District Court of Appeal held the notice to be misleading and

tending to deceive the adverse party and prevent him from defending the action on its merits.

We are aware that courts have in some species of transactions restricted the party specifically naming certain grounds of objections to proof of the grounds so named. The rule, however, is not to be strictly enforced in cases where a general clause, which would of itself be sufficient to grant relief if standing alone, is followed by untenable specific objections which may be treated as surplusage to the end that the cause may be decided on its merits; and further, if, as a matter of fact, the adversary has been informed both by correspondence and by the allegations of the complaint filed against him, as in this case, as to the real grounds upon which the rescission is made, he is not misled as to the defense he is called upon to make. The supplemental and amended complaint to which answer was made without objection, by demurrer or otherwise, squarely presented the issues as to the refusal to execute and deliver said bill of sale together with warranty of title. We think the rule stated in *Simmons v. Briggs*, 69 Cal. App. 447, 231 P. 604, 610, may here well be invoked in the light of the facts of the instant case. It is there said:

[3] "The allegation as to the notice of rescission is not as certain and clear as it might have been made. In *McNeese v. McNeese*, 190 Cal. 402, 405, 213 P. 36, 38, it is said: 'It is not necessary that the notice to rescind shall be formal and explicit; it is sufficient that notice shall be given to the other party which clearly shows the intention of the person rescinding to consider the contract at an end. It has been held in other states that the mere bringing of an action is a sufficient disavowance of a sale.'"

There can be no doubt as to the intention of the respondent herein to consider the contract at an end. Neither can there be any doubt as to appellant's knowledge before suit filed, and later by the complaint, that failure to execute and deliver said bill of sale and warranty of title would be relied upon as grounds for rescission, in addition to the insufficient ground set forth in the notice. We cannot see, in the circumstances of the instant case, that appellant suffered the slightest injury or prejudice by the inartfully drawn notice of respondent, which unmistakably expressed respondent's intention of rescinding the sale.

This brings us to the second branch of the case. The complaint further alleges that appellant's refusal to accept the return of the cattle made it obligatory upon him to feed and care for the same at an expense of \$850, and, appellant having refused to reimburse him therefor, he exercised the right of an agister and sold the same at public sale on or about December, 1924, to satisfy his lien

thereon, as provided by section 3052, Civil Code. By a supplemental pleading the expenses of caring for and feeding said cattle since suit filed to the day of sale was alleged to have amounted to \$2,191.66. The cattle were purchased at said sale by respondent's wife at the price of \$154, and were subsequently resold by her at private sale at prices aggregating a sum considerably in advance of the public sale price, but in no event sufficient to pay the charge of \$2,191.66. No deficiency judgment was prayed for, and consequently none was awarded. The answer denies, *inter alia*, that said cattle were sold in accordance with legal proceedings.

[4, 5] There was much doubt in the mind of the trial court, shared by counsel for appellant at the trial, as to whether the validity of the sale and the items constituting the lien claim for feeding and caring for said cattle were triable in said action for rescission. The court seemed to be of the view that the expense of feeding and caring for the stock and the sale thereof to reimburse the respondent for his outlay was admissible only to excuse the inability of respondent to make delivery at the close of the trial, as they had passed out of his possession and into the possession of their purchasers. The pleadings expressly made the legality of sale and fairness of the lien claim issues in the case. Certainly, too, the issues were incidentally involved, and the parties should not be required to litigate issues in a separate action which are so closely correlated to the main issue as were said questions in the instant case. The court did find, after hearing considerable evidence on the issue, that the respondent was entitled to a lien, and that after proceedings had in accordance with law said cattle were sold, except one head thereof, in satisfaction of his lien, but the proceeds of such sale were insufficient to pay the amount of respondent's lien. The sources of evidence seem to have been exhausted as to the subject-matter, and there seems to be no reasonable probability that appellant can or could have refuted the evidence which tends to show that the lien sale price of said cattle was far below the costs of feeding and caring for said stock, which extended over a period of some eighteen or twenty months. Appellant had ample opportunity to produce such witnesses, if any there were, to rebut this testimony, but chose not to do so. This case has been twice tried and has been before three appellate courts. One of the parties is bound to sustain a loss. The respondent has paid to the appellant \$3,500 for twenty head of cattle of questionable comparative value. Appellant, on the other hand, stands to lose his herd of twenty head. The trial court upon a full hearing determined the issues in favor of respondent. We feel satisfied that the evidence, by reason of the source from which it must be obtained, has

been fully exploited, and that a resubmission of the issues of feeding and caring for said cattle would rather add to the already heavy burdens of the appellant than lighten them.

No other questions are raised which seriously affect the judgment.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

211 Cal. 154

HENRY COWELL LIME & CEMENT CO. v. STATE INDUSTRIAL ACCIDENT COMMISSION.

S. F. 14028.

Supreme Court of California.

Dec. 24, 1930.

1. Master and servant ⇨415.

In absence of employer's agreement, commission *held* unauthorized on second hearing to consider evidence of physician and compensation claimant at first hearing, to which employer was not party.

2. Master and servant ⇨415.

Commission *held* unauthorized to consider physician's affidavit, not filed until after hearing and submission of compensation claim.

3. Master and servant ⇨398.

Subsequent permanent disability is "new and further disability" within Compensation Act, extending time for filing claim (St. 1917, p. 841, § 11(c)).

Seriousness of injury is frequently not at first apparent, and from its nature cannot be detected until considerable time has elapsed. In such cases, Workmen's Compensation, Insurance and Safety Act, § 11(c), St. 1917, p. 841, requires claim to be filed within 6 months after compensation agreement or payment, but also permits claimant to sue within 245 weeks after injury, on ground that original injury has caused "new and further disability."

[Ed. Note.—For other definitions of "New and Further Disability," see Words and Phrases.]

4. Master and servant ⇨398.

Statute *held* to entitle claimant, within 245 weeks after injury, to seek compensation for permanent disability, notwithstanding

prior award or voluntary payment for temporary disability (St. 1917, p. 841, § 11(c)).

5. Master and servant ⇨398.

Statute *held* not to require filing of claim for new and further disability within 6 months after claimant has become aware thereof (St. 1917, p. 841, § 11(c)).

6. Master and servant ⇨416.

Commission's finding that compensation claim is not barred by limitation is finding of fact.

7. Master and servant ⇨405(1).

Evidence *held* to warrant findings that injury to claimant's eye was apparently superficial, causing only temporary disability, but later resulted in permanent disability; hence compensation claim therefor was not barred by limitation (St. 1917, p. 841, § 11(c)).

In Bank.

Proceeding under the Workmen's Compensation Insurance and Safety Act by Antone Cabral, claimant, opposed by the Henry Cowell Lime & Cement Company, employer. To annul an order of the Industrial Accident Commission granting an award, the employer applies for certiorari.

Award annulled.

Thelen & Marrin, of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondent.

CURTIS, J.

Petitioner by this proceeding seeks to have annulled an award against it and in favor of Antone Cabral. Cabral was in the employ of petitioner as a farm laborer, and while so employed on June 1, 1928, sustained injury to his right eye, which resulted in complete loss of the sight of said eye. Immediately on being injured he was taken to a hospital where he received treatment for the injuries sustained by him, including the injury to his eye. He remained in the hospital some two weeks, but thereafter received regular treatments for his injury until August 28, 1928, when he was discharged. He was advised on or about September 1, 1928, by the attending physician to try to take up light work. He returned to the ranch of petitioner and was put at some light work, but soon found that he was unable to perform the work assigned to him. The petitioner paid the attending physician, Dr. Cowden, for his services in attending Cabral. This payment was made October 13, 1928. No other payment, either as compensation or otherwise, has been made by petitioner on account of the injuries sustained by Cabral. Cabral, on April 23, 1929,

filed with the Industrial Accident Commission, his claim for compensation for the injuries sustained by him as aforesaid. This claim was filed against Henry Cowell only. A hearing was had thereon on August 29, 1929, and, after the introduction of the testimony of Cabral and the attending physician, the matter was submitted for decision. Prior to said hearing, and on or about July 11, 1929, the secretary of petitioner sent written notice to the Industrial Accident Commission that there was no such person as Henry Cowell against whom Cabral had attempted to file his claim before said commission, and that Henry Cowell had died in the year 1902. Apparently the commission paid no attention to this notice, but proceeded to hold the hearing on August 29, 1929, as stated above. It was not until March 7, 1930, that an order was made by the commission making the petitioner, the Henry Cowell Lime & Cement Company, a party to said proceeding. Thereafter, and on April 28, 1930, a further hearing in said proceeding was held, at which petitioner was present and interposed as a defense to the claim of Cabral that the same was barred by the statute of limitations, in that said proceeding had not been commenced against said petitioner within six months from the date of the last payment made by petitioner to said attending physician. At this further hearing additional evidence was taken before a referee, and, after the submission of the case, the referee made findings, and, based upon said findings an award was made in favor of Cabral which was thereafter confirmed by the commission.

The commission found that Cabral, while employed by the Henry Cowell Lime & Cement Company, sustained injuries arising out of and in the course of his employment when a team of horses which he was driving ran away, causing various injuries to his right eye, neck, and head, and that at the time both employee and employer were subject to the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), hereinafter referred to as the Workmen's Compensation Act. Finding 2 was as follows: "Defendant (the employer) paid medical expenses on account of aforesaid injury to the applicant. The injuries now complained of and which are the result of the aforesaid accident are permanent. The claim is, therefore, not barred by the statute of limitations." The remaining findings relate simply to the age of the employee; that the injury caused permanent disability consisting of loss of sight of right eye; the amount of wages the employee was receiving at the time of the injury; the compensation to which the employee was entitled; the fixing of a reasonable attorney's fee and future medical expenses. Leave was also reserved to the employee to file a new petition for increased permanent disability rating in the event that the permanent disa-

bility as found had increased and for any permanent condition which was not included in the rating fixed therein.

[1, 2] It was insisted by petitioner before the commission that Cabral's claim was barred by the statute of limitations. Petitioner now makes the same contention before this court. Independent, however, of the defense of the statute of limitations, we think the award must be annulled. As shown above, Cabral's claim was originally filed against Henry Cowell only, and the Henry Cowell Lime & Cement Company was not made a party to said proceedings until March 7, 1930. Before that date, and on August 29, 1929, the commission held a hearing at which the testimony of Cabral and that of Dr. Cowden was taken, and the matter was submitted to the commission for decision. Neither petitioner nor any one representing petitioner was present at said hearing. After the submission of the matter, the commission made an order bringing in the petitioner as a party to said proceeding, and a further hearing was had. No stipulation nor agreement was had relative to the evidence taken at the prior hearing. At this second hearing while Cabral and a witness, George, representing the petitioner, were called as witnesses and testified before the commission, Dr. Cowden was not called, and the only testimony given by him was at the first hearing. Without his testimony, the evidence before the commission was not sufficient to establish Cabral's claim. The commission, without an agreement or stipulation on behalf of petitioner permitting it to do so, had no authority or right to consider the evidence given by Dr. Cowden and Cabral at the first hearing when petitioner was not a party to said proceeding. Petitioner was not bound by said evidence. *Carstens v. Pillsbury*, 172 Cal. 572, 158 P. 218. Furthermore, the record before us shows that, after the close of the second hearing, and after the case had been submitted, there was filed with the commission an affidavit of Dr. Cowden to the effect that he had examined Cabral on the date of said affidavit, which was April 28, 1930; that he found him practically blind in his right eye; and that said injury was permanent in nature. This affidavit is quoted by counsel for the commission in support of the findings of the commission. It was evidently considered by the commission and relied upon by the commission in making up its findings. This affidavit was entitled to no weight as evidence, and should not have been given consideration by the commission. *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 P. 24. Excluding the evidence taken at the first hearing and at a time when petitioner was not a party to said proceeding before the commission, and disregarding the affidavit of Dr. Cowden filed with the commission after the matter had been submitted for decision, the evidence before the commis-

sion was insufficient to support the findings, and for that reason the award must be annulled.

As this matter will in all probability again be brought before the commission, and as the parties hereto have devoted their arguments mainly to the question of whether or not the claim involved herein was barred by the statute of limitations, we consider it only proper to express our views upon the question thus presented and which, at least from the standpoint of counsel, appears to be the principal question involved in this proceeding. In discussing this phase of the case, we will assume that all of the evidence before the commission, both that taken at the first as well as that taken at the second hearing, and also the affidavit of Dr. Cowden filed after the submission of the matter, were properly before the commission for its consideration in arriving at said award.

By the provisions of section 11 of the Workmen's Compensation Act, proceedings for the collection of any benefit provided by the terms of said act (and this includes compensation for medical treatment and for temporary and permanent disability but not for death benefits) must be commenced within six months from the date of the injury, except as provided in said act. The only exception contained in the act to this six months' limitation is found in subdivision (c) of section 11, and is as follows: "The payment of compensation, or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such compensation, or any part thereof, or the expiration of the period covered by any such payment; provided, however, that nothing contained in this section shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within two hundred forty-five weeks after the date of the injury upon the grounds that the original injury has caused new and further disability; and the jurisdiction of the commission, in such cases, shall be a continuing jurisdiction at all times within such period; provided, further, that the provisions of this section shall not apply to an employee who is totally disabled and bedridden as a result of his injury, during the continuance of such condition or until the expiration of six months thereafter."

The facts in this case recited above show that Cabral did not file his application for compensation with the Industrial Accident Commission within six months of the date of the injury, nor did he file said application within six months after the payment by his employer of the doctor who attended him for his said injuries. He has, therefore, not brought himself within the terms of subdi-

vision (c) of said section 11, unless his claim is saved by the terms of the proviso contained in said subdivision. This proviso, which we will again state, is to the following effect: "Provided, however, that nothing contained in this section shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within two hundred forty-five weeks after the date of the injury upon the grounds that the original injury has caused new and further disability; and the jurisdiction of the commission, in such cases, shall be a continuing jurisdiction at all times within such period."

[3, 4] It was held in the cases of *Hutchinson Lumber Co. v. Ind. Acc. Comm.*, 77 Cal. App. 141, 246 P. 118; *General Accident, etc., Corp. v. Ind. Acc. Comm.*, 77 Cal. App. 314, 246 P. 570; and *Ocean A. & G. Corp., Ltd., v. Ind. Acc. Comm.*, 90 Cal. App. 725, 266 P. 556, that a permanent disability is a new and further disability within the provisions of the Workmen's Compensation Act. We are in full accord with this conclusion of the District Courts of Appeal. Many times the seriousness of the injury is not at first apparent, and from its very nature cannot be detected until considerable time has elapsed after its infliction. The clear intent of the statute in such cases is that the injured employee shall be entitled to compensation for his permanent disability notwithstanding the fact that he may in the early stages of his injury have been granted an award only for temporary disability, or may have been paid compensation voluntarily by his employer; provided, of course, that proceedings for the collection of such permanent disability shall have been commenced within two hundred and forty-five weeks after the date of the original injury.

It is conceded by petitioner that, in case an injured employee files within six months from the date of the injury an application for compensation for temporary disability, and the same is granted by the commission, said employee may, in case his disability becomes permanent, at any time within two hundred and forty-five weeks after the date of his original injury, present and file with the commission his application for further compensation on the grounds that the original injury has caused a new and further disability. This was undoubtedly the clear and unambiguous intent of said section 11 (c) of the Workmen's Compensation Act. We think it is also equally clear that, if the injured employee receives compensation for temporary disability by the voluntary payment thereof by the employer, instead of through a compulsory award by the Industrial Accident Commission, and thereafter his disability becomes permanent, he may at any time within two hundred and forty-five weeks from the date of his original injury institute proceedings before the commission

for compensation on the grounds that the original injury has caused a new and further disability. This construction has been given to the statute by the courts in the following decisions: *Employee's Credit Co. v. Ind. Acc. Comm.*, 177 Cal. 46, 169 P. 1001; *Kauffman v. Ind. Acc. Comm.*, 37 Cal. App. 500, 174 P. 690; *Anaheim Co-Operative Orange Ass'n v. Ind. Acc. Comm.*, 70 Cal. App. 168, 233 P. 1115; *Hutchinson Lumber Co. v. Ind. Acc. Comm.*, 77 Cal. App. 141, 246 P. 118, 119; *General Accident, etc., Corp. v. Ind. Acc. Comm.*, 77 Cal. App. 314, 246 P. 570, 572; *Ocean A. & G. Corp., Ltd., v. Ind. Acc. Comm.*, 90 Cal. App. 725, 266 P. 556.

[5] There is an intimation in some of the decisions that the application based upon a new and further disability must be commenced within six months after the claimant had become aware of the fact that a new and further disability had developed, but this construction of section 11 (c) of the Workmen's Compensation Act is neither warranted by the language of the statute nor supported by authority. This contention was made in the case of *Hutchinson Lumber Co. v. Ind. Acc. Comm.*, supra, but was resisted by the commission. The court held with the commission stating that "we are of the opinion that the position taken by the commission must be sustained. The statute specifies no such limitation of time for the filing of an application based upon a new and further disability." In *General Accident, etc., Corp. v. Ind. Acc. Comm.*, supra, the court stated the correct rule in the following language: "However, in view of the language of section 11 (c) of the Workmen's Compensation, Insurance, and Safety Act (Stats. of 1917, p. 831, as variously amended), it would appear that, if the injuries received in the first accident 'caused new and further disability,' the question of the date when the permanent disability of Robinson was first determined would be immaterial, so long as the proceedings to have his claim adjusted were instituted within 245 weeks after the date when the first injury was sustained."

Applying the statute as thus construed to the facts in the present proceeding, it is apparent that Cabral's claim was not barred by the statute of limitations, provided he sustained a new and further disability from his original injury. The uncontroverted facts show that his employer, the petitioner herein, made payment of compensation by settling Cabral's medical bills on October 13, 1928, Cabral filed his claim with the Commission on April 23, 1929, and the petitioner herein was made a party to said proceedings on March 7, 1930, considerably less than two years from the date of the original injury, and therefore well within the period of two hundred and forty-five weeks from said date.

[6] Petitioner, however, contends that Cabral sustained no new or further disability from his original injury, for the reason that

said injury was permanent from its inception, or, as petitioner states its case, *ab initio*. If petitioner is correct in this statement that Cabral's injury was permanent at the date of its infliction, then the contention that his claim is barred by the statute of limitations must be sustained. For the right to file a claim within two hundred and forty-five weeks is given only in case the injured employee sustains a new and further disability, and not necessarily for a permanent disability. It is only when there is a change in the condition of the original injury from a temporary to a permanent disability that a "new and further disability" is established. Therefore, if the injury is permanent *ab initio*, no such changed condition can ever take place. Petitioner contends that this is the situation in the present proceeding relative to Cabral's injury—that is, that his injury at the date it was received was permanent, and therefore no new or further disability has been established. The commission found that Cabral's disability was permanent, but failed to find when it became permanent. From this finding it cannot be determined whether the injury was permanent at the date it was received or whether it became permanent at some future date. If the findings stopped here, we would be compelled to hold that they were not sufficient to sustain the award. But the commission further found that Cabral's claim was not barred by the statute of limitations. This is a finding of fact. 16 Cal. Jur. 633, and cases there cited. The only hypothesis upon which the commission could have found that Cabral's claim was barred by the statute of limitation was to find that the disability caused by his original injury was permanent in the first instance, and therefore no new and further disability had been shown. By finding that his claim was not barred by the statute of limitations, the commission, at least impliedly, found that the disability resulting from his injury was not permanent *ab initio*, but that originally it was temporary and later developed into a permanent disability. If this implied finding is sustained by the evidence, then the award is immune from attack in so far as said attack is based upon the statute of limitations.

[7] After a thorough consideration of the evidence, we are convinced that it is sufficient to justify the findings of the commission. The record before the commission, which has been certified to this court, shows that the ball of Cabral's right eye apparently received only superficial injury at the time of the accident. It was in no way destroyed. Dr. Cowden, who attended Cabral at the hospital and afterwards, testified that Cabral had a laceration of the inner side of the right eye; that at the time he was first called to attend Cabral at the hospital Cabral's eyes were full of dirt and whatever he could pick up in the field; that he cleaned out the eye and took stitches

in the eye, lip, and ear; that there was no evidence of any permanent injury at the time he was hurt; that the wounds healed and the eye cleared up all right by the time Cabral left the hospital, and that he never heard Cabral say anything about the vision in his eye, nor complain of his eye. The doctor later filed an affidavit that he had examined Cabral after the application had been filed with the commission and that he found Cabral to be practically blind in his right eye. Cabral testified that his sight in his right eye before the accident was good and that up to that time he had never had any trouble with his eyes. He further testified at the time of the hearing as follows:

"Q. How is your eye (right)? Can you see out of it? A. No. I no see good. All foggy.

"Q. Was your eye good before the accident? A. Yes.

"Q. Just the same as the other eye? No answer.

"Q. Can you see out of it? Put your hand over your left eye and tell me what you can see. A. Just figures—heavy fog—just some.

"Q. Can't recognize me? A. No.

"Q. Could you recognize the doctor with your left eye closed? A. No (distance of about three feet)."

He was not asked and it is not shown when the loss of vision in his right eye occurred, and whether it was gradual or all at once. But the fact that the doctor testified that there was no evidence of any permanent injury to the eye resulting from the accident, and that he detected nothing wrong with Cabral's vision, and that Cabral made no complaint to the doctor while the latter was attending him for some four or five months after the accident, is most persuasive that the original injury to Cabral's eye was apparently superficial and caused only temporary disability.

The evidence is without conflict that at the time of the hearing, at least, and subsequent thereto, the vision in Cabral's right eye was practically gone. The evidence, therefore, upon the whole was ample, in our opinion, to support the commission in finding that the injury to Cabral's eye was at the first only temporary, but that later the condition of the eye changed to that of a permanent injury. This brought Cabral's claim clearly within the rule established by section 11 (c) of the Workmen's Compensation Act as one founded upon a new and further disability. It was therefore not barred by the statute of limitations prescribed by said act.

For the reasons, however, heretofore given, the award is annulled.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.

NEW YORK INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION
et al.*

S. F. 13954.

Supreme Court of California.

Dec. 29, 1930.

Rehearing Granted Jan. 26, 1931.¹

1. Master and servant ⇨417(7).

On review of award allowing compensation, Supreme Court must determine whether there is any substantial evidence supporting finding of Industrial Commission that applicant was employee.

2. Master and servant ⇨417(7).

In reviewing award of compensation, Supreme Court need not determine whether it would have arrived at same conclusion as commission.

3. Master and servant ⇨405(2).

Evidence of organization established to distribute newspapers through newsboys justified Industrial Commission's conclusion that publishers retained power of control over newsboys as to characterize them "employees" within Compensation Act (St. 1917, p. 835, § 8(a, b)).

Evidence disclosed that newspaper publishers employed district manager to distribute newspapers to newsboys at fixed price under conditions specified by publishers. Newsboys were not carried on pay roll by newspaper publishers and received no salary or reward directly from them; compensation of newsboys consisting only in difference between cost of papers and the price newsboy was permitted to charge purchasers. Specified corners were allotted to newsboys by district manager, and newsboys were instructed not to interfere with any other newsboy's corner, and were further required to sell prescribed possible minimum of papers or have corner turned over to another newsboy.

[Ed. Note.—For other definitions of "Employee," see Words and Phrases.]

4. Master and servant ⇨417(7).

Finding of Industrial Commission, justified by evidence, is conclusive (St. 1917, p. 835, § 8(b)).

5. Master and servant ⇨367.

That newsboys were not paid wages but depended for compensation on sales of newspapers was immaterial in determining whether they were employees of publisher, if other necessary elements were present (St. 1917, p. 835, § 8(a, b)).

6. Master and servant ☞361.

Newsboys held not precluded from recovering compensation for injuries as employees of publishers because not performing personal service (St. 1917, p. 835, § 8(a), b).

In Bank.

Proceeding under the Workmen's Compensation Act by Claude Eustace, employee, opposed by the Los Angeles Evening Herald and another, employers, and the New York Indemnity Company and another, insurance carriers. To review an award of compensation by the Industrial Accident Commission, the insurance carriers bring certiorari.

Award affirmed.

Superseding opinion in 287 P. 368.

E. Herbert Herlihy and F. George Herlihy, both of Los Angeles, for petitioners.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

Flint & MacKay and Edward L. Compton, all of Los Angeles, for respondent Evening Herald Pub. Co.

PER CURIAM.

Petition to review and annul an award of the Industrial Accident Commission in favor of the respondent Claude Eustace. This respondent, a man of 34 years, was engaged in selling Los Angeles Evening Heralds and Los Angeles Records on the streets of the city of Los Angeles. He was injured while in the act of selling a paper to a customer who had hailed him from a passing automobile.

No question is raised as to the correctness of any finding made by the commission except the finding that the vending on the streets of Los Angeles of these newspapers by the applicant, Claude Eustace, constituted him a compensable employee of the respective publishers thereof, the respondents Los Angeles Evening Herald and Los Angeles Record Publishing Company. The review on this ground alone is asked by the petitioners, who are the insurance carriers for the last-named respondents.

[1] It becomes necessary, in accordance with well-established rules, to determine whether there is any substantial evidence to support the finding of the commission that the applicant was an employee of the newspaper publishers, for, if he was an employee, he is concededly entitled to compensation. If, however, the evidence is capable of but one inference, viz. that the injured man was an independent contractor, as contended by the petitioners herein, he is not entitled to compensation.

Eustace is one of a number engaged in the same occupation in Los Angeles under cir-

cumstances similar to those here presented. The undisputed evidence, in substance, is that both the Heralds and the Records were delivered to persons usually called newsboys, of whom Eustace was one, by a district manager, who acted as the representative of both publishing companies in the distribution of the newspapers to the newsboys in his district. The newsboys paid 2 cents each for the Heralds, which were sold by them at a price fixed by the publishers thereof. The newsboys paid \$1.25 per hundred for the Records, which they sold also at a fixed price. Eustace took from the district manager a specified number, 130, of Heralds per day, but received as few or as many Records as he wished. Unsold Heralds were not returnable, but credit was given by the district manager for Records returned. The papers were paid for by the newsboys when they received them, or they were charged with the number taken and payment was made at the end of the day. Eustace was not carried on the pay roll of either publisher, and received no salary or reward directly from them. His compensation consisted in the difference between the cost of the papers to him and the price he was permitted by the publishers to charge the public as purchasers.

Although there is some dispute in the testimony as to just what control or regulation was exercised over the newsboys by the district manager, nevertheless the following conclusions of fact are supported by testimony in the record, some of which was elicited from conceded employees of the publishing companies: That specified "corners" were allotted to the applicants therefor, who received instructions not to interfere with or sell at another newsboy's corner; that in order to retain his selling station at the corner allotted to him, a newsboy was required to be a "hustler" and sell a prescribed possible minimum of Heralds for that corner, otherwise his corner was given to another newsboy and he was refused further copies of that paper by the district manager. If copies were distributed for sale to newsboys who were not allotted a corner, they were instructed to sell only between corners and not to interfere with any occupied corner. The circulation manager of the Herald testified that it was one of the duties of the district manager, who is admittedly an employee of both publishers, to try to keep peace among the boys, and that some regulation was enforced as to the stations which the boys were to occupy in vending the papers, that the district manager had personal supervision of the newsboys, and that it was the duty of the district manager to see that all of the territory in his district was covered by newsboys so that the greatest possible number of copies each day would be sold.

[2-6] The question before us is not whether this court would have arrived at the same conclusion as that reached by the commission, but whether the evidence reasonably justifies the inference drawn by the Commission that the newsboys were employees entitled to the benefits of the act. We cannot escape the conclusion that the evidence was sufficient to justify the commission in concluding that such a system of distribution was established and such an organization built up to effect control of those selected to aid in obtaining the largest possible circulation by the particular means employed as to amount in effect to a complete exercise or retention of control of the activities of the newsboys to the end that the desired result be accomplished and thus satisfy the tests laid down in well-known cases. *Globe Ind. Co. v. Ind. Acc. Comm.*, 208 Cal. 715, 284 P. 661; *Moody v. Industrial Acc. Comm.*, 204 Cal. 668, 269 P. 542, 60 A. L. R. 299; *Hillen v. Ind. Acc. Comm.*, 199 Cal. 577, 581, 582, 250 P. 570; *Archbishop v. Ind. Acc. Comm.*, 194 Cal. 660, 230 P. 1; *Brown v. Ind. Acc. Comm.*, 174 Cal. 457, 163 P. 664; *Western Ind. Co. v. Pillsbury*, 172 Cal. 807, 159 P. 721; *Ocean Acc., etc., Corp. v. Ind. Acc. Comm.*, 87 Cal. App. 290, 262 P. 38. That being so, this court is powerless to set aside the finding of the commission that Eustace was as employee entitled to compensation. *Hillen v. Ind. Acc. Comm.*, supra, page 580 of 199 Cal., 250 P. 570; *Archbishop v. Ind. Acc. Comm.*, supra; *Western Pac. R. R. Co. v. Ind. Acc. Comm.*, 193 Cal. 413, 224 P. 754; *Tartar v. Ind. Acc. Comm.*, 191 Cal. 703, 218 P. 39; *Employers' L. A. Corp. v. Ind. Acc. Comm.*, 92 Cal. App. 119, 267 P. 922; *Ocean Acc., etc., Corp. v. Ind. Acc. Comm.*, supra. It cannot therefore be said as a matter of law that the inference drawn by the commission is not supported by the evidence or that it is so unreasonable as to be an act in excess of the commission's jurisdiction. It was said in *Hillen v. Industrial Accident Commission*, 199 Cal. 577, at page 580, 250 P. 570, 571, citing *Eastman Co. v. Ind. Acc. Comm.*, 186 Cal. 587, 598, 200 P. 17: "Unless there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the commission, the court is not empowered to set it aside." The fact that the newsboys are not paid a salary or wages, but depend upon the number of sales made for any return for their efforts is immaterial, if other necessary elements be present. *Globe Indemnity Co. v. Ind. Acc. Comm.*, 208 Cal. 715, 284 P. 661; *Hillen v. Ind. Acc. Comm.*, 199 Cal. 577, 581, 250 P. 570. Neither are we convinced that there is any merit in the argument that the newsboys are not performing a "personal" service. It must be obvious that any salesman who is hired to vend his employer's product, provided the evidence sufficiently

supports the conclusion that the elements of control are present, is performing a personal service. See *Easton v. Ind. Acc. Comm.*, 34 Cal. App. 321, 167 P. 288. The petitioners' claim that the facts present no more than a case of the purchase of a certain number of papers at wholesale for sale at retail is not supported by the record. The petitioners have not met the burden placed upon them by section 8(b) of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 835) of overcoming the presumption that the applicant is an employee entitled to the benefit of the act. See *York Junction T. & S. Co. v. Ind. Acc. Comm.*, 202 Cal. 517, 261 P. 704; *Montezuma Mt. School v. Ind. Acc. Comm.*, 201 Cal. 603, 258 P. 84; *Hillen v. Ind. Acc. Comm.*, supra; *Employers' L. A. Corp. v. Ind. Acc. Comm.*, supra.

We must therefore conclude on the present record that the system instituted and the organization established for the purpose of supervising and directing the largest distribution and sale of their papers on the streets by the class of news vendors involved herein justified the commission's conclusion that the petitioners' assured retained such powers of control over the class of newsboys so drawn into that system and organization as to characterize them employees within the meaning of the Workmen's Compensation, Insurance and Safety Act.

The award is affirmed.

211 Cal. 142

**BROOME v. LANTZ,
L. A. 10522.**

Supreme Court of California,
Dec. 23, 1930.

Rehearing Denied Jan. 22, 1931.

1. Quieting title ☞41.

Demurrer on ground that plaintiff was seeking to quiet title to land not within boundaries described in patent under which plaintiff claimed *held* properly overruled, patent being ambiguous.

2. Evidence ☞390(3).

When description in patent is unambiguous, evidence varying description is inadmissible.

3. Evidence ☞450(3).

Where discrepancies appeared on face of patent and in accompanying plat, evidence *held* admissible to explain ambiguity.

4. Appeal and error *↪*1011(1).

Finding based on conflicting evidence relating to plaintiff's possession in quiet title action *held* conclusive on appeal.

In Bank.

Appeals from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Thornhill Francis Broome against Charles Lantz. From the portion of the judgment for defendant, plaintiff appeals, and, from the portion of the judgment for plaintiff, the defendant appeals.

Affirmed.

Charles F. Blackstock, of Oxnard, and Drapeau, Orr & Gardner, of Ventura, for appellant.

Winslow P. Hyatt, of Los Angeles, for respondent.

RICHARDS, J.

There are two appeals herein, one by the defendant from that portion of the judgment which is in the plaintiff's favor, and one by the plaintiff from the portion thereof in the defendant's favor. Our main consideration will be given to the first of the foregoing appeals. The action is one to quiet title to certain portions of the Guadaluasca rancho, situate in the county of Ventura, to which the plaintiff, as the owner of the larger portion of said rancho, also claims title, the complaint being in the usual form employed in such actions. There are two separate parcels of land described in the complaint. The first of these, and the one awarded by the judgment to the plaintiff, lies along the southeasterly line of said rancho, and if confirmed to plaintiff will have the effect of defining the southeastern boundary of the plaintiff's property as extending throughout the entire length thereof to the ocean. The other piece or parcel of land lies along the most easterly line of said rancho and with it we shall, if necessary, deal later. In the year 1836 Mariano Chico, Mexican Governor of Alta California, upon the petition of Isabel Yorba, described as a widow with four adopted children, granted to her the rancho then known as "Guadaluasca," with no other description thereof than that supplied by a map which accompanied her petition. In this first grant there was expressly excepted therefrom a certain considerable tract of land which the Mission of San Buenaventura was then using for the pasturage of the mission cattle. A year later, it being made to appear that the mission had ceased to use this latter tract of land, another grant was issued by Governor Juan B. Alvarado to Isabel Yorba, which included these latter lands in the rancho Guadaluasca. The maps accompanying each of these grants de-

pic the granted lands as extending on their southeastern side to the ocean and as being bounded on that side by the cost and sierra (costa y sierra); the "costa" thus referred to being, evidently, that portion of said boundary which then consisted and still consists of a sandy beach extending for a considerable distance along the seashore, and the "sierra" being a steep bluff which at the southerly end of said beach rises abruptly from the waters of the ocean to the height of several hundred feet and extends along the remainder of said depicted boundary line as shown upon said maps.

In the year 1852, the Mexican War having in the meantime been fought and having resulted in the acquisition of Alto California by the government of the United States by conquest, and also by the terms of the treaty of Guadalupe Hidalgo (9 Stat. 922); and the said government having by act of Congress of March 3, 1851 (9 Stat. 631) created a commission "to ascertain and settle the private Land Claims in the State of California," Isabel Yorba on February 5, 1852, presented to said commission her petition for the approval and confirmation to her of her aforesaid grants of the rancho Guadaluasca. The commission held hearings upon her said petition and the proofs offered in support thereof, but finally, and on April 24, 1854, refused to confirm said grants upon the ground of insufficiency in the description; whereupon Isabel Yorba took an appeal from the ruling of the commission to the United States District Court in the manner provided for under the terms of said act; and said court, after full consideration of the proofs offered in support thereof, including the map or maps upon which the petitioner relied for a description of said rancho, reversed the action and order of the commission, and adjudged and decreed the claim of the petitioner to the lands embraced in said rancho to be good and valid, and that the same should be confirmed to her to the extent of eleven leagues of land within the boundaries called for in the grant of Governor Juan B. Alvarado of the date of April 6, 1837, and described in the map to which said grant refers. An amended decree was filed on March 3, 1857, which does not materially alter the former decree, but which, after referring to the grants made by Governors Chico and Alvarado, decrees that "the said lands have the boundaries shown by the respective grants and maps to which reference is made for a more particular description." Accompanying these decrees and filed with them in the office of the commission for the settlement of private land claims in California, as giving direction to the future action of said commission, is to be read the opinion of the judge of said District Court, which furnishes some interesting data as to the de-

scription of said rancho as the same is shown upon said maps and as a guide to the commission in the issuance of a patent confirming said grants. The court says: "The map in this so far as my experience goes is remarkably definite and distinct and is accompanied by notes made upon it explaining with great certainty the situation of the tract. The note upon the map states the commencement of the survey was at the Punta de Muju; this point is shown upon the map as being the southern corner of the tract; the southeastern side is described as running along the coast and the mountains which are laid down upon the map, and being in extent three leagues, thus then a point on the coast three leagues from the Punta de Muju forms the second corner." In view of the fact that Punta de Muju is a high perpendicular bluff rising directly from the waters of the sea, and that the "mountains" or sierra which extend from it along the shore to where the sandy beach begins partakes of its rugged and perpendicular character, it would seem to be obvious that this intended boundary line between the two described corners, each "on the coast," was, in the view of the court, to be a meander line following the seashore from corner to corner. In the later portion of the opinion this is made even more clear, the opinion stating: "The side which looks to the southeast faces the seashore and mountains and is three leagues in length. This side is also well defined, as it begins at Punta de Muju and runs along the seashore and sierra in a southeasterly direction three leagues." The transcript of the record of the District Court embracing the foregoing decrees having been filed in the General Land Office pursuant to the terms of the foregoing act of Congress, and no appeal having been taken therefrom, the General Land Office proceeded, through the Surveyor General's office, to have the Guadaluasca rancho surveyed and a proper description, map, and plat made thereof as preliminary to the issuance of a United States patent thereto. A survey thereof was accordingly made by one J. E. Terrell, a deputy surveyor, which survey, with accompanying map and plat, was in due course filed in the General Land Office. Thereafter and on September 1, 1873, a patent was duly issued to Isabel Yorba, purporting to describe and grant to her the rancho Guadaluasca. The description of said rancho corresponds with and in fact exactly copies the description thereof contained in the field notes of the survey thereof as made by said J. E. Terrell. The map of said rancho which is embraced in said patent is a copy of the map thereof which was drawn in the office of the Surveyor General by some cartographer who prepared the same supposedly from the field notes of the Terrell survey. Whatever defects and uncertainties may be found to have existed in the Terrell survey, and whatever dif-

ferences may appear to exist between the field notes thereof and the map which was prepared and inserted in said patent, supposedly in conformity with the Terrell survey, were not discovered either by the grantee of said patent or by any one else until some years after the date of said patent and the entry of said grantee into completed ownership and possession of the Guadaluasca rancho pursuant to the issuance unto her of the patent thereto. In the meantime, and both before and after the issuance to her of said patent, Isabel Yorba had been making conveyances of undivided portions of said rancho to various grantees, with the effect that in the year 1874 Wolf Kalisher and Henry Wartemberg, who were grantees mediately from Isabel Yorba of a certain portion of said rancho, commenced an action in partition against a number of other grantees of undivided portions thereof in the then district court of the first judicial district of the state of California. In said action commissioners were appointed to make such partition, and John T. Stow was selected to make the requisite survey of the rancho.

The report of the commissioners introduced in evidence herein sheds an interesting light upon the inadequacies of the Terrell survey. The report states: "The first work that presented itself to the commission in the field was to retrace and establish the boundary lines of the rancho as called for in the official survey made in January, 1861, by J. E. Terrell, United States Deputy Surveyor, but upon endeavoring to do so very grave errors were found to exist in said survey, so much so that it was found impossible to run the lines as called for in the official survey. The official survey called for, however, certain unmistakable landmarks and the commission was governed by these in relocating the lines of the rancho." The commission in its said report proceeded to point out specifically the errors and inaccuracies of the Terrell survey and map, chief among which was that of the course along the shore of the ocean which, if attempted to be followed according to the calls of the survey, would place the southeasterly boundary of the rancho at least half a mile out in the ocean and would continue the same for practically the entire distance between the points Q3 and Q4 as designated upon the field notes and plat of said survey.

The report of the commission, however, adopted the location of Q4 as shown both by the field notes and plat of the Terrell survey as having been originally established "on the top of ridge near the shore of the Pacific Ocean," and adopted as the southeasterly boundary of the rancho between points Q3 and Q4 a meander line following the shore between said points. The report of this commission was carried into the decree of the court fixing the ocean shore as forming the southeasterly boundary of the rancho for the

purpose of said partition suit. The discovery of the errors and discrepancies in the Terrell survey and of the fact that these had been carried into the patent of the rancho had the effect of disclosing that apparently there existed along the southeasterly boundary thereof a strip of land of varying width lying between a straight line drawn between points Q3 and Q4, as shown upon said plat, and the ocean shore, and hence not included within the boundaries of the rancho. The result was that various persons began occupying portions of this outlying strip of land and insisting that the federal government should undertake another survey of that portion of said rancho with a view to opening to settlement and acquisition this alleged strip of public land. As a result of this agitation the federal government designated one J. R. Glover, a deputy United States surveyor, to make a resurvey of the Guadaluca rancho in the year 1896. In carrying out this commission Glover claimed to have rediscovered the lost monument Q4 as set in the course of the Terrell survey and to have replaced the same, but this monument, instead of being "close to the seashore," as described in the field notes of Terrell, was located by Glover as being situate about 1,400 feet distant from the then shore line, which discrepancy he explained by his surmise that the shore line had been changed by accretion since the making of the Terrell survey. However, Glover, in making and reporting his survey, with its accompanying plat, stated and showed upon the latter that he regarded the ocean to be the true boundary of the rancho, and hence extended the eastern line thereof from his said station at Q4 to the seashore, thus making the boundary as between Q4 and Q3 practically a meander line along the sierra and shore. In the year 1910, at the instance of the defendant, or his predecessors in interest occupying the two strips of land claimed to lie outside of the established boundaries of the Guadaluca rancho, the United States government deputed a deputy surveyor named Lightwood to make surveys of these disputed strips of land. In so doing Lightwood accepted the location of station Q4 as claimed to have been remade by Glover, and, based thereon, returned to the United States General Land Office a plat and survey approved by the Surveyor General; whereupon and in the following year the lands embraced therein were opened to settlement and purchase as government lands; and thereafter and in about the year 1914 patents thereto were issued to the predecessors of the defendant herein. In the meantime, William Richard Broome having acquired by mesne conveyances the title of the original grantee, Isabel Yorba, to a large tract of the lands of said rancho, constituting the easterly portion thereof, and thereafter having died and his estate having been duly probated, and having by decrees of the su-

perior court in and for the county of Ventura been duly distributed in undivided portions thereof as to said real estate unto his widow and heirs, the plaintiff herein, as one of said heirs, in the year 1914 commenced an action in partition of said lands then known as the "Broome Estate Ranch." In the course of said action referees were duly appointed by the said court to make or cause to be made a survey of said last-named premises and to partition the same among the persons entitled thereto in severalty, as a result of which the plaintiff herein, either by virtue of the decree of partition therein entered or of conveyances from his co-owners, became and at the time of the institution of the present action was and still is the owner of all or a major portion of said Broome Estate ranch property and of all such portions thereof as are legally embraced within the boundaries of the Guadaluca rancho.

Thereafter and in the year 1925 the present action was begun. The defendant, upon being duly served with process, appeared and demurred to the amended complaint of the plaintiff herein upon several grounds, but chiefly upon the ground that a sufficient cause of action was not therein stated. This demurrer being overruled the defendant answered, denying the averments of the plaintiff's amended complaint, pleading the statute of limitations and also setting forth affirmatively his own claim of title to the lands in dispute. The cause proceeded to trial upon the issues as thus framed, whereupon the trial court, basing its action in so doing upon the theory that the original description and boundaries of the Guadaluca rancho were so far indefinite as to the location of the southeasterly line thereof with relation to the ocean as to permit the introduction of extraneous evidence for the purpose of establishing said southeasterly boundary line, admitted at the plaintiff's instance and over the defendant's objection a large amount of such evidence, consisting in the main of the several surveys and maps of the Guadaluca rancho which had from time to time been made and which are above adverted to, and also in the admission of testimony on the part of several surveyors who had upon various occasions made investigations, comparisons, and surveys with respect to the rightful location of said boundary line. Upon the conclusion of the plaintiff's case the defendant moved for a nonsuit, basing his contention that the said motion should be granted upon the points urged upon his demurrer and upon the many objections which he had urged against the admission of the foregoing evidence offered upon the plaintiff's behalf. The trial court overruled said motion. The defendant then proceeded to offer his evidence in support of his affirmative pleadings, and thereafter and upon the final submission of the cause the trial court filed its findings of

fact and conclusions of law, wherein it found and decided that as to the lands in dispute lying along the southeasterly line of said rancho upon the ocean side the plaintiff was the owner thereof and was entitled to have his title quieted thereto, but that as to the lands in dispute lying along the easterly side of said rancho the defendant was the owner thereof and was entitled to have his title quieted thereto as against the asserted claims of said plaintiff. Judgment was entered accordingly. Each of the parties have appealed from that portion of the judgment which is in favor of the other. The plaintiff, however, has set forth in his briefs upon appeal that, if the determination of this court shall upon the defendant's appeal be in the plaintiff and respondent's favor, affirming the judgment as to the portions thereof so appealed from, he will waive the further prosecution of the appeal taken on his own behalf and consent to an affirmance of that portion of said judgment from which he has appealed. We shall at present only consider the defendant's appeal.

[1] The defendant's first contention upon his said appeal is that the trial court was in error in overruling his demurrer to the plaintiff's amended complaint upon the ground that a cause of action was not therein set forth. The basis of this contention is that, since the plaintiff's alleged title to the portion of the Guadalupe rancho owned by him is founded upon the patent to said rancho, and not otherwise, and since that description and boundaries of said rancho as set forth in said patent are not ambiguous or uncertain, but, on the contrary, clearly show that the lands to which the plaintiff is by this action asserting title are outside of said boundaries, he has for that reason failed to state a cause of action. The vice of the defendant's contention in the foregoing regard is that it disregards the very fact in dispute in this action, viz., the uncertainty and ambiguity of the patent boundaries and description, based as they are, upon the Terrell survey. His demurrer was, therefore, properly overruled, and for the same reason his motion for nonsuit was properly denied.

[2, 3] The next contention of the defendant is that the trial court was in error in admitting the main portion of the plaintiff's evidence offered for the purpose of explaining the alleged inaccuracies and ambiguities in the patent description and plat with respect to the location of the aforesaid southeasterly boundary of said rancho. It is undoubtedly true, and supported by abundant authority, that when the description of the granted tract of land embraced within the terms of a United States patent is, upon the face thereof, clear and unambiguous, such description constitutes the final word, and in such case evidence will not be admissible to show that

the grantor intended to do other than that thus clearly set forth upon the face of said grant. *Rose v. Davis*, 11 Cal. 133; *Moore v. Wilkinson*, 13 Cal. 478; *Chapman v. Polack*, 70 Cal. 487, 11 P. 764; *Heinlen v. Heilbron*, 97 Cal. 105, 31 P. 838; *Los Angeles F. & M. Co. v. Thompson*, 117 Cal. 594, 49 P. 714; *Harvey v. Barker*, 126 Cal. 262, 58 P. 692; *Weaver v. Howatt*, 171 Cal. 302, 152 P. 925; *Knight v. United Land Association*, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974; *De Guyer v. Banning*, 167 U. S. 723, 17 S. Ct. 937, 42 L. Ed. 340; *Southern Pacific R. Co. v. United States*, 200 U. S. 354, 26 S. Ct. 298, 50 L. Ed. 512. But the foregoing authorities have no application to a case wherein it sufficiently appears upon the face of the description embraced in the terms of the patent itself or of the plat which accompanies and is made a part of the same that the same is in certain vital respects uncertain. In such a case the authorities hold that extrinsic evidence is admissible to explain away the uncertainties of the grant and to prove the real intent of the grantor in making the same, provided such evidence does not go to the extent of changing the clear intent of the grant as to the premises to be conveyed. This rule was well set forth in the case of *Miller v. Grunsky*, 141 Cal. 441, 452, 66 P. 858, 75 P. 48, 50, wherein this court said: "A patent is no doubt conclusive between the parties and their privies against any collateral attack, but before it concludes anything it must be construed and its meaning determined, and when it contains conflicting calls they are to be reconciled upon the same principles and by the same rules that govern the construction of other deeds of conveyance." We think this is such a case. We have hereinbefore pointed out some of the inaccuracies and defects in the Terrell survey which were carried into the description embraced in the grant itself. We might add, incidentally, that Deputy United States Surveyor Terrell made many surveys of California land grants, and that the reaction of the courts thereon has been that the Terrell surveys were quite generally found to be wrong. See *Adair v. White*, 85 Cal. 313, 24 P. 663. We might further suggest that the plat which accompanies the patent and which was not prepared by Terrell varies in an important particular from the calls of the field notes of Terrell; as, for example, the Terrell field notes establish the two points at each end of the southeasterly line of the rancho as being upon or very near the immediate coast line of the ocean. The natural and proper inference to be drawn therefrom would be that a meander line along the ocean shore would connect these two coast line corners. In the case of *City of Los Angeles v. San Pedro, L. A. & S. L. R. Co.*, 182 Cal. 652, 654, 189 P. 449, 450, this court laid down the rule of law governing such a situation to be as follows: "It may be considered a canon in

American jurisprudence, that where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." Yet upon turning to the plat which accompanies the patent we discover that the cartographer thereof has disregarded this rule and has drawn a straight line between these two shore-wise points, thus carrying the southeasterly boundary of the grant, throughout the larger portion thereof, many hundred feet inland from its natural shore line, thus making it to appear that the government in making this grant was not only disregarding the plain mandate of the District Court as to what was to constitute the southeastern and shore line boundary of the rancho, but was also thereby excluding from the terms of the grant a rugged and barren and apparently worthless (as land was then regarded) triangular strip of land without the slightest conceivable reason why it should have done so. There is another significant fact in this connection, which is that Surveyor Terrell, after completing his survey, figured the area of the rancho to be 30,593.85 acres, and that the patent accordingly calls for that area. The inclusion of the strip of land along the ocean side for which the plaintiff is herein contending gives an area to the rancho, according to the Stow survey, of 30,597.40 acres, or within about 4 acres of the Terrell calculation, while the exclusion of this strip of land, comprising 233.89 acres, would reduce the acreage of the rancho to that extent, and which in itself constitutes a material variation between the patent as the defendant contends it should be construed and the acreage stated in the patent as the area of the confirmed grant. In considering the foregoing obvious discrepancies appearing upon the face of the patent and its accompanying plat, the trial court concluded that it might properly be given access to the terms and maps of the original Mexican grant, to the decision of the United States District Court in directing a confirmation of said grant, to such other and later surveys of the rancho by surveyors seeking, somewhat vainly, to follow in the footsteps of Surveyor Terrell, and particularly to the testimony of C. W. Petit, who for many years had been the county surveyor of Ventura county, and was as such very familiar with the topography of the precise region involved in this litigation, and

who not only went over the ground traversed by Terrell in making his survey, but undertook to prepare a map illustrative of the situation on the ground. The court, as we have seen, admitted these various forms of evidence, and also admitted much testimony offered by the defendant in controverting the same; and upon the conclusion and submission of the cause decided that the proper interpretation to be placed upon the patent of the Guadaluasca rancho as to its designation of the southeasterly boundary thereof was that such boundary consisted of a meander line along the ocean side, and as a consequence the lands involved in the defendant's appeal herein were at all times embraced within the area of the Guadaluasca rancho. Without undertaking to go over the numerous points in detail wherein the defendant and appellant assails said conclusion, and which are mainly covered by the points hereinabove considered, we are satisfied that these are without sufficient merit to justify a reversal of the case. We also do not deem the points made upon defendant's motion for a new trial worthy of detailed review.

[4] There is but one remaining point involved in the defendant's appeal, viz., that of the statute of limitations. It will be sufficient to state that whatever evidence was offered upon the subject of any adverse possession on the part of the defendant or his predecessors of the strip of land lying along the southeasterly boundary line of said rancho was quite conflicting, the claim of the plaintiff being that he and his predecessors in interest back to the original making of the Mexican grant had always been in the actual possession of said strip of land. The trial court found in the plaintiff's favor upon this issue and we shall not disturb its said finding thereon upon this appeal. Neither shall we disturb, for the same reason, the finding of the trial court upon the plea of an estoppel on the part of plaintiff to maintain this action.

In view of the foregoing considerations and of the plaintiff's concession that, in the event the judgment of the trial court is affirmed as to the defendant's appeal, it may also be affirmed upon the plaintiff's appeal, it follows that the said judgment must be, and the same is hereby, affirmed upon both appeals, each of the parties to pay his own costs.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

MESSENKOP et al. v. DUFFIELD.**L. A. 12416.****Supreme Court of California.****Dec. 30, 1930.****1. Appeal and error ↪985.**

It is for trial, rather than appellate, courts to fix amount of appeal bonds and determine sufficiency of sureties.

2. Appeal and error ↪492.

Although appellate court may annul execution in violation of supersedeas, relief is not to be extended to cases where there was no effective stay when execution was had.

3. Appeal and error ↪484.

Effect of supersedeas is to hold matters in condition existing when stay became effective.

4. Contempt ↪22.

Plaintiff was not in contempt of Supreme Court's order, staying further proceedings upon judgment for possession of property, by leasing property after lawfully acquiring possession before order was made, though after application therefor.

Sureties upon defendant appellant's undertaking filed in court below having been rejected, and no other sureties having justified within time allowed by law, execution was no longer stayed by undertaking, and Supreme Court had not then issued order staying enforcement of judgment; hence plaintiff, having been placed in possession by sheriff before Supreme Court's order, he did not violate order by exercising his rights of property thereafter.

5. Appeal and error ↪484.

Stay pending appeal does not operate to restrain acts of litigants involving no further judicial proceedings.

6. Assistance, writ of ↪9.

Writ of possession issued upon judgment decreeing plaintiff entitled to possession of realty held proper though not ordered issued by court upon motion after judgment and proof of demand (Code Civ. Proc. § 682, subd. 5).

Defendant's contention that there was no valid execution because writ of possession was not ordered issued by court order upon motion after judgment and upon proof of demand, could not be upheld, since Code Civ. Proc. § 682, authorizes clerk to issue writs of execution upon judgments, and from subdivision 5 it appears procedure is applicable to writ issued upon judgment in present case, and

since upon such judgment plaintiff was entitled to possession as matter of course.

7. Appeal and error ↪479(2).

Supreme Court, in exercising discretion, stayed execution upon unexecuted money judgment pending appeal, upon appellant's filing required undertaking in double amount of judgment (Code Civ. Proc. § 942).

In Bank.

Action by Louis H. Messenkop against Kathleen Duffield, and cross-action by defendant against plaintiff and another. Judgment in favor of plaintiff, and defendant and cross-complainant appeals. On petition in Supreme Court for writ of supersedeas, and on motion for order restoring petitioner to possession of real property involved in suit and adjudging respondent to be in contempt for violation of Supreme Court's order directing respondent to show cause why supersedeas should not be issued and staying execution pending hearing.

Stay of execution upon money judgment continued upon petitioner's filing with clerk a sufficient undertaking. Motion for order restoring petitioner to possession and adjudging respondents in contempt denied.

Frank Lehan, D. A. Knapp, Stanley & Lewis, Russell F. Milham, and E. D. Moore, all of Los Angeles, for appellant.

A. R. Button, Alvin W. Wendt, G. R. Dexter, G. S. Pinney, and Dexter & Wendt, all of Los Angeles, for respondents.

PER CURIAM.

Petition for writ of supersedeas. Upon an appeal from a judgment of the superior court of Los Angeles county decreeing plaintiff, Louis H. Messenkop, to be the owner and entitled to the possession of real property in the city of Los Angeles, and also awarding plaintiff a money judgment for \$1,140, defendant and cross-complainant, Kathleen Duffield, filed an undertaking in the sum fixed by the court, to wit, \$7,000, with five personal sureties. Said plaintiff, Messenkop, and cross-defendant, William L. Milne, excepted to the sufficiency of the sureties. The sureties were found insufficient and the undertaking rejected by a court commissioner on June 5, 1930. Defendant, on June 7, 1930, filed her petition for a writ of supersedeas in this court, praying that the execution of the judgment be stayed pending the hearing on the application for supersedeas, and that after hearing held a writ of supersedeas issue upon the filing of an undertaking in an amount fixed by this court. Petitioner alleged that said commissioner improperly rejected the sureties, and that the property owned by them was shown far to exceed the amount of the undertaking.

On June 16, 1930, this court entered its order directing respondents to show cause why a writ should not be issued and staying execution of the judgment pending hearing on said order. The proceeding is now before us after hearing held on September 15, 1930, pursuant to said order to show cause.

On September 5, petitioner filed notice in this court of a motion for an order restoring her to possession and adjudging respondents to be in contempt for violation of the court's order of June 16. It appears, from petitioner's affidavit accompanying the notice of motion and from the answer of respondents, that on June 9, after petitioner had filed her application for a writ of supersedeas, but before this court had taken any action thereon, the sheriff executed the portion of the judgment decreeing plaintiff entitled to possession of the property under a writ issued to him on June 6. Petitioner alleges that respondents and said sheriff had notice of the application made by her to this court for a writ of supersedeas.

[1-3] It is the function of trial courts, rather than of appellate tribunals, to fix the size of appeal bonds and to pass upon the sufficiency of sureties. But this court nevertheless has several times exercised its inherent power to restrain the enforcement of judgments upon the filing of a proper undertaking in this court where, by reason of the insufficiency of the undertaking filed in the court below, a statutory supersedeas had not been created. *Williams v. Borgwardt*, 115 Cal 617, 47 P. 594; *Hill v. Finnigan*, 54 Cal. 493; *Nonpareil Manufacturing Co. v. McCartney*, 143 Cal. 1, 76 P. 653; *Segarini v. Bargagliotti*, 193 Cal. 538, 226 P. 2. In these cases, however, the judgments had not been fully executed at the time the appellate court granted a supersedeas. In the case herein that portion of the judgment decreeing plaintiff to be the owner and entitled to the possession of the property was fully executed by the sheriff's placing him in possession on June 9 under a writ dated June 6. The writ was legally issued and served. The sureties upon the undertaking filed in the court below having been rejected, and no other sureties having justified within the time allowed by law, execution of the judgment was no longer stayed by said undertaking, and this court had not then issued an order staying enforcement of the judgment. Although the appellate courts have annulled executions had in violation of a supersedeas which was in full force and effect by ordering a restoration of possession of real property or restoring money seized (*McAneny v. Superior Court*, 150 Cal. 6, 87 P. 1020; *Owen v. Pomona Land, etc., Co.*, 124 Cal. 331, 57 P. 71; *Holcomb v. Juster*, 39 Cal. App. 462, 179 P. 445), this relief is not to be extended to cases where at the time the execution was had there was no effective stay

(*Hoppe v. Hoppe*, 99 Cal. 536, 34 P. 222; *De Lemos v. Siddall*, 143 Cal. 313, 76 P. 1115; *In re McKean*, 82 Cal. App. 580, 256 P. 226; *Craig v. Stansbury*, 37 Cal. App. 668, 174 P. 404; *Smith v. Smith*, 91 Cal. App. 743, 267 P. 709). The effect of a supersedeas is not to undo what already has been done, but to hold matters in the same condition as they existed at the time the stay became effective. Furthermore, it appears from petitioner's allegations that plaintiff and cross-defendant have not continued in possession of the property, but have leased it. It is not shown that the lessee had notice, actual or constructive, of any circumstances rendering it inequitable for his lessor to have acquired possession at a time when application had been made to this court for a supersedeas.

[4, 5] Plaintiff did not violate this court's order of June 16, staying further proceedings upon the judgment, by exercising his rights of property, as by leasing the property, after he had lawfully acquired possession before the order of this court was made. A stay pending appeal stays further proceedings in the court below upon the judgment or order appealed from. It does not operate to restrain acts of the litigants involving no further judicial proceedings. Hence plaintiff and cross-defendant are not in contempt.

[6] Petitioner's contention that there was no valid execution because the writ of possession was not ordered issued by court order upon motion after judgment, and upon proof of demand for possession and refusal, cannot be upheld. Section 682, Code of Civil Procedure, authorizes the clerk to issue writs of execution upon judgments, and from subdivision 5 of said section it appears that this procedure is applicable to a writ issued upon a judgment decreeing that plaintiff is entitled to possession of real property. Upon such a judgment a plaintiff is entitled to possession as a matter of course.

[7] As to that portion of the decree awarding plaintiff a money judgment for \$1,140, a different situation exists. Said provision had not been executed at the time this court made its order staying further proceedings pending the decision upon the application for supersedeas, and the question is whether the court shall continue this stay until the determination of petitioner's appeal upon the filing of a bond in this court. Respondents do not controvert petitioner's allegations relating to the evidence offered before the commissioner as to the sufficiency of the sureties. They object only to this court granting relief as to that portion of the judgment directing delivery of possession of the real property to plaintiff, which has been executed.

In her application for a writ of supersedeas, petitioner alleges that the commissioner re-

jected the sureties upon her undertaking in the sum of \$7,000 although two qualified appraisers testified that the aggregate of the property of four of the five sureties, after deducting incumbrances, was of a value exceeding \$30,000, and that the two persons who appeared on behalf of plaintiff testified to no experience whatsoever as public appraisers. Petitioner further alleges that, but for the statement of the commissioner that he would accept the appraisal of one Herman F. Spitzel, one of the appraisers offered by petitioner, who, petitioner alleges, is generally recognized as the official appraiser of Los Angeles county, and but for the worry, harassment, and nerve exhaustion caused by the methods of cross-defendant Milne, she would have and could have secured other sureties within the time allowed. She claims that Milne and his wife went to her sureties to induce them to withdraw from the undertaking by threatening to purchase and foreclose mortgages upon their property.

Although petitioner alleges that the appraisers testified that the property of the sureties exceeded in value the sum of \$30,000, nowhere does she make allegation to the effect that the appraisals showed a compliance with section 1057, Code of Civil Procedure, as interpreted in *Mohn v. Superior Court*, 53 Cal. App. 425, 200 P. 360. In that case there were six sureties. The affidavits of five showed that they were severally worth amounts less than that specified in the undertaking and that the aggregate value of their property was less than the amount of the undertaking. Although the sixth surety owned property sufficient to make the total for which the sureties qualified equal to twice the amount of the undertaking, the court held that it was not the equivalent of two sufficient sureties as required by the section, each of whom qualified in the full amount of the undertaking.

We are disposed, however, in the exercise of discretion, to continue the stay of execution upon that portion of the judgment awarding plaintiff \$1,140, upon petitioner's filing with the clerk of this court, within twenty days, a good and sufficient undertaking in the sum of \$2,280, which shall have been first approved by the presiding judge of the superior court of Los Angeles county upon at least five days' notice to respondents, the stay now in effect to continue pending the expiration of said twenty-day period. The amount of said undertaking is twice the amount of the judgment, as is the requirement for appeal bonds filed on money judgment in the superior court. Section 942, Code Civ. Proc. Petitioner's motion for an order restoring her to the possession of the real property in suit and adjudging respondents to be in contempt of court is denied.

It is so ordered.

PEOPLE ex rel. STEVENOT, Director of Natural Resources, v. ASSOCIATED OIL CO. et al.

L. A. 12311.

Supreme Court of California.

Dec. 3, 1930.

Rehearing Denied Dec. 29, 1930.

1. Constitutional law ⇨55.

Legislature, although it may regulate appeal and restrict granting of stay of execution, may not deprive reviewing court of constitutional power to grant writ of superseas (Const. art. 6, § 4).

2. Constitutional law ⇨81.

State's police power authorizes measures promoting general welfare.

3. Eminent domain ⇨2(1).

Use of private property, like property itself, is entitled to protection, and undue restriction on use constitutes "taking of property" for constitutional purposes.

[Ed. Note.—For other definitions of "Taking (In Eminent Domain)," see Words and Phrases.]

4. Constitutional law ⇨48.

If it is fairly debatable whether unlawful taking of property, or valid exercise of police power, is involved, statute will be upheld.

5. Constitutional law ⇨48.

That strong and preponderant opinion favors particular measure as immediately necessary to public welfare is important factor in establishing limits of police power.

6. Mines and minerals ⇨48.

At common law, owner of land owns everything above and beneath surface, as regards right to oil and gas.

7. Mines and minerals ⇨48.

Surface right to prospect for and recover oil and gas, apart from land in which they lie, is subject of barter, lease, sale, and assessment.

8. Mines and minerals ⇨48.

Oil and gas partake of nature of common property, title to which becomes absolute only when reduced to possession.

9. Mines and minerals ⇨92.

Because of peculiar nature of oil and gas, and their character as natural resources, public has interest in their preservation from waste and destruction.

10. Mines and minerals ⚡92.

Statute to protect petroleum and gas, prohibiting unreasonable waste, *held* constitutional, being valid exercise of police power (St. 1915, p. 1404, as amended by St. 1929, p. 923).

Oil and Gas Conservation Act (St. 1915, p. 1404) § 21a, as added by St. 1917, p. 1598, § 18, declares that people have primary and supreme interest in deposits of oil and gas, and section 8b, as added by St. 1929, p. 927, § 9, prohibits unreasonable waste of natural gas from oil or gas lands. Section 14b, as added by St. 1929, p. 930, § 14, relates to method of enforcement.

11. Evidence ⚡5(1), 9, 20(1).

Courts may take judicial notice of condition and development of petroleum industry, and of matters of science and common knowledge.

12. Mines and minerals ⚡92.

"Unreasonable waste of natural gas" within Conservation Act *held* to result where gas is allowed to come to surface without utilizing its lifting power to produce greatest proportional quantity of oil (St. 1915, p. 1404, § 8d, as added by St. 1929, p. 928, § 11).

Oil and Gas Conservation Act (St. 1915, p. 1404) § 8d, as added by St. 1929, p. 928, § 11, states that production of gas in quantities exceeding reasonable proportion to amount of oil, and in excess of industrial needs, shall be deemed "unreasonable waste."

13. Statutes ⚡47.

Statute prohibiting "unreasonable waste" of natural gas *held* not objectionable as being too vague or uncertain in meaning (St. 1915, p. 1404, § 8b, as added by St. 1929, p. 927, § 9).

It appeared that, due to many varying conditions peculiar to each well, which would affect determination of reasonable proportion of gas to amount of oil produced, it would be impossible for Legislature to frame measure based on ratios or percentages which would operate without discrimination; and that, in each case, reasonable proportion of gas to oil produced could be ascertained to fair degree of certainty.

14. Constitutional law ⚡55.

State has power generally to prescribe admissible evidence and its effect, and may provide that proof of particular fact shall be prima facie evidence of another fact.

15. Constitutional law ⚡55.

Statute, making escape of natural gas prima facie evidence of unreasonable waste,

held not objectionable, although imposing burden of justifying waste on person responsible (St. 1915, p. 1404, § 8b, as added by St. 1929, p. 927, § 9).

16. Mines and minerals ⚡92.

Statute prohibiting unreasonable waste of natural gas *held* not objectionable as intended to curtail oil production and regulate price, notwithstanding possibility of such result (St. 1915, p. 1404, as amended by St. 1929, p. 923).

Statute involved recognized primary function of natural gas in production of oil, and attempted to safeguard complete utilization of gas, without unnecessary waste, whether in producing oil, or in providing light and heat for industrial and domestic use.

17. Mines and minerals ⚡92.

That statute prohibiting, under police power, unnecessary waste of natural gas, may curtail oil production, cannot alone invalidate act (St. 1915, p. 1404, as amended by St. 1929, p. 923).

18. Mines and minerals ⚡92.

Operation of oil well, causing unreasonable waste of gas, injurious to adjoining owners and public, *held* properly enjoined under statute, until improvement in efficiency (St. 1915, p. 1404, as amended by St. 1929, p. 923).

19. Mines and minerals ⚡92.

Under statute prohibiting unreasonable waste, injunction limiting gas production, allowing for unavoidable waste, and allotting proportional amounts based on estimated potential oil production, *held* proper (St. 1915, p. 1404, as amended by St. 1929, p. 923).

It appeared that there was no serious dispute on the facts; that experts, whose testimony was received by trial court, were not in accord as to proper methods of enforcing co-operation in limiting waste of gas; and that court reserved right to modify injunction as might be found necessary.

In Bank.

Action by the People, on the relation of Fred G. Stevenot, Director of Natural Resources, against the Associated Oil Company, the Twin Bell Oil Syndicate, the Second Twin Bell Syndicate, the Star Petroleum Company, and others. Pending an appeal from an order granting a preliminary injunction, defendants named, except defendant first named, petitioned for a writ of supersedeas to stay the effect of the injunction.

Writ denied.

Neil S. McCarthy, Earl L. Banta, Harmel L. Pratt, and Howard P. Hall, all of Los Angeles, for petitioners Twin Bell Oil Syndicate.

Call & Murphey, Robert B. Murphey, and Asa V. Call, all of Los Angeles (William L. Murphey, of Los Angeles, of counsel), amici curiæ for petitioners.

Charles A. Son, of Los Angeles, for petitioners Robert M. Pease and Roy P. Dolley.

James S. Bennett, of Los Angeles, and U. S. Webb, Atty. Gen., for respondents.

Roland Rich Woolley, of Los Angeles, amicus curiæ in re constitutionality of California Act relating to Conservation of Petroleum, etc.

Arthur R. Smiley, of Los Angeles, amicus curiæ for appellants.

Rush M. Blodgett and George W. Nilsson both of Los Angeles (Charles H. King, of Los Angeles, of counsel), amici curiæ in support of petitioners.

SHENK, J.

This is a petition for a writ of supersedeas to stay the effect of a preliminary injunction pending an appeal therefrom by the petitioners herein.

The action was commenced in the county of Los Angeles on September 11, 1929, and in the name of the people on the relation of Fred G. Stevenot, Director of Natural Resources of the State of California, against some forty-three defendants who are oil producers owning oil wells and leases in the Santa Fé oil field in said county. The purpose of the action is to restrain the alleged unreasonable waste of natural gas from the wells of the defendants. In response to the order to show cause the defendants appeared and after an extended hearing the superior court granted a temporary injunction, the terms of which were complied with except by the defendants Twin Bell Syndicate, Second Twin Bell Syndicate, and Star Petroleum Company, who have taken an appeal from the order granting the temporary injunction and who are the petitioners herein.

On the hearing it appeared from the allegations of the complaint and the affidavits and other evidence, both oral and documentary, in support thereof, that during the year 1928, 77,000,000,000 cubic feet of natural gas were wasted into the air from the subsurface oil and gas zones in the state of California through the operation of oil wells; that because of the increase in the production of oil since that time a proportional increase in the wastage of natural gas is taking place, and that in the Santa Fé Springs oil field alone there was at the time of the commencement of the action a wastage of natural gas to the extent of approximately 500,000,000 cubic feet of gas per day. This wast-

age was alleged to be unreasonable and unlawful under the terms of the so-called Oil and Gas Conservation Act (St. 1915, p. 1404, as amended by St. 1929, p. 923). In granting the preliminary injunction the court found that no sufficient cause had been shown why a preliminary injunction should not be issued as prayed for in the complaint; that the equities of all parties might be fairly conserved by a preliminary injunction which would limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for the beneficial use above ground; that the total gas escapeage from outlets for all uses, with a reasonable tolerance to take care of fluctuating demands and the necessary waste, would be fixed at 285,000,000 cubic feet of gas per day in said field, and the estimated potential production of oil taken at 237,576 barrels per day distributed among lessees and other operating property units as shown by a schedule set out in the order. It was then provided in the order that the defendants be enjoined until the further order of the court: "1. From blowing, releasing, or permitting any natural gas to escape into the air from any well or wells in the Santa Fé Springs oil field before the removal of the gasoline from such natural gas. 2. From operating any well producing natural gas in the Santa Fé Springs oil field except while exercising a high degree of care in the selection and adjustment of appliances and in the use thereof for the purpose of keeping each producing well in its 'optimum gas-oil ratio'—the term 'optimum gas-oil ratio' being defined as the smallest number of cubic feet of gas which can be produced with each barrel of oil from the same well at the same time. 3. From producing more net formation gas on the average day of each seven (7) day period from any lease or other property unit than is set forth in the 'Allowed Gas Production' column following." The name of each operator and of each well operated is then set out in detail and opposite thereto the estimated potential in barrels of oil per day and the allowed gas production in daily average as to each well is stated. The term "Gas-oil ratio," as used in the order, is declared to be "the proportion which the total number of cubic feet of formation gas bears to the total number of barrels of net oil produced from the same well at the same time, exclusive of the quantity of gas inserted in the well for the purpose of lifting the oil." The preliminary injunction contains other provisions not necessary to be noticed, except that the court retained jurisdiction to vacate or modify the same on five days' notice. The order was dated March 19, 1930, and to be effective two days later. On March 28, 1930, the court modified its order as to allowable gas production applicable to certain wells and certain defendants operating the same, includ-

ing the petitioners herein; and in such a way that instead of a gas allowance of 1,200 cubic feet to a potential barrel of oil established by the original order, the petitioners were allowed approximately 2,000 cubic feet of gas to a potential barrel of oil. The oil cut in the field was 50 per cent. of the potential, consequently the petitioners were allowed a potential ratio of 4,000 cubic feet of gas to a barrel of oil. From the order granting the temporary injunction the petitioners herein have taken an appeal.

The authority for the action in which the temporary injunction was issued is found in section 14b of the Oil and Gas Conservation Act (St. 1915, p. 1404, as amended, St. 1929, p. 923.) The purpose of the act is stated in its amended title, which recites in part: "An act to protect the natural resources of petroleum and gas from waste and destruction." Section 8b of the amended act reads: "The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste." Section 14b of the act provides in part: "Whenever it appears to the director of the department of natural resources that the owners, lessors, lessees or operators of any well or wells producing oil and gas or oil or gas are causing or permitting an unreasonable waste of gas, he may institute, or have proceedings instituted, in the name of the people of the State of California, to enjoin such unreasonable waste of gas. * * * Such proceedings shall be instituted in the superior court for the county in which the well or wells from which the unreasonable waste of gas is occurring or any thereof are situated. The owners, lessors, lessees or operators causing or permitting an unreasonable waste of gas in the same oil or gas field, although their properties and interests may be separately owned and their unreasonable waste separate and distinct, may be made parties to said action. In such suits no restraining order shall be issued ex parte, but otherwise the procedure shall be governed by the provisions of chapter three, title seven, part two of the Code of Civil Procedure of the State of California and no temporary or permanent injunction issued in such proceedings shall be refused or dissolved or stayed pending appeal upon the giving of any bond or undertaking, or otherwise."

[1] It is conceded that this court has the power, by virtue of section 4 of article 6 of the Constitution and in aid of its appellate jurisdiction, to stay pending appeal the oper-

ation of a prohibitory injunction, and it is not seriously contended that the provision at the end of said section 14b that "no temporary or permanent injunction issued in such proceedings shall be refused or dissolved or stayed pending appeal upon the giving of any bond or undertaking, or otherwise," would have the effect of limiting the discretion of this court in the exercise of its constitutional power. Although the Legislature may prescribe certain regulations in matters of appeal and restrict the granting of a stay of execution, it may not enact legislation which will deprive the reviewing court of its power under the Constitution to grant a writ of supersedeas in a proper case. *United States of America v. Berg*, 202 Cal. 10, 13, 258 P. 942; *Ohaver v. Fenech*, 206 Cal. 118, 273 P. 555. Whether the application herein presents a proper case for the issuance of the writ is one of the principal points to be considered.

Three main contentions are advanced for the issuance of the writ: First, that the Conservation Act is unconstitutional because the enforcement of its provisions amounts to a taking of property without due process of law and if the taking be for a public purpose, that such taking is the taking of private property without compensation; secondly, that the provision of the act declaring unlawful the "unreasonable waste" of natural gas is so vague, uncertain and indefinite as to be devoid of any guide or standard as to what shall constitute reasonable or unreasonable waste of natural gas; and, thirdly, that the order is arbitrary and violative of the due process and equal rights guaranties of the state and federal Constitutions and that the showing made on this application presents a proper case for the issuance of the writ in order to preserve the appellants' rights pending appeal.

[2-5] The foregoing contentions will be considered in the order stated. The first relates to the constitutionality of the act as an alleged police measure. This question is argued extensively by counsel for the parties and more at length by numerous amici curiae supporting the position of the petitioners, who contend that the pertinent portions of the act do not constitute a valid exercise of the police power of the state. It is argued that the state has no sufficient interest in oil and gas resources within its boundaries to justify its attempt to control what the owner of the land may do with his own beyond such regulations as will prevent injury or are necessary to protect the life, health and safety of its citizens. But there is no longer any doubt that this general rule has been extended so as to include measures which relate to the general welfare. In the case of *Chicago, B. & Q. Railway v. Illinois*, 200 U. S. 561, at page 592, 26 S. Ct. 341, 349, 50 L. Ed. 596, 4 Ann. Cas.

1175, the Supreme Court stated: "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." (Citing cases.) See, also, *Bacon v. Walker*, 204 U. S. 311, 27 S. Ct. 289, 51 L. Ed. 499; *Camfield v. U. S.*, 167 U. S. 519, 17 S. Ct. 864, 42 L. Ed. 260; *Noble State Bank v. Haskell*, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487; *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923; *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016; *Zahn v. Board of Public Works*, 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074; *Block v. Hirsh*, 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165. The same view has heretofore been expressed by this court in *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479. The difficulty usually arises in determining whether the particular right sought to be regulated or prohibited is subject to such regulation or prohibition and whether in the particular case the legislature has gone too far with the resultant unlawful taking. It may not be disputed that the use of private property is a right as much entitled to protection as the property itself, and an undue restriction on the use thereof is as much a taking "for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 43 S. Ct. 158, 160, 67 L. Ed. 322, 28 A. L. R. 1321; *Missouri Pac. Ry. v. Nebraska*, 164 U. S. 403, 17 S. Ct. 130, 41 L. Ed. 489; *Pumpelly v. Green Bay Canal Co.*, 13 Wall. (80 U. S.) 166, 20 L. Ed. 557. If the question between the taking of private property and a proper exercise of the police power is fairly debatable, the statute will be upheld. *Gorieb v. Fox*, 274 U. S. 603, 47 S. Ct. 675, 71 L. Ed. 1228, 53 A. L. R. 1210; *Zahn v. Board of Public Works*, supra; *Levy Leasing Co., Inc. v. Siegel*, 258 U. S. 242, 42 S. Ct. 289, 66 L. Ed. 595. Also where a strong and preponderant opinion prevails in the state that a particular measure is greatly and immediately necessary to the public welfare, that factor has an important influence in establishing the limitations of the police power in a particular case (*Muller v. Oregon*, 208 U. S. 412, 28 S. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; *Noble State Bank v. Haskell*, supra); although such a view is always subject to the qualification stated by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, supra: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

There are many cases and great uniformity of decision to the effect that the public has

a sufficient interest in the preservation of oil and gas to justify legislation to prevent waste thereof, among which are *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729; *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; *Hague v. Wheeler*, 157 Pa. 324, 27 A. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736; *Quinton Relief Oil & Gas Co. v. Corporation Commissioner*, 101 Okl. 164, 224 P. 156; *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627; *Commonwealth v. Trent*, 117 Ky. 34, 77 S. W. 390, 4 Ann. Cas. 209; *Louisiana Gas & Fuel Co. v. White Brothers*, 157 La. 728, 103 So. 23. See, also, note in 24 A. L. R., beginning at page 307.

[6-9] The argument is advanced by the petitioners and by their supporting amici curiae that the public interest cannot be invoked where the common law as to the nature of the property right in the oil and gas prevails. The rule at common law is that the owner of the land owns everything above and beneath the surface, and it is contended that oil and gas beneath the surface are recognized as part of the realty and belong to the owner of the land and are a part of it so long as they are on it or in it or subject to his control. In this they are supported by the case of *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 P. 993, 24 A. L. R. 294, where the same rule was applied to gas and oil beneath the surface as to minerals in place, such as coal and ore. But Montana appears to be the one state, among the many gas and oil producing states, which has established such a rule of property with reference to gas and oil. By uniformity of decision elsewhere the common-law rule has been modified in order to adapt it to the peculiar nature of gas and oil. The rule universally adopted, except in Montana, is expressed in *Brown v. Spilman*, 155 U. S. 665, 15 S. Ct. 245, 247, 39 L. Ed. 304, as follows: "Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are part of it, so long as they are on it or in it or subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land, and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property." (Citing cases.) In this state the character of oil beneath the surface, as distinguished from that of the precious metals, fixed in the veins which hold them, was well

described in *Acme Oil & Mining Co. v. Williams*, 140 Cal. 681, at page 684, 74 P. 296, 297, wherein it was said: "Oil, on the contrary, is of a fluctuating, uncertain, fugitive nature, lies at unknown depths, and the quantity, extent, and trend of its flow are uncertain. It requires but a small surface area, in what is known as an oil district, upon which to commence operations for its discovery. But when a well is developed the oil may be tributary to it for a long distance through the strata which holds it. This flow is not inexhaustible, no certain control over it can be exercised, and its actual possession can only be obtained, as against others in the same field, engaged in the same enterprise, by diligent and continuous pumping. It is anybody's property who can acquire the surface right to bore for it, and when the flow is penetrated, he who operates his well most diligently obtains the greatest benefit, and this advantage is increased in proportion as his neighbor similarly situated neglects his opportunity." The same rule would apply to natural gas. It is common knowledge that the surface right to prospect for and recover oil and gas, apart from the land in which they are situated, is the subject of barter, lease, or sale. When so acquired the right is subject to assessment apart from the land. *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211. The generally accepted view, therefore, is that the property right of the owner or lessee of land in and to the gas and oil beneath the surface is not an absolute one. Such substances, because of their peculiarity in the natural state, partake more of the nature of common property, title to which becomes absolute when they are captured and reduced to possession. Because of their peculiar nature the public has a definite interest in their preservation from waste and destruction. This is true because of their character as natural resources and also because the public interest has attached by virtue of positive statutory law or by court judgment independent of statute. In seven states of the Union legislation making unlawful the unreasonable waste of natural gas has been upheld: *Indiana: State v. Indiana v. Ohio Oil & Gas Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729. *Kentucky: Commonwealth v. Trent*, 117 Ky. 34, 77 S. W. 390, 4 Ann. Cas. 209. *Wyoming: Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276. *Oklahoma: Quinton Relief O. & G. Co. v. Corp. Comm.*, 101 Okl. 164, 224 P. 156. *Louisiana: State v. Carson Carbon Co.*, 162 La. 781, 111 So. 162. *Texas: Oxford Oil Co. v. Atlantic Oil P. Co.* (C. C. A.) 22 F.(2d) 597, certiorari denied United States Supreme Court, 277 U. S. 585, 48 S. Ct. 433, 72 L. Ed. 1000; *Railroad Commission of Texas v.*

Bass (Tex. Civ. App.) 10 S.W.(2d) 586; *Magnolia Petroleum Co. v. Stroud* (Tex. Civ. App.) 3 S.W.(2d) 462. *Kansas: State v. Lebow*, 128 Kan. 715, 280 P. 773, 775; *Marrs v. City of Oxford* (C. C. A.) 32 F.(2d) 134, 67 A. L. R. 1336, rehearing denied, Circuit Court of Appeals, May 17, 1929, certiorari denied, United States Supreme Court, October 21, 1929, 280 U. S. 573, 50 S. Ct. 29, 74 L. Ed. 625. Independently of statute the waste of gas resulting merely in a depletion of the supply in a common reservoir has been enjoined. *Manufacturers Gas & Oil Co. v. Ind. Natural Gas Co.*, 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768, and *Id.*, 156 Ind. 679, 59 N. E. 169, 60 N. E. 1080; *Louisville Gas Co. v. Ky. Heating Co.*, 117 Ky. 71, 77 S. W. 368, 70 L. R. A. 558, 111 Am. St. Rep. 225, 4 Ann. Cas. 355; and *Id.*, 132 Ky. 435, 111 S. W. 374; *Louisiana Gas & Fuel Co. v. White Brothers*, 157 La. 728, 103 So. 23. The leading case on the power of the state to prevent the waste of natural gas is *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729. There a statute of Indiana was sustained which made it unlawful to permit the escape of natural gas from any well for more than two days after oil or gas had been struck, without storing the same. There is considerable discussion in that case concerning the protection necessary to be accorded the correlative rights of adjoining landowners in the same field, and the petitioners herein seek to confine the holding of the Supreme Court in that case to the protection, under the exercise of the police power, of those correlative rights. But the holding in that case cannot be so limited. The decision in that case defines the so-called correlative right not necessarily as a right to a fixed distributive or proportional share of the oil and gas underlying the surface, which no other owner of soil overlying the same reservoir may take and use beneficially, but as a coequal right to take whatever of the oil and gas can be captured, so long as waste, as defined by the statute, is not committed.

In the *Ohio Oil Company Case* the Supreme Court, at page 204 of 177 U. S., 20 S. Ct. 576, 582, quoted with approval from *Hague v. Wheeler*, 157 Pa. 324, 27 A. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736, as follows: "Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells. * * * In the disposition he may make of it (private property) he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive pro-

vision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public, as consumers, restrict and regulate it by statute." Again the Supreme Court, in the same case, at page 207 of 177 U. S., 20 S. Ct. 576, 583, referring to *Townsend v. State*, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477, said: "In a full opinion reviewing the nature of the ownership in oil and natural gas, the power of the state to regulate and control their use and waste in the interest of all those within the gas field and of the public at large was elaborately considered. Reviewing its own previous adjudications, which we have cited, and those of the supreme court of the state of Pennsylvania, to which we have also referred, it was decided that the owners of the surface of the land within the gas field, whilst they had the exclusive right on their land to sink wells for the purpose of extracting the oil and gas, had no right of property therein until by the actual drawing of the oil and gas to the surface of the earth they had reduced these substances to physical possession. It was further held that in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all and of the public at large, the state could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein the gas and oil were deposited, as well as the public, had an interest, because in the preservation of these substances the well-being and prosperity of the entire community was largely involved. And it was upon the opinion announced in that case that the court rested its decree in the case now under review."

Section 21a of our statute provides, among other things, for the levy of charges necessary to supervise and protect deposits of oil and gas within the state, "in which deposits the people of the State of California are hereby declared to have a primary and supreme interest." St. 1917, p. 1598. This declaration is in accord with the prevailing opinion, both legislative and judicial, in the many jurisdictions where the exploitation and waste of such natural resources as gas and oil have attracted and received intelligent public consideration.

[10] Whatever refinements may be suggested as to the definition of the nature of the property right in gas and oil beneath the surface and uncaptured, we are entirely satisfied that the waste of these natural re-

sources may be regulated and the unreasonable waste thereof may be prohibited in the exercise of the police power of the state, and that the statute in question is not subject to the objections first advanced by the petitioners.

It is next contended that the term "unreasonable waste" has not been defined by the statute; that it is so uncertain in its meaning and so devoid of a rule or standard of conduct that an ordinary person cannot determine in advance what he may and may not do; and that it is therefore void within the doctrine of such cases as *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *Connally v. General Construction Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 47 S. Ct. 681, 71 L. Ed. 1146; *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315.

[11] Courts are entitled to take judicial notice of the condition and development of the petroleum industry. *Gilbreath v. States Oil Corp. (C. C. A.)* 4 F.(2d) 232. The present status of the importance of petroleum and gas in industry is stated in the recent case of *Boone v. Kingsbury*, 206 Cal. 148, 181, 273 P. 797. Courts may also take judicial notice of all matters of science and common knowledge. *Reynolds v. McMan Oil & Gas Co. (Tex. Com. App.)* 11 S.W.(2d) 778, 784. Facts relating to the general nature of so-called oil "sands" which also contain natural gas, such as are found in this state, and the physical and economic laws governing oil and gas production, the present general economic status and the necessity and pressing demand for conservation to prevent waste in the gas and oil producing industry, may be found in the following scientific reports referred to by counsel, viz.: Report 111 of the Federal Oil Conservation Board to the President of the United States, February 25, 1929; Bulletin 194, Department of the Interior, Petroleum Technology 61, published as a report of the Bureau of Mines in 1921 by Carl H. Beal and J. O. Lewis; Bulletin 232, Department of the Interior, Manual for Oil and Gas Operations, prepared by T. E. Swigart and C. E. Beecher, 1923; Technical Paper 322, Department of the Interior, Experiments in the Use of Back Pressures on Oil Wells, T. E. Swigart and C. R. Bopp, 1924; Department of Commerce, Mineral Resources of the United States, 1927, Part II, pages 129-137, Natural Gas, by G. R. Hopkins and H. Backus; Department of Commerce, United States Bureau of Mines, 1929, H. C. Miller, Function of Natural Gas in the Production of Oil; Reports of American Bar Association, 1927, vol. 52, page 577 et seq.

[12] For present purposes it need only be noted that oil in this state is found under layers of rock in a sand or sandstone formation termed a lentille or "lentic," under pressure caused by the presence of natural gas within the formation. The layers of rock thus form a gas-tight dome or cover for the oil reserve. The oil adheres in the interstices between the sand particles. The natural gas may be in a free state at the top of the dome, but is also in solution with the oil, thus increasing the fluidity of the oil and the ease with which the oil is lifted with the gas in solution when the pressure on the gas is released by drilling into the oil "sand." It is estimated that only from 10 to 25 per cent. of the total amount of oil deposited in a reservoir is ultimately recovered, depending on the natural characteristics of the reservoir and the methods employed in utilizing the lifting power of the gas. The importance of gas in the oil-producing industry has, therefore, become a question of great concern to the industry itself and to government, to the end that its function may be fully utilized without waste. It fairly appears on this application that, depending on its location in the oil reservoir, the extent of the oil "sand," the degree of pressure within the formation, the amount of oil in the "sand," the amount of gas in solution with the oil, the porosity of the "sand," and other considerations, each oil and gas well has a best mean gas and oil ratio in the utilization of the lifting power of the gas and the production of the greatest quantity of oil in proportion to the amount of gas so utilized, and which may be computed as to each individual well to a reasonable degree of certainty and be regulated accordingly. Gas, therefore, which has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion, may be said to amount to an unreasonable waste of natural gas.

That the Legislature intended to prohibit such a waste of natural gas, and so defined the term "unreasonable waste," is quite apparent from a consideration of the provisions of a portion of section 8d of the act. Section 8d relates to the procedure upon complaint of undue waste filed with the director of natural resources, and the portion thereof immediately quoted is offered to us by petitioners as the only statement in the act of any standard of "unreasonable waste," viz.: "If it shall appear that gas is being produced from any oil well or wells in quantities exceeding a reasonable proportion to the amount of oil produced from the same well or wells, even though it is shown that such excess gas is being used in the generation of light, heat, power or other industrial purpose and that there is sufficient other gas available for such uses from other wells in the same or other fields

in which the gas produced is not in excess of the amount which bears a reasonable proportion to the amount of oil produced from such other wells and that there are adequate gas-pipe-line connections between such other wells and the place of utilization of such gas the state oil and gas supervisor shall hold that such excess production of gas is unreasonable waste thereof if such holding will not cause an unreasonable waste of gas in any other field." It would seem, therefore, that the Legislature has plainly adopted the standard so expressed, viz.: that gas may not be produced, under existing conditions where the production thereof so greatly exceeds the market demand therefor, in quantities exceeding a reasonable proportion to the amount of oil produced, as the standard to be applied and beyond which the production is prohibited as being an unreasonable waste of natural gas.

[13] The standard so adopted by the Legislature is, we think, not objectionable as being too vague or uncertain of application. The best mean ratio, or the amount of gas which bears a reasonable proportion to the amount of oil produced, may vary for each reservoir or deposit of oil, depending on the natural characteristics above mentioned, and may, and probably does, vary for each well drilled into the same reservoir, depending on the location of the well and other factors. Therefore, because of the many and varying conditions peculiar to each reservoir and to each well, which will bear upon a determination of what is a reasonable proportion of gas to the amount of oil produced, it may be said that it would be impossible for the Legislature to frame a measure based on ratios or percentages or definite proportions which would operate without discrimination, and that what is a reasonable proportion of gas to the amount of oil produced from each well or reservoir is a matter which may be ascertained to a fair degree of certainty in each individual case. The adoption, therefore, of such a measure seems to us to be within the scope of cases upholding other legislative enactments which have employed the so-called "rule of reason." Citation of authority is not necessary to support the statement that the standard of reason has been applied in many cases where certainty is less capable of measurement than in the present case, for instance, in statutes prohibiting unreasonable restraints of trade, the common-law rule of a reasonable use of water by riparian owners, the rule of law regulating the duty of care, etc. Instances "where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree," are common. See *Nash v. United States*, 229 U. S. 373, 377, 33 S. Ct. 780, 57 L. Ed. 1232.

The so-called "price" and similar cases relied upon by the petitioners as establishing

the contrary doctrine, and above cited, involve the uncertainty of man's judgment as to what is an unjust, or unreasonable price, or a current rate, or fair market value, in fluctuating or uncertain markets, so as to make the risk of conduct so great as to be without the pale of certainty required for the terms of a statute. The case of *Hewitt v. State Board of Medical Examiners*, *supra*, is also clearly distinguishable, in that the prohibition against gross and improbable statements in medical advertising involved therein does not define any measure upon which two persons may agree within any degree of certainty. The argument is made that the same conclusion must be reached in respect to the standard of reasonableness required by the present statute, for the reason that the standards applying the "rule of reason" in cases said to be analogous have been gleaned from or formulated by previous legislation or by many prior decisions or are within the common experience of mankind. But this argument is not persuasive when it may be said that scientific knowledge and oil and gas operating experience have achieved a similar degree of certainty in the field in which the present standard will apply. Whether the evidence sustains the ratio applied by the court in this case under such standard is a question on the merits of the appeal and is not pertinent to a determination of the merits of this application.

[14,15] Objection is made to the provision of section 8b of the act that "the blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste," as inconsistent with other provisions of the act which it is claimed authorize some waste of gas in the production of oil. The state has the power generally "to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be prima facie evidence of another fact." *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 342, 55 L. Ed. 369, Ann. Cas. 1912C, 160. In prescribing that any waste shall be prima facie evidence of unreasonable waste, the state has cast upon the party found to be wasting gas the burden of justifying the same. A statute which casts the burden of proof upon the defendant in a criminal action upon the proof of certain facts for whose existence he is responsible has been upheld. *People v. Osaki* (Cal. Sup.) 286 P. 1025. As applied to a civil action, a statute imposing the burden of proof is freed from the objections incident to the rules inherent in a criminal prosecution and cannot be avoided for any reason suggested by the petitioner or otherwise apparent.

[16,17] It is contended that the real purpose of the statute is to curtail the production of oil so as to regulate and stabilize the market

price thereof. We cannot agree with this contention. Obviously the enactment is an effort on the part of the Legislature to conserve for present and future needs great natural resources in which the people of the state are interested. It may be that the enforcement of the statute throughout the gas and oil producing sections of the state may have an effect upon the market price of oil. For this reason the subject-matter of the act is a delicate one for legislative treatment and judicial cognizance. But the fact that the field of economic law to some extent may thus be invaded may not justify the avoidance of the statute. As we view the terms of the act, the primary function of gas in the production of oil is recognized, and its complete utilization in that respect, without unnecessary waste, is attempted to be safeguarded. The additional function of the gas in providing light and heat for manufacturing and domestic purposes is also recognized, and the effort is made to compel the fullest utilization as to both functions. The act, without doubt, was a response to a growing recognition that the continuing and increasing waste of the propulsive energy of gas underground and of its full energy above ground was unreasonable and should be inquired into and regulated, to the end that the public convenience and general prosperity of the commonwealth be promoted. Such legislation should not be stricken down because there may be an incidental and unavoidable interference in the economic field. The result complained of—the lessening of the daily production of oil—if it follow from the operation of the statute, is a matter of concern for the Legislature and cannot of itself make void a police measure which is otherwise a constitutional exercise of the legislative power. "At least," as was stated in *Noble State Bank v. Haskell*, 219 U. S. at page 111, 31 S. Ct. 186, 188, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, "if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

Some argument also is advanced that the statute is unconstitutional because it embraces more than one subject and that the title does not express the subjects embraced in the act; that the statute impairs the obligations of contracts; and that it deprives petitioners of the equal protection of the laws and grants special privileges and immunities. We have considered these arguments and, except such as are related to the matters herein elsewhere discussed, we deem it unnecessary to give them any further notice.

[18] The final question to be considered is whether the particular preliminary injunction ordered by the trial court violates any constitutional guaranties. The terms of the order in establishing the gas-oil ratio have been hereinbefore specifically noted. It is

contended that the enforcement of the terms of the order will require the shutting down of well No. 4 of the petitioner, Star Petroleum Company. Conceding this to be so, it is the contention of the respondents that the operator is in no position equitably to insist that that well, which, is called a "waster," may operate to the manifest detriment of the other operators in the field and to the public in general. There are twelve oil and gas zones in the Santa Fé Springs oil field, varying in depth from 3,450 feet to 8,000 feet. The area of land within the oil field is divided into not less than 1,145 parcels at the surface. These parcels are owned of record by more than 110 individuals and corporations. Many of the parcels are rectangles less than 75 feet by 100 feet. The Star Well No. 4 is on one of the smaller parcels, being located within a radius of 137 feet from the exterior boundaries of the parcel on which it is located. This well has withdrawn the equivalent of all the recoverable oil within said exterior boundaries and has withdrawn gas and large quantities of oil from the lands of its neighbors. Under the rule in this state such withdrawal is recognized as lawful and without trespass. Without more, however, the foregoing facts with reference to this well may be said to be insufficient upon which to base an injunctive order. But when it further appears that in the operation of this well the natural gas-oil ratio is injurious to the rights of all of the adjoining landowners and to the public in general by reason of the unreasonable waste of gas in the operation thereof, we have no hesitancy in saying that it should be shut down until more efficient methods are employed to conserve the wasted product. The statute held valid in the case of *Ohio Oil Co. v. Indiana*, supra, permitted no waste of gas whatsoever for a longer period than two days after gas or oil had been struck. The margin between no waste at all and a reasonable waste in recognition of the propulsive function of the gas is largely one of fact. In the ascertainment of the fact the Legislature has vested in the superior court full power and duty in the premises. It is contended by the petitioner that the statute, as applied by the court, has made it practically impossible to profitably extract the oil. This same contention was advanced with seemingly more justification, but was rejected, in the case of *Ohio Oil Co. v. Indiana*, supra.

[19] As we understand the order, the natural gas outlets in the entire field were taken as 285,000,000 cubic feet of gas per day, determined by the beneficial uses to which such gas could be put, and which contained a certain tolerance for necessary and unavoidable waste and the fluctuations in the demands for the same. The court then, for safety, increased the amount by some 10,-

000,000 cubic feet and fixed the daily "Allowed Gas Production" for the entire field at such increased amount. It then prorated this "Allowed Gas Production" among the separate operating properties of the defendants and in connection therewith estimated the "Potential Oil Production" of the field at 237,576 barrels of oil per day. In other words, the court limited the total quantity of gas which might be produced from the field and allotted proportional amounts thereof to the separate parcels of land of the defendants based on the estimated potential oil production of each parcel. As to the facts, there is no serious dispute. The experts whose testimony was received by the trial court were not in accord as to the proper methods to apply in enforcing cooperation in response to the statute. Reading the act as a whole, it cannot be said that the method of its enforcement adopted by the court was unlawful or improper. We find no reason at this time to interfere with the action taken. The court reserved to itself the right to modify the preliminary injunction as occasion may require, and this, we assume, the court will do if and when, by test and experience, other proper methods may be discovered and applied to the correction of the evil of unreasonable waste of this natural resource. Other points need not be discussed.

The writ of supersedeas is denied, and the order to show cause is discharged.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

110 Cal. App. 578

WILSON v. DROEGE.

Civ. 194.

District Court of Appeal, Fourth District,
California.

Dec. 20, 1930.

1. Master and servant ⇨301(1), 302(1).

Respondent superior doctrine obtains only if relation of master and servant existed and servant acted within general scope of employment.

2. Automobiles ⇨242(6).

Plaintiff has burden of proving that truck which caused injuries was being operated by defendant's employee.

3. Evidence ⇨597.

Evidence must be substantial to support finding.

4. Automobiles ⇨244(26).

Evidence that driver of truck which struck plaintiff wore sun glasses, and that one of defendant's truck drivers occasionally wore such glasses, *held* insufficient to support finding that truck was being driven by defendant's employee.

5. Automobiles ⇨244(26).

Evidence that truck was owned by defendant and being operated on highway did not warrant inference that it was being operated by defendant's agent.

6. Automobiles ⇨211.

Automobilist, driving partially off highway where it was impossible to get farther off, was bound to proceed to place where she could drive entirely off highway, if car's condition permitted (St. 1923, p. 561, § 136).

California Vehicle Act (St. 1923, p. 561) § 136, provides that no person shall leave vehicle standing on main traveled portion of highway, when practicable to leave it standing off such portion, but that such section shall not apply to driver of vehicle so disabled that it is impossible to avoid stopping and temporarily leaving it in such position.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Marion Wilson against E. Droegé. Judgement for plaintiff, and defendant appeals.

Reversed.

Swing & Wilson, of San Bernardino, for appellant.

Chas. Bagge, of San Bernardino, for respondent.

WARMER, Justice pro tem.

This case was tried without a jury. The court made its findings and entered a judgment for plaintiff, and defendant appeals from the judgment so entered. The plaintiff charges negligence of an employee or agent of the defendant in the operation of a motor truck. The answer denies the allegations of the complaint and sets up contributory negligence as a defense. The court finds as follows: "That, heretofore and within a period of one year next before the filing of the complaint in this action, to-wit: On or about the 23rd day of January, A. D. 1929, the plaintiff herein was, in the county of San Bernardino, state of California, run into and struck by an automobile truck belonging to the defendant, E. Droegé, then and there in charge of and being driven and operated by one of defendant's employees, agents or servants in and about defendant's business and in the regular

course of the employment of said employee, agent or servant of the said defendant, and with the knowledge and consent of the said defendant and under his direction; that, at the time the plaintiff was so run into and struck by said automobile truck of the defendant, as aforesaid, the said employee, agent or servant of the said defendant was guilty of negligence in the driving and operation of said automobile truck and, but for which said negligence, said plaintiff would not have been so run into and struck by said automobile truck of the defendant; that, as a direct and proximate result of the negligence and carelessness on the part of the said employee, agent or servant of the said defendant, and the running into and striking of the plaintiff, the plaintiff was knocked down and against and across the bumper of her automobile and to the pavement and, by reason thereof, plaintiff was bruised and injured in and about her abdomen, her leg broken at the knee, her spine and back wrenched, and her vertebra dislocated; that, by reason thereof, plaintiff was greatly and permanently injured; and suffered great physical and mental pain and anguish."

The facts out of which the cause of action arose, briefly stated, are as follows: On January 23, 1929, plaintiff was driving from the city of Riverside to her home on South Cedar avenue, town of Bloomington, and as she proceeded along said avenue in a northerly direction she discovered that something was wrong with her automobile so that it became more difficult to control or steer. As she passed the intersection of said Cedar avenue and Santa Ana street she drove her car off the paved portion of the highway to a position where the two right wheels of her automobile were about one foot and a half off the pavement, got out of the said car, went around in front thereof and stooped down and found that a piece of wire was lodged between the brake lining and the brake drum on the left front wheel. The wheels of said automobile were what is known as disk wheels and she removed the wire so lodged as aforesaid by pulling the same back and forth. Just as she released it and while she was standing on the paved portion of the highway and immediately in front of her automobile and slightly farther out on the paved portion of the highway than her machine she heard the blast of a horn and raised up and just as she was getting up a truck struck her on the shoulder, causing her to spin around and throwing her against the bumper on the front of her automobile, thence on her knees to the ground. She observed that the driver of the truck wore sun glasses, that the cab of the truck was painted red and the tank on the truck was painted a turquoise blue, that there was the name "Marine" on the rear end of tank on the truck, and that said tank was

oval in shape. She observed the state license plate number under the rear parking light on said truck, that the number was either 239922 or 239920, that she was certain of each of the numbers on the license plate excepting the last one and she was not certain whether said number was "0" or "2," but was certain that it was either "0" or "2," that the registration records show that the defendant was the owner of three trucks, two of them being similar in type, one bearing the state license No. 239920 and the other 239922 and the third of a somewhat different and lighter type bearing the license number 239921. The truck did not stop at the time plaintiff was struck, and there is nothing in the evidence to show that the driver of said truck knew of any collision. The truck was equipped with a shelf along the side of the tank. On said shelf there was either one or two cans. Another witness testified that a short distance from the place where he saw the automobile of plaintiff standing partially off the pavement, near the intersection of Cedar avenue and Santa Ana street, he had observed a truck painted similarly to the one described by the plaintiff, proceeding in a northerly direction on said Cedar avenue. The defendant had a loading depot at West Riverside and distributed oil products in and around Bloomington, Colton, and San Bernardino. Said trucks were brought to San Bernardino for storage each night. The defendant herein knew nothing concerning the claim of plaintiffs until several months after said January 23d. The defendant, in the course of his business, kept a daily report of his trucks, and said reports show that the drivers of said trucks had no business of defendant in or about the vicinity of Bloomington or on Cedar avenue on said 23d day of January, or within two days thereof.

[1, 2] Appellant urges that there is no evidence to sustain the findings that said truck was being operated at the time of the collision by an employee of the defendant, or, in other words, that the doctrine of respondeat superior does not here obtain. Before such doctrine obtains two facts are necessary of proof, first, the existence of the relationship of master and servant, and, second, that the servant was acting within the general scope of his employment. *Kish v. California State Automobile Association*, 190 Cal. 246, 212 P. 27. When the pleadings put in issue the fact as to whether or not the truck was being operated by an employee, the burden of proof is on the plaintiff to establish such fact at the time of the alleged negligence. *King v. Emerson* (Cal. App.) 288 P. 1099.

[3, 4] Assuming that one of the trucks belonging to the appellant was the truck involved in the accident, which one of the two trucks, the one bearing license number 239922 or 239920, cannot be determined unless the fact that the person who was driving the

truck at the time of the accident wore sun glasses, coupled with the fact that occasionally the driver of truck bearing state license number 239922 wore sun glasses, can be said to determine that fact, or, in other words, constitute substantial evidence to support the finding. The wearing of sun glasses by one driving a truck is very common. In fact sun glasses are occasionally worn by almost every one who has occasion to be riding in or operating an automobile. If, instead of sun glasses, the evidence had been that the driver wore a white shirt or khaki breeches or a cap or brown shoes or puttees and that the defendant, appellant, had a driver who occasionally wore a white shirt or khaki trousers or brown shoes or a cap or puttees, can it be said that there is anything about the above facts so distinctive or unusual as to support the conclusion that because the driver was dressed in such a manner one could reasonably say that the driver who occasionally so dressed was the driver of the truck involved in the accident? We think not. Such a conclusion would be a conjecture and would not meet the requirement that evidence must be substantial to support a finding, nor can the mere fact that the driver of a truck which is involved in an accident wore sun glasses so mark him that it can be said that such fact, coupled with the fact that the driver of truck number 239922 occasionally wore sun glasses, would constitute sufficient or substantial evidence to support the finding that such driver was the employee of the owner of the truck. It merely points the way to the possibility that such a fact might be true. Without such a fact established, the evidence is insufficient to support the finding that the truck was being driven at the time of the accident by an employee of the defendant. Without sufficient proof of the fact that the driver of the truck was an employee of the defendant, no inference can arise that the truck was being operated in the business of the defendant. The evidence being insufficient to support the finding that the truck that was involved in the accident was being driven by an employee of the defendant, it is insufficient to support the finding that the truck was being operated by an employee of the defendant in and about the defendant's business in the regular course of his employment.

[5] Appellant further urges that the evidence is insufficient to sustain the finding that the truck was being operated by an agent of the defendant within the scope of his authority. This contention must be sustained unless the fact that the truck was owned by the defendant and was being operated upon a public highway raises an inference that the operator so operating the truck is an agent of the owner and acting within the scope of his authority. *Cal. Jur. Permanent Supp.* 1928, p. 284. In other words, they contend, the ownership

of the truck being proved and its operation upon a public highway appearing, such facts raise first an inference of agency, and, second, an inference that said agent was acting within the scope of his authority. The evidence shows that the truck involved in the accident was a truck owned by the defendant and was being operated by some one, which gives rise to an inference that the owner permitted the operator to use said motor vehicle. To hold otherwise would be to presume that it was reasonably likely that the driver was then and there guilty of criminal conduct or to infer that the operator was actually engaged in the commission of a crime. Therefore under such circumstances the law creates an inference that the owner permitted the driver to use said motor vehicle. Such being true, does the inference that the owner permitted the driver to use said motor vehicle, thus drawn, also give rise to an inference that the operator was an agent of the owner? It seems to us that to hold that an inference of agency thus arises by implication of law would be to give rise to a broader inference than is created to sustain a finding under the doctrine of respondeat superior, and we perceive of no reason either in law or logic so to do. Further that such an inference would be useless and of no avail to the plaintiff unless such inference under such circumstances gave rise to another and independent inference that the agent was acting within the scope of his authority. To so hold would permit of an inference founded upon another inference or deduction instead of upon proven facts. To do so would be merely conjecture or speculation. Hence the inference that arises from the ownership of a motor vehicle and its operation upon a public highway is one of permissive use rather than one looking to agency, and, in the absence of other proof that the person operating said motor vehicle was an agent of the owner, it would not support a finding to that effect. To hold otherwise would be to say to the plaintiff "prove an act of negligence and the ownership of a machine and its operation upon a public highway and you have established a prima facie case," which would in effect be the creating of an inference by deduction from an inference. Therefore we are of the opinion that no inference arises from the proof or admission of the ownership of the vehicle alone and its operation upon a public highway, that the machine was being operated by an agent of the owner within the scope of his authority. The evidence is therefore insufficient to support the finding that the truck was being operated by an agent of the defendant and in the defendant's business.

Nothing herein expressed is in conflict with the line of cases as *McWhirter v. Fuller*, 35 Cal. App. 288, 170 P. 417, holding that, where a wife is driving a car owned by her husband

with the express knowledge and consent of the husband, an inference arises that she was using the car as the agent of the husband, or that line of cases holding that, when the ownership of the motor vehicle is admitted or proved, and it is admitted or proved that the operator thereof was an agent or servant of the owner, the inference arises that said agent or servant was operating said motor vehicle within the scope of his authority. *King v. Emerson*, supra. In each and all of said cases the identity of the operator of the automobile was established to sustain the finding that the operator was the agent or servant of the owner, while in the instant case the identity of the driver of the truck at the time of the accident is undisclosed. No inference of agency is created by the facts that the defendant owned the offending vehicle, and that he permitted the driver to use it. *Aubel v. Sosso*, 72 Cal. App. 57, 62, 236 P. 319. Where, however, it is admitted or established that the vehicle which collided with the plaintiff was owned by the defendant and that the driver was his employee, an inference arises that the driver was acting within the scope of his authority or employment. *Wagnitz v. Scharetz*, 89 Cal. App. 511, 265 P. 318; *Cal. Jur. Permanent Supp. 1928, p. 284 supra*, and cases there cited.

[6] It is next urged that the plaintiff was guilty of contributory negligence as a matter of law because she parked her machine partially on the highway in contravention of statute. Inasmuch as this cause, from what we have heretofore said, must be reversed, we deem it sufficient to say that the statute prescribes where a person shall stop his machine and when it is permissible to stop the same upon the highway. The evidence is not very clear as to what the condition of the shoulder along the highway was at the date of the accident. It does appear that at the place where the plaintiff actually stopped her machine she could not have driven the same completely off of the highway but it does not appear that it was impossible for her to have proceeded in safety a little farther to a place where it might have been possible for her to have driven her machine entirely off of the highway. Neither does it appear that it would have been impossible for her to have driven her machine completely off of the highway had she proceeded farther.

The California Vehicle Act § 136 (St. 1923, p. 561), provides in part as follows:

"No person shall park or leave standing any vehicle whether attended or unattended upon the paved or improved or main traveled portion of any public highway, outside of a business or residence district when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no

event shall any person park or leave standing any vehicle whether attended or unattended upon any public highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for the free passage of other vehicles thereon. * * *

"The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a public highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

It appears from the quoted portions of said act that no person shall leave any vehicle standing on a public highway, unless there is a clearance of 15 feet on said public highway, unless the condition of the machine is such as to make it impossible to proceed. It appears from the evidence that at the place where the plaintiff drove partially off of the highway it was impossible for her to get farther off of the highway, but it may have been that, in the condition in which her machine then was, it would have been possible for her to proceed in safety a short distance and come to a place where she could have driven her machine entirely off of the highway. If such was the case, the statute imposed upon her the duty of so doing unless the condition of her machine was such as to make it imperative for her to stop at the narrow place in the road. It will be observed that the cause of action herein arose prior to the adoption of section 1714 $\frac{1}{4}$, Civil Code.

For the foregoing reasons the judgment is reversed.

We concur: CARY, P. J.; MARKS, J.

110 Cal. App. 659

MOORE v. GIFFEN et al.
Civ. 7714.

District Court of Appeal, First District,
Division 2, California.
Dec. 26, 1930.

1. Sales $\S$ 52(7).

In action for rescission of contract to purchase gasoline station business, evidence did not support finding seller's representation of net profit for certain month was false.

2. Sales $\S$ 52(1).

In action for rescission of contract to purchase business, buyer had burden of prov-

ing falsity of representations regarding daily sales.

3. Evidence $\S$ 75.

Failure by buyer of business having burden of proving false representations regarding daily sales to produce evidence given his counsel by seller must be taken against him (Code Civ. Proc. $\S$ 1963, subd. 5).

4. Fraud $\S$ 50, 58(1).

Fraud cannot be presumed, but must be proved by competent evidence.

5. Sales $\S$ 52(7).

In action to rescind contract for purchase of business, finding of seller's misrepresentations regarding daily sales held not supported by evidence.

6. Sales $\S$ 127.

Notice of rescission of contract for purchase of gasoline business, automobile tires, and other goods held defective, where not offering to restore consideration.

The contract was to purchase a sublease on an oil and gasoline service station together with all equipment and stock in trade, and included in the sale were automobile tires, casings, tubes, and other accessories of an approximate value of \$1,100 and gasoline and oils. Buyer sold these goods while in possession and retained the proceeds, but made no offer to make restoration.

7. Sales $\S$ 52(7).

Finding that buyer of gasoline service station business did not discover falsity of representations until June, 1925, held not supported by evidence.

8. Sales $\S$ 126(1).

Buyer of business must make election to rescind contract for false representations when he has knowledge of facts.

9. Sales $\S$ 126(1).

One knowing facts reasonably putting him on inquiry leading to discovery of fraud will be charged with having discovered it as of time he should have discovered it.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by J. C. P. Moore against C. Thomas Giffen and others. From a judgment for plaintiff, defendants appeal.

Reversed.

Meserve & Meserve and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued for the rescission of a contract to purchase a sublease on an oil and gasoline service station together with all equipment and stock in trade. The cause was tried without a jury, and the court gave judgment for plaintiff, from which the defendants appeal on a bill of exceptions.

The defendants had been operating the station under lease and during the year 1924 had averaged a sale of 1242 gallons of gasoline a day. The Sierra Refining Company was the lessee of the real property and held a contract with defendants for the sale to them at wholesale of all the gasoline dispensed upon the premises. Under the agreement with the refining company the defendants were obligated to pay a monthly rental of \$150 plus one cent a gallon per month for each gallon of gasoline sold on the premises.

In the latter part of January, 1925, negotiations were had between plaintiff and defendants for the sale of the station and plaintiff insisted that this lease be changed to a flat rental. Thereupon a new lease was executed by the refining company to the defendants for an extended period at a monthly rental of \$400, all of which was done with the written consent and agreement of plaintiff. On February 2, 1925, plaintiff and defendants executed a written contract for the sale of the sublease and all the equipment and accessories and the plaintiff soon thereafter entered into possession and continued to operate the station until July 8, 1925.

On the 4th of June, 1925, plaintiff gave written notice of his election to rescind this contract, giving as his sole ground the falsity of defendants' representations that the station had enjoyed an average sale of over one thousand gallons of gas per day. When confronted with proof that the average daily sales for the entire year preceding the transfer had been 1242 gallons, plaintiff, on June 29, 1925, gave a new notice of rescission, specifying as his ground that the representations as to daily sales went to the month of January, 1925, alone, and that the "net profit" for that month had been \$690.

The appellants have assigned numerous errors, but as we are satisfied that the judgment must be reversed, we deem it necessary to consider but three of the grounds assigned.

[1-3] 1. The failure of proof of the falsity of the representations relied on: On the matter of the net profit for the month of January no evidence at all was received, and hence the finding that this representation was false was not supported by the evidence. On the matter of the daily sales, the only competent

evidence covered the period from January 1st to the 9th and the period from the 21st to the 28th inclusive. There was no competent evidence covering the remaining days of the month—the guess of the employee who was working part time being nothing more than a conjecture. Respondent testified that early in February one of the appellants had given respondent's counsel sales slips containing the complete data of daily sales and also the record of sales by the wholesaler, that these had been handed to him by his counsel, but he had failed to examine them and had lost them. Inasmuch as the burden of proof was on respondent to prove the falsity of the representations, his failure to produce this evidence must be taken against him under the presumption found in section 1963, subdivision 5, Code of Civil Procedure.

[4, 5] On this point the case is a simple one. The respondent first based his claim of fraud on a general representation as to daily sales. When convinced that the proof of these sales for the entire previous year showed they were far greater than represented, he changed his charge to the period of January, 1925. The utter improbability of a purchaser of a going business limiting his investigations to the sales of one month out of the twelve when the information covering the entire previous year was available from the records and when he knew that the information as to the January sales was incomplete merely emphasizes the necessity of satisfactory proof of the charges relied on. These representations were claimed to have been made before the end of January when complete records of sales for that month were not at hand and when it was impossible to correctly state the net profits for the month. It has frequently been said that fraud is not to be presumed, and, when fraud is the basis of the action, it must be proved by competent evidence. Here the finding as to the average daily sales for the month of January is based upon conjectures and not upon evidence. This is patent when we take into consideration that the business of a gasoline service station in the month of January is largely dependent upon weather conditions, so much so that sales for the month cannot be fairly averaged on the basis of actual sales during a portion of the month without taking the weather conditions into account.

[6] 2. The notice of rescission was defective because the respondent did not offer to restore the consideration he had received. Included in the sale were automobile tires, casings, tubes, and other accessories of an approximate value of \$1,100. These respondent sold while in possession. He retained the proceeds, but made no offer to restore to appellants. There was also included in the sale 1,100 gallons of gasoline and a large quantity of oils. Sales of these materials were also

made, but respondent did not offer to make restoration.

[7-9] 3. The importance of this item is emphasized by the third point to be considered, which is the undisputed laches of the respondent. Though the trial court found that respondent did not discover the falsity of the representations until June, 1925, all the evidence is directly to the contrary. Bearing in mind that these representations were not what daily sales might be anticipated, but what sales were actually made in January, 1925, we turn to the evidence and find that in February of that year respondent was informed by one of the appellants' employees that the January sales did not exceed seven hundred gallons daily and that respondent admitted while on the stand that he learned in February that the January sales had been misrepresented and that this "put me on inquiry." He further testified that he knew he could obtain the data of January sales from the wholesaler, that records showing these sales had been in his possession and in the hands of his counsel in February, but that he had not examined them. The undisputed evidence is that in February, 1925, respondent knew that the January sales had been exceptionally low, that the business did not pick up in February as he had expected, but that he continued in the possession of the premises in the hope that with the end of the "gasoline war" and with better weather conditions the business would improve. This is, therefore, a typical case of a purchaser who, knowing the facts which would entitle him to rescind, elects to stand upon the contract for the purpose of seeking profit to himself, and then, failing to gain profit, changes his mind and seeks to avoid the contract. The cases are uniform that the purchaser must make his election when he has knowledge of the facts involved and that he cannot gamble with his contract. *Ferguson v. Edgar*, 178 Cal. 17, 19, 171 P. 1061; *Bancroft v. Woodward*, 183 Cal. 99, 111, 190 P. 445; *Greene v. Locke-Paddon Co.*, 36 Cal. App. 372, 374, 172 P. 168; *Schneider v. Henley*, 61 Cal. App. 758, 763, 215 P. 1036; *Garstang v. Skinner*, 165 Cal. 723, 730, 134 P. 329; *Shiverick v. Bonsall*, 185 App. Div. 338, 173 N. Y. S. 90, 94. It is equally well settled that where a party has knowledge of facts which would reasonably put him on inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud, he will be charged with having discovered it as of the time he should have discovered it. *Lady Washington C. Co. v. Wood*, 113 Cal. 482, 488, 489, 45 P. 809; *Bancroft v. Woodward*, 183 Cal. 99, 108, 190 P. 445.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

110 Cal. App. 750

RICKER v. FAY SECURITIES CO.

Civ. 6115.

District Court of Appeal, Second District,
Division 2, California.

Jan. 2, 1931.

1. Evidence ⇐429.

Where vital issue required decision on true nature of contract, all evidence pertinent thereto was admissible.

2. Usury ⇐115.

Agreement legal on its face is open to evidence dehors written contract to show it was in fact usurious.

3. Usury ⇐117.

Evidence held not to warrant implied finding that difference between cash sales price for automobile and time sales price was interest and did not authorize recovery of triple interest for usury.

Automobile was sold under conditional sales contract providing for payments in installments, deferred payments to bear interest from maturity at highest legal rate. Buyer alleged total of cash payment and installments exceeded agreed purchase price of car, and that such excess was interest exceeding legal rate of interest allowed, and was usurious. Seller claimed that amount added to purchase price was mark-up or added charge for expenses and risk incident to financing as time sales price.

4. Usury ⇐32.

Where time price exceeds cash price, and difference is more than legal rate of interest, transaction is not thereby usurious.

Appeal from Superior Court, Santa Barbara County; E. J. Marks, Judge.

Action by Leslie Ricker against the Fay Securities Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Wheeler & Wackerbarth, Henry O. Wackerbarth, Henry E. Carter, Joseph A. Adair, and Harold S. Morrison, all of Los Angeles, for appellant.

W. P. Butcher, of Santa Barbara, for respondent.

CRAIG, J.

A judgment having been rendered in favor of the plaintiff and against the purchaser of a conditional-sale contract for triple the amount of alleged interest on deferred payments, the latter appealed therefrom.

The respondent entered into a contract in writing for the purchase of an automobile from a dealer who subsequently sold said contract to the appellant herein for an amount equal to the retail price of the car, if sold for cash. By the terms of their agreement the original parties recited payment upon its execution of a specified sum, and divided the remainder into eighteen equal installments which they agreed respondent should pay each consecutive month thereafter, "all deferred payments to bear interest from date of maturity at the highest legal rate, but not exceeding 12 per cent per annum." The plaintiff alleged that the total of the cash payment and installments exceeded the agreed purchase price of the car, that such excess was interest thereon, and that it amounted to more than the legal rate allowed for "the loan or forbearance of money, goods or things in action," and was usurious. It is conceded that the amount in controversy was added to the unpaid balance of the purchase price after deduction of the cash payment, but with the knowledge and consent of the purchaser, prior to the execution of the contract. It is contended by appellant that it consisted of a "mark-up," or added charge for expenses and risk incident to financing the contract and extending the time for payment of the balance of the purchase price. It was testified on behalf of the vendor: "There was a cash sales price and a time sales price. Ten months' time would be one price; sixteen months another, eighteen months another, twelve months another. * * * It would be the price we would have to charge in order to have the Fay Securities Company take the contract on a time sales price." The plaintiff testified: "I asked him what mark-up meant, and he said that covered interest and handling charges. * * * I asked him what the interest ran, and he said it ran 10 per cent. and he figured it up for me." The trial court found that the increase so added exceeded the legal rate of interest, and that appellant "took and received money in a greater sum for the forbearance of money, goods or things in action than the rate of twelve dollars upon each one hundred dollars for one year and that said contract was so written and worded with the intent to evade the usury law of the state of California."

[1, 2] Since the vital issue before the trial court required a decision as to the true nature of the contract, all evidence pertinent thereto was material and clearly admissible. In such a case the agreement of the parties is open to evidence dehors the written contract to show that, although legal on its face, it was in fact an illegal agreement. *France v. Munro*, 138 Iowa, 1, 115 N. W. 577, 19 L. R. A. (N. S.) 391; *Brown v. Johnson*, 43 Utah, 1, 134 P. 590, 46 L. R. A. (N. S.) 1157, Ann. Cas. 1916C, 321; *Cissna L. Co. v. Gawley*, 87 Wash. 438,

151 P. 792, L. R. A. 1916B, 807, Ann. Cas. 1917D, 722.

[3, 4] We think the evidence did not warrant the implied finding that the difference between the cash sales price and the time sales price was stipulated to be interest. There was no evidence to indicate what portion of this sum was interest except the statement of the plaintiff that the vendor had said it would run 10 per cent. It has repeatedly been held that, where the time sales price exceeds the cash sales price and the difference amounts to more than the legal rate of interest it does not follow that the transaction is usurious, but that other considerations than interest are properly involved, such as the risk incident to financing the contract, expenses connected therewith, etc. 27 R. C. L., pp. 213, 215, § 14, 15; *Verbeck v. Clymer*, 202 Cal. 557, 261 P. 1017; *Berger v. Lodge*, 90 Cal. App. 19, 265 P. 515; *Murphy v. Agen*, 92 Cal. App. 468, 268 P. 480; *Pac. Fin. Corp. v. Lauman*, 95 Cal. App. 541, 273 P. 48.

The judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

110 Cal. App. 726

PANN v. FAY FRUIT CO.

Civ. 6369.

District Court of Appeal, Second District,
Division 2, California.

Dec. 30, 1930.

1. Sales ⇨391(8), 441(2).

Evidence held to support findings that seller warranted oranges, which were unmerchantable, justifying buyer in recovering price.

Court found that seller knew oranges in question were bought for specific purpose of resale in eastern markets; that buyer relied on warranties that oranges were of good color and merchantable; that oranges were not of good color, and were worthless to buyer; and that buyer, on discovering falsity of warranties, immediately tendered oranges to seller, who refused to accept them.

2. Sales ⇨418(3).

Where seller of unmerchantable oranges knew that buyer contemplated resale in eastern market, their value in such market, rather than value in place of original sale, held controlling factor in damages.

It appeared that seller knew buyer was relying on representations regarding color and quality of oranges in question, and that buyer would probably make no inspection at place of shipment.

3. Evidence ⇨325.

In buyer's action to recover price of green and unmarketable oranges, color chart, not aiding in determining marketability, held properly excluded.

It appeared that chart in question was prepared by bureau of standardization of state department of agriculture, rather than by witness, who was deputy county horticultural commissioner. Purpose of chart was said to be to illustrate color scheme, showing oranges 25 per cent. colored, and oranges 70 per cent. colored, but it did not appear how chart would have assisted court in determining whether oranges were of good color when shipped, or whether they were marketable and merchantable.

4. Sales ⇨398.

In allowing buyer to recover price of unmarketable oranges, court should have deducted amount which buyer recouped on resale.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by William F. Pann, transacting business under the fictitious name of the Angeles Brokerage Company, against the Fay Fruit Company. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

Henry O. Wackerbarth, Henry E. Carter, and Joseph A. Adair, all of Los Angeles, for appellant.

Frank G. Falloon, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This is an appeal from a judgment in favor of the plaintiff in the sum of \$1,562.30, and representing the full purchase price of a carload of oranges purchased of defendant at Santa Ana, Cal. The material facts are as follows: On December 4, 1922, a representative of appellant called respondent on the telephone and asked him if he had any orders; quoted respondent two cars of navels, one for shipment that day and one on the following day. Respondent inquired concerning the quality and particularly concerning the color. The fruit was represented to be of "good color and good full pack." Respondent replied that he would wire the car out and confirm the following day, which he did, receiving in return bill of lading and manifest. Re-

spondent also informed appellant's representative that he was relying upon his representations entirely as to the quality. Respondent paid appellant the sum of \$1,562.30 for the oranges. On the arrival of the car at Youngstown, Ohio, it was found, according to the testimony of at least one witness, that the "color was dead green and couldn't even be identified as oranges"; that "they were worthless," although there was a "good market" and "heavy demand" for California oranges. According to the chief food inspector of Youngstown he found the "shipment of oranges to be too green to be marketable" and estimated their condition as follows: "yellow—8%; 10–25% green—30%; light green 27%; $\frac{1}{4}$ to $\frac{1}{2}$ green 20%; more than $\frac{1}{2}$ green 15%." When this condition of the fruit was reported to respondent he advised appellant and demanded that it receive the oranges back, which demand it refused, whereupon, he diverted the car to New York and sold these oranges, which had been robbed of sufficient California sunshine, at public auction, realizing therefrom the sum of \$41.80 in excess of the freight, or a total of \$752.40. It was alleged in the complaint and not denied that respondent was engaged in the business of buying fruit in California and shipping it to purchasers in the east, all of which was known to appellant. Further, the respondent testified that "very likely" he told appellant's representative where the car was going and the latter testified that he thought respondent told him "he was purchasing for an eastern purchaser." It should be observed, of course, that we have recited the testimony supporting the respondent's cause of action and not the testimony adduced by appellant in conflict therewith.

[1] It is now insisted by appellant that certain portions of the findings of the court are unsupported by the testimony. It is obvious from our review that the following contested portions thereof do find sufficient support:

(a) "That plaintiff purchased said fruit for the purpose of selling same in the eastern holiday markets, and defendant at the time it sold same to plaintiff knew that plaintiff was purchasing said fruit for that specific purpose."

(b) "That plaintiff purchased said fruit from defendant upon the statements, representations, assurances and warranties of defendant that said oranges and all thereof were of good color, marketable, sound and merchantable."

(c) "That said oranges were not of good color but were too green to be merchantable or marketable and were so green as to be worthless to plaintiff; that defendant made said representations for the purpose of deceiving plaintiff and inducing plaintiff to purchase said oranges well knowing that said oranges were not marketable and were not merchantable."

(d) "That when plaintiff learned of the falsity of said statements, representations, assurances and warranties, he immediately tendered the whole of said car to defendant and notified defendant that he would not accept same; that defendant refused to accept such tender and refused to have anything more to do with said carload of oranges."

[2] There is another part of a finding which is attacked, to wit: "That said oranges * * * were of no value whatsoever at Santa Ana, California, or Los Angeles, California, or at any eastern market by reason of the fact that said oranges were not of good color and were not as represented by defendant." There was no testimony that the oranges were not of any value at Santa Ana, or Los Angeles, and it is to be observed that the court simply declared that they were of no value, deducing his conclusion from their condition, which was described by witnesses, the effect of which testimony we have already set down. Aside from this fact, however, arises the question of whether their value here or their value in the eastern market is the governing factor. The appellant contends that the value at Santa Ana must be considered as determining the situation, but in this we do not agree. In the recent case of *Brandenstein v. Jackling*, 99 Cal. App. 438, 278 P. 880, 885, it is said: "Moreover, it was proper to measure the damages as of the time and place of arrival of the rice at Cuba under the authority of *W. R. Grace & Co. v. Levy*, 30 Cal. App. 231, 156 P. 626. Appellants knew the rice was to be shipped to Cuba by the terms of the contract and the contract likewise apprised them that no inspection as to quality No. 1 would be made by respondents at point of shipment. See, also, 22 Cal. Jur. 1022, and cases cited, and *Porter v. Gestri*, 77 Cal. App. 578, 247 P. 247." The authorities cited in the quoted matter fully support the rule and effectually dispose of appellant's argument.

Two other excerpts from the findings to which objection is made relate solely to the question of demand and damages. Further comment is unnecessary.

[3] While it is said that a finding responsive to an affirmative defense upon which issue no testimony was presented is not supported by the evidence, the point actually presented is that the court committed error in refusing appellant's offer of a chart (apparently colored) prepared by the bureau of standardization of the state department of agriculture, and not by the witness, who was a deputy horticultural commissioner of the county of Los Angeles. The purpose of the offer in the words of counsel was "as showing the color scheme, or document as prepared by this department showing oranges which are approximately 25% colored and oranges approx-

imately 70% colored, said chart being made under the provisions of the Standardization Act of 1921." We are unable to conceive how the chart would have assisted the court in arriving at the conclusion that the oranges were 70 per cent. colored at the time of the packing or that they were marketable and merchantable. There was no error in its rejection.

[4] The court did commit one error. It failed to deduct from the purchase price the sum of \$41.80 recouped by respondent. That sum should be deducted from the amount of the judgment.

The judgment is modified by reducing it to the sum of \$1,520.50, and, as so modified, it is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

110 Cal. App. 633

Ex parte DANIELS.

Cr. No. 1143.

District Court of Appeal, Third District,
California.

Dec. 24, 1930.

1. Criminal law ⇨1216(6).

When parole has been revoked and time credits canceled, term served in county jail for misdemeanor committed during parole may not be credited on pending state prison commitment.

Prisoner was sentenced for felony to serve in state prison, and, before expiration of term, was released on parole. During parole, prisoner was convicted of misdemeanor and sentenced to six months' imprisonment in county jail, whereupon prison board revoked parole and credits earned.

2. Criminal law ⇨1216(6).

Prisoner remaining without walls after parole is revoked is, in effect, escaped prisoner or fugitive and may not, during such period, claim benefit of running of sentence.

3. Pardon ⇨10.

When parole is suspended or revoked, prisoner must forthwith surrender to warden for completion of sentence.

4. Courts ⇨477.

Ordinarily, another court may not pronounce judgment of commitment interfering with execution of previous judgment of imprisonment.

5. Criminal law ⇨1216(2).

Statute authorizing concurrent sentence held inapplicable to conviction by justice for misdemeanor committed during parole period, case not being "exceptional case" (Pen. Code, § 669).

Pen. Code, § 669, provides that imprisonment upon second or subsequent conviction must commence at termination of preceding term; provided that in "exceptional cases" court, in its discretion, may direct sentences to run concurrently.

[Ed. Note.—For other definitions of "Exceptional Case," see Words and Phrases.]

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Application by F. V. Daniels for writ of habeas corpus. From an order granting the writ, the People appeal.

Reversed and petitioner remanded to custody of warden of state prison at Folsom for completion of term of imprisonment.

See, also, 288 P. 1109.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

Lawrence J. Skirving, of Sacramento, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order granting a writ of habeas corpus. The petitioner was released on bond pending the appeal.

The petitioner was convicted of a felony and sentenced to imprisonment in the state prison at San Quentin. He was received at that prison June 27, 1925. The prison board subsequently fixed his term of imprisonment at five years. He was released on parole. October 23, 1928, during his parole, he was convicted of a misdemeanor and sentenced to imprisonment in the county jail at Los Angeles for the term of six months. He served his term in the county jail, which sentence terminated May 13, 1929. The petitioner was thereupon returned to the state prison at Folsom to complete his sentence upon the charge of the felony. May 18, 1929, the prison board found him guilty of a violation of his parole. Pursuant to section 1588 of the Penal Code, as it then existed, the prison board revoked all of the petitioner's past and future time credits. Without the benefit of time credits the petitioner's term of imprisonment in the state prison expired June 28, 1930, provided the intervening period of six months during which he was imprisoned in the Los Angeles county jail is credited upon his state prison term. Upon a petition for a writ of habeas corpus, which

was presented to the superior court of Sacramento county on September 13, 1930, the writ was granted and the warden of Folsom state prison was directed to discharge the prisoner. From this order the people of the state of California appealed. The petitioner was admitted to bail pending the appeal.

It is contended by the petitioner that his term of imprisonment in the county jail at Los Angeles, under the provisions of section 669 of the Penal Code, ran concurrently with his state prison term, and that he was entitled to credit on the last-mentioned term for the intervening time which he served in the county jail.

[1] This precise question has been determined adversely to the petitioner. In re Forbes (Cal. App.) 292 P. 142. A writ of habeas corpus in behalf of Forbes, based upon the same grounds presented in the case last cited, was denied by the Supreme Court October 23, 1930. Upon that authority it follows that when a parole has been revoked and time credits have been canceled, the term of imprisonment served by a prisoner in a county jail as punishment for a misdemeanor committed during the period of parole may not be credited on a pending state prison commitment.

[2-5] In the present case the petitioner served six months' time in the county jail as punishment for a misdemeanor which was committed during his parole. This offense constituted a violation of the parole which was therefore revoked November 17, 1928. While a prisoner remains without the prison walls after his parole has been revoked, in effect, he may be deemed to be an escaped prisoner or a fugitive from justice, during which period he may not claim the benefit of the running of his sentence. When a parole is suspended or revoked, it is the duty of a prisoner to forthwith present himself to the warden of the state prison for the completion of his sentence. The fact that he has incurred another penalty for a subsequent offense may not inure to his benefit so as to shorten his term of imprisonment for the former felony. Ordinarily another court may not legally pronounce a judgment of commitment so as to interfere with the due execution of a previous judgment of imprisonment. Section 669 of the Penal Code, upon which the petitioner in this case relies, is not applicable. Under the provisions of that statute, if it has any application at all to a misdemeanor case, it was the duty of the justice of the peace who pronounced judgment in the misdemeanor case to have sentenced the petitioner so that his imprisonment would commence "at the termination of the first term of imprisonment" for the felony charge. If the justice was not aware of the fact that the prisoner was then subject to a judgment of commitment in the

state prison, it would be the duty of the petitioner to inform the court of that fact. The accused may not remain silent at the time of his second sentence respecting his status as a prisoner and then claim the benefit of his own secrecy. Under the last-mentioned section of the Code, it is only "in exceptional cases" that a court has the discretion of administering the penalty of imprisonment for a second "crime" so as to permit it to run concurrently with the commitment for the former felony. This offense does not appear to have been such "an exceptional case" as to warrant the exercise of discretion in pronouncing judgment. No order was made that it should run concurrently with the former judgment of commitment.

The petitioner is therefore not entitled to credit, as a part of his commitment in the state prison, the six-month term during which he wrongfully remained away from that institution after his parole was revoked.

The order granting the writ of habeas corpus is therefore reversed. The petitioner is remanded to the custody of the warden of the state prison at Folsom for the completion of his term of imprisonment.

110 Cal. App. 685

O'DONNELL v. EXCELSIOR AMUSEMENT CO. et al.*
Civ. 7408.

District Court of Appeal, First District,
Division 1, California.

Dec. 29, 1930.

Rehearing Denied Jan. 28, 1931. Hearing Denied by Supreme Court Feb. 19, 1931.

1. Master and servant ☞331.

In action against master alone for assault committed by servant, compensatory damages only were recoverable.

2. Assault and battery ☞38.

One suing master for servant's assault could recover for pecuniary loss, physical injuries, pain and suffering, medical and like expenses, and damages for wounded feelings, indignity, and humiliation.

3. Assault and battery ☞40.

\$7,500 compensatory damages for assault held excessive.

The injuries to plaintiff, who was 42 years old, consisted chiefly of contusions about the face, several loosened teeth, two of which were extracted, and a compound fracture of jaw. An abscess also developed under covering of jawbone which required two operations, but plaintiff re-

ceived free medical, surgical, and hospitalization treatment at his employer's hospital, so that his pecuniary loss was confined to loss of wages, amounting to \$336.96.

4. Appeal and error ☞1004(1).

Reviewing courts will not interfere, unless verdict is obviously so disproportionate to injuries as justifies belief it was not result of dispassionate discretion of jury.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Thomas M. O'Donnell against the Excelsior Amusement Company and others. From a judgment for plaintiff, defendants appeal.

Reversed and remanded.

L. S. Hamm, J. G. Moser, and B. E. Kragen, all of San Francisco, for appellants.

Ford & Johnson, of San Francisco, for respondent.

PER CURIAM.

The respondent, Thomas M. O'Donnell, entered a moving picture theater on Mission street, near Ocean avenue, in San Francisco, without purchasing a ticket, and as a result of the altercation which followed was severely injured by the special police officer of the theater, named Murphy. On account of the injuries respondent brought this action for damages against Murphy's employer, the appellant corporation, and upon trial before a jury was awarded a verdict of \$7,500. Judgment was entered accordingly, and, following the denial of a motion for a new trial, this appeal was taken. The sole ground urged for reversal is that the amount of the verdict is grossly excessive; it being contended that the cause should be remanded for a new trial upon the single issue of damages. *Morris v. Standard Oil Co.*, 188 Cal. 468, 205 P. 1073.

The injuries respondent received consisted chiefly of contusions about the face, several loosened teeth, two of which were afterwards extracted, and a compound fracture of the jaw. About two weeks after the injuries were inflicted an abscess developed under the covering of the jawbone, causing much pain and necessitating an operation; and about three weeks later a second and similar operation was performed. The injuries required respondent to remain in the hospital for a period of 42 days and kept him from work 52 days. Aside from the loss of the teeth, a slight impairment of the use of the jaws, and a small scar on the side of the face where the abscess was lanced, no permanent injuries were shown. Respondent stated also that his eyesight and hearing had not been as good since he was injured, but there was no medi-

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

cal testimony produced to prove that either has resulted from these injuries, and in this connection it was shown that he was 42 years old at the time this trouble happened, and that continuously for fifteen years prior thereto he had been employed as a boilermaker in the shops of the Southern Pacific Company, in the southern part of the city; and with reference to his defective hearing he frankly admitted that all of the men engaged in that kind of work sooner or later are affected that way, and that "it had been coming on him" for four or five years. On account of his employment with the railroad company he was put to no expense whatever for the medical, surgical, and hospitalization treatment he received at the hospital. Consequently the pecuniary damage he sustained was confined to the loss of wages, amounting to \$336.96, leaving an award of approximately \$7,100 as damages for the other elements recoverable in this particular kind of a case.

[1, 2] As indicated, Murphy was not made a party to the action, his employer alone being sued; therefore compensatory damages only, to the exclusion of exemplary damages, were recoverable; and the jury was so instructed. The measure of compensatory damages in an action against the master for an assault committed by the servant is much the same as in other actions for tortious injuries to the person, including, among other elements, recovery for the pecuniary loss, the physical injuries and the consequent pain and suffering, and medical and like expenses; and, in addition thereto, recovery may be had for wounded feelings, indignity, and humiliation. 5 Corpus Juris p. 702; 2 Ruling Case Law, p. 580. In view of this latter element, it becomes necessary to inquire to some extent at least into the circumstances leading up to the alleged assault. In this regard the evidence shows that on the evening in question respondent's daughter, aged 14 years, was attending the theater as a spectator; and, when respondent returned home from his work, he went to the theater for the purpose, so he claims, of accompanying her home. The theater has two front entrance doors, and a doorman was stationed at one of them. Without purchasing a ticket, respondent entered the other door, and the doorman, named Geister, followed him in, and told him that he would have to buy a ticket or leave. Respondent testified that prior to the evening in question he had been given permission by the manager, named Moore, to enter the theater for the purpose of bringing his daughter home, and that he tried to explain the matter to Geister, and asked to see Moore, but that Geister refused to listen, and sent for Murphy; that when Murphy arrived, he, too, refused to listen to any explanation or to call Moore, and taking hold of him told him he "was going out"; that he brushed Murphy's hand aside,

and told him to keep his hands off; that thereupon Murphy took hold of him again and shoved him forward toward a room in the front of the theater, and, while holding him with one hand, gave the keys to an attendant with instructions to open the door. Respondent's testimony, in the foregoing respects, was substantially corroborated by another witness, who stated that on the way to the room Murphy struck respondent three times on the chin. Continuing, respondent testified that as soon as the door of the room was opened Murphy shoved him inside and immediately started to beat him about the face with some blunt instrument, inflicting the injuries above described, and knocking him to the floor in a dazed condition; that Moore then appeared and prevented further punishment; that soon afterwards his daughter was allowed to come into the room and took him away; and later he went to the Southern Pacific Hospital for treatment.

Geister testified that as respondent entered the theater he asked him for his ticket and was told "to go to hell"; that, when he followed respondent down the aisle and told him he must either purchase a ticket or leave, respondent again told him "to go to hell"; that thereupon he called Murphy; and that respondent continued to scuffle until put into the room. Briefly stated, Murphy's testimony was that, when respondent refused to buy a ticket or leave, he started to eject him, but that respondent commenced to fight; that he then concluded that respondent should be sent to jail, and accordingly took him to the room to await the arrival of the police patrol wagon; that on the way to the room respondent was fighting "furiously," and that consequently he "gave him a punch"; that when they entered the room respondent continued to fight, and that he "gave him a punch and pushed him around a bit and he fell over, and there was a chair there and desk, and he fell over it," and thereupon he (Murphy) shut the door. Murphy denied striking respondent with any instrument, and Moore, Geister, and Murphy all testified that respondent was under the influence of liquor, but this was denied by respondent.

[3, 4] If the action were brought against Murphy, the one by whom the injuries were inflicted, and the jury were asked to add exemplary damages as a punishment for the assault, the evidence above set forth would be legally sufficient, beyond doubt, to sustain the amount of the award; but, as pointed out, respondent has not chosen to sue the person who made the attack, but has sought to hold his employer responsible therefor, against whom exemplary damages are neither claimed nor recoverable. That being so, we are unable to escape the conclusion that the amount of the verdict is excessive beyond all reasonable limit, it being manifest, we think, that,

after making all reasonable allowance for the legitimate elements of damage, the jury lost sight of the fact that the person inflicting the injuries was not being sued, and, despite the instructions of the court to the contrary, awarded damages by way of punishment against his employer. In so holding we are not unmindful of the rule that the matter of excessive damages is one which must be left almost entirely to the determination of the trial court, and that reviewing courts will not interfere, unless the verdict is obviously so disproportionate to the injuries received as to justify the belief that it is not the result of cool and dispassionate discretion of the jury (*Szasz v. Joyland Co.*, 84 Cal. App. 259, 257 P. 871), and to suggest, at first blush, passion and prejudice or corruption on the part of the jury (*Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100; *Morris v. Standard Oil Co.*, 188 Cal. 468, 205 P. 1073). But, being convinced that in fixing the amount of damages in the present case the jury ignored certain well-defined legal rights to which appellant, as an employer, was clearly entitled, and that the excessive amount it allowed was the product of passion and prejudice, arising from the belief on the part of the jury that the chastisement administered to respondent was unnecessary and wanton, a plain case is presented, we think, where the exercise of the power reserved in the reviewing court is demanded.

The judgment is therefore reversed and the cause remanded for a new trial upon the single issue of damages.

110 Cal. App. 654

HERRICKS v. F. HENNESSEY CO. et al.

Civ. 7367.

District Court of Appeal, First District,
Division 1, California.

Dec. 26, 1930.

1. Trial ☞339(2).

Where verdict is defective in form, court must call jury's attention thereto and advise them wherein verdict should be corrected (Code Civ. Proc. § 619).

2. Trial ☞339(3).

Where jury returned verdict finding negligence of both parties, court's statement that verdict should be for defendant *held* not erroneous instruction on negligence (Code Civ. Proc. § 619).

The remarks of the court were not objectionable on the ground that they amounted to instruction on law of negli-

gence and were erroneous in omitting element of proximate cause, since jury had been fully instructed upon the element of proximate cause in connection with the alleged contributory negligence of plaintiff, and it could therefore be assumed that when jury returned their verdict it meant the character of negligence about which they had been instructed; that is, negligence contributing proximately to cause the accident.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Howard F. Herricks against the F. Hennessey Company and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Spencer G. Prime and C. K. Bonestell, both of San Francisco, for appellant.

J. E. McCurdy, of San Mateo, for respondents.

KNIGHT, J.

This is an action for damages on account of personal injuries plaintiff claimed to have sustained as a result of a collision between an automobile driven by him and a truck belonging to the defendant corporation and operated by the defendant Costigan. Upon trial before a jury, a verdict was rendered in favor of the defendants, and plaintiff appeals from the judgment entered thereon. The single question involved relates to certain proceedings had after the cause had been submitted to the jury, and just prior to the rendition of its verdict.

Plaintiff's cause of action was based upon the alleged negligence of the driver of the truck; and one of the defenses urged was that plaintiff was guilty of contributory negligence. The court fully, fairly, and correctly instructed the jury upon the law relating to those issues, and several times throughout its charge informed the jury in substance that contributory negligence, to bar a recovery, must proximately contribute to the happening of the accident. After the jury had deliberated for some time, it returned into court, and upon inquiry by the court the foreman announced that the jury had agreed upon a verdict. Thereupon the following proceedings took place:

"The Court: Read your verdict, Mr. Foreman.

"The Foreman: 'We the jury in the above entitled cause find negligence on the part of both parties by a vote of nine to three.'

"The Court: Read that again.

"The Foreman: 'We the jury in the above entitled cause find negligence on the part of both parties by a vote of nine to three.'

"The Court: Yes, that is proper but I might add to that that finding negligence of both parties, under the instructions of the court, your verdict should have been for the defendant.

"The Foreman: There was little doubt on that point.

"The Court: If you find any negligence on the part of the plaintiff then the plaintiff will not recover."

The court then requested the jury to retire and correct the verdict "in that way," adding; "that is, if you agree to it." Whereupon the jury again retired and subsequently returned a verdict in due form, finding for the defendants.

[1] The contention plaintiff makes is that the remarks of the court amounted to an instruction upon the law of negligence, and that since the element of proximate cause was omitted therefrom the instruction was erroneous. In our opinion there is no merit in the contention. Section 619 of the Code of Civil Procedure reads as follows: "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." And in construing said section it has been held that while a trial court may not interfere with or control the jury in passing upon the evidence, it may nevertheless exercise a salutary supervisory power over their verdict (*People v. Knutte*, 111 Cal. 453, 44 P. 166; *Redo y Cia v. First National Bank*, 200 Cal. 161, 252 P. 587); that where the verdict is defective in form it becomes the court's duty to call the attention of the jury to such fact and to advise them wherein it should be corrected; and that the correction may be made in the presence of the court, or the jury may retire to further consider their verdict and put it in proper form (*Stewart v. Taylor*, 68 Cal. 5, 8 P. 605).

[2] As stated, the jury in the present case had been fully instructed upon the element of proximate cause in connection with the alleged contributory negligence of the plaintiff, one of the instructions being to the effect that the defense of contributory negligence was not established unless it was "proved by a preponderance of the evidence that the injuries sustained by plaintiff were the result of his own negligence proximately contributing thereto. * * *". In another, after stating that if the plaintiff was guilty of contributory negligence he could not recover, the court added: "By contributory negligence I mean negligence on the part of the plaintiff which is in some degree a contributing, proximate or direct cause of the accident." And then sum-

marizing the law upon the subject the court stated: "* * * One of your first considerations in determining the matters involved herein is (what) was the proximate or direct cause of the collision. In determining this fact, you must take into consideration all the evidence before you and from this evidence determine the direct cause of the accident. When you have determined the direct cause of the accident, then it is your duty to determine whether the plaintiff or the defendants were responsible for the cause or causes. If the plaintiff himself is responsible, then your judgment must be for the defendants and against the plaintiff. If both the defendants and the plaintiff were responsible, then your judgment must be for the defendant and against the plaintiff."

It may be fairly assumed, therefore, that when the jury returned the informal verdict finding "negligence on the part of both parties" it meant the character of negligence about which it had been instructed, namely, negligence contributing proximately to the cause of the accident. That being so, the verdict should have been in favor of the defendants. But, as already appears, it was not in that form, and consequently, under said section 619, it became the duty of the court to have it corrected, which it proceeded to do, by explaining to the jury, in effect, that having found negligence on the part of both parties, "under the instructions of the court" its verdict should be for the defendant, provided such was the verdict agreed upon. It is plain to be seen, therefore, that the remarks complained of were never intended as an additional instruction as to the law of the case, but merely as directions to the jury to correct the form of its verdict so that it would conform legally to its expressed finding. And the fact that the jury had already been fully instructed as to the law of the case and asked for no further instructions, either before or after the matter of the form of the verdict was disposed of, confirms the belief that it accepted the remarks as they were intended and was in no manner misled thereby.

Even construing the remarks as an instruction as to the law of the case, no sufficient grounds for reversal are shown, because, as will be noted, the remarks were qualified by the clause "under the instructions of the court," which had the effect of connecting the same directly with and making them a part of the instructions theretofore given (*Hall v. Steele*, 193 Cal. 602, 226 P. 854), and the latter, as already pointed out, fully covered the element of proximate cause.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

DODGE et al. v. NATIONAL SURETY CO.

et al.

Civ. 7711.

District Court of Appeal, First District, Division 2, California.

Dec. 24, 1930.

Rehearing Denied Jan. 23, 1931. Hearing Denied by Supreme Court Feb. 19, 1931.

1. Appeal and error ⇨544(1).

In appeal on judgment roll, no question of fact is involved.

2. Appeal and error ⇨916(3).

When complaint may be cured by stipulation or admission of proof without objection, appellate court may assume that complaint was cured when objection is raised for first time on appeal based on judgment roll alone.

3. Brokers ⇨4.

Bond conditioned on real estate brokers faithfully performing undertakings included acts of brokers' agent acting within scope of employment (St. 1919, p. 1252, § 2, as amended by St. 1925, p. 600).

4. Brokers ⇨4.

As respects liability on broker's bond, provisions of act prohibiting revocation of real estate broker's license for default of agent, unless broker had guilty knowledge of default, are penal and inapplicable to broker's civil liability for agent's wrongs (St. 1919, p. 1259, § 15).

5. Brokers ⇨4.

As respects liability on broker's bond, broker's civil liability for agent's wrongs is fixed by general law of agency applying equally to contractual relations between principal and agent and to those dealing with them as such.

Appeal from Superior Court, Los Angeles County; W. Cloyd Snyder, Judge.

Action by Fred B. Dodge and another against the National Surety Company and others. Judgment for plaintiffs, and defendant named appeals.

Affirmed.

Baillie, Turner & Lake and Allen T. Lynch, all of Los Angeles, for appellant.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondents.

NOURSE, P. J.

Plaintiffs sued for damages for fraud in relation to a real estate transaction. Defendant surety company was joined as the

surety on the bond of Lloyd and McElmeel, who were real estate brokers. Defendant Hughes was an employee and salesman for the brokers. Plaintiffs had judgment against the surety company on its bond for \$2,000, and that defendant appeals on a typewritten clerk's transcript.

[1] The appeal being on the judgment roll, no question of fact is involved. The trial court found that Hughes, while acting in the scope of his employment by the brokers, induced the plaintiffs to purchase real property in the state of Nebraska through fraudulent misrepresentations, resulting in damage to plaintiffs in the sum of \$2,000.

The first attack on the judgment is that the complaint fails to state a cause of action because it does not allege that Hughes was acting for a compensation. This, it is argued, is necessary because a real estate broker is defined in the statute (St. 1919, p. 1252, § 2, as amended by St. 1925, p. 600) as one "who, for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate." The complaint alleges that Lloyd and McElmeel were copartners duly licensed as real estate brokers under the fictitious name of West Coast Colonization Company, and that Hughes was employed by them as a duly licensed real estate salesman. It is then alleged that, while acting as such salesman and agent, Hughes conducted the transactions complained of. By stipulation of the parties there has been added to the record a written agreement under which plaintiffs promised to pay a commission to Hughes when the Nebraska land was sold.

[2] At the outset we may concede that pleadings of this character are not to be approved. If the point had been raised on demurrer, the defect might have been easily remedied, and, so far as we may know from the record brought up, this might have been done during the course of the trial. When the objection to the complaint may be cured by stipulation or by the admission of proof without objection, we may assume that it has been cured when the point is raised for the first time on an appeal based on the judgment roll alone. We so held in *Nittler v. Continental Casualty Co.*, 94 Cal. App. 498, 504, 271 P. 555, 272 P. 309, and appellant has given us no reason why we should change our views.

[3] It is argued that the surety company cannot be held liable for fraudulent acts of the brokers' employees because the bond ran to the brokers alone. The point is without merit. The bond is a "faithful performance" bond. *Bridges v. Price*, 95 Cal. App. 394, 273 P. 72; *Hogberg v. Landfield*, 99 Cal. App. 360, 278 P. 907. The bond was conditioned

that the brokers would "faithfully perform every undertaking entered into by (them) as a licensed real estate broker under said act." The complaint alleged, and the trial court found, that the acts complained of were done by Hughes as agent for and within the scope of his employment by the brokers. The liability of the principal for the acts of his agent in the scope of the employment is fixed by section 2330, Civil Code, and other authority does not need to be cited. The surety having undertaken to insure the faithful performance of the brokers' duties under the act, the bond included the acts of the brokers' agents who were employed, and licensed under the same act, to perform those duties.

[4, 5] But it is argued that, because under the Real Estate Act (St. 1919, p. 1259, § 15) a broker's license cannot be revoked for the default of an agent unless the broker had guilty knowledge of the default, therefore, the broker cannot be held liable on his bond unless he had guilty knowledge of the acts of his agent. These provisions of the Real Estate Act are penal and are confined to the punishment that may be inflicted on the broker by the real estate commissioner. They have no application to the civil liability of the broker for the wrongs of his agent. This liability is fixed by the general law of agency applying equally to the contractual relations between principal and agent and to those dealing with them as such. If the Real Estate Act had intended to modify this general rule, it would have used some language indicating that intention. But it is apparent that such was not the intention from the language which confines the section of the act to the proceedings under the act for a revocation or suspension of the broker's license.

For the reasons given, the judgment and order are both affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.

110 Cal. App. 607

LEE et ux. v. FOLCEY et al.
Civ. 7701.

District Court of Appeal, First District,
Division 2, California.
Dec. 23, 1930.

1. Conspiracy ☞18.

Complaint alleging defendants conspired to defraud plaintiffs of property and seeking cancellation of instruments conveying property and accounting held good against general demurrer.

The complaint alleged in substance that defendants conspired to defraud plaintiffs of property, and as part of conspiracy induced plaintiffs to enter into contract with certain defendants for construction of an apartment house building on lot involved and to execute promissory note secured by mortgages, and later induced plaintiffs to convey other property to other defendants in order to clear mortgages, and as result of transactions plaintiffs lost to defendants all their real property. The prayer was for cancellation of certain instruments, reconveyance of property, and for an accounting.

2. Conspiracy ☞1.

Elements of action for conspiracy are formation and operation of conspiracy and damage resulting from acts done in furtherance of common design.

3. Pleading ☞52(2).

Complaint seeking cancellation of separate written instruments affecting several pieces of property held objectionable as not separately stating separate causes.

4. Pleading ☞72.

Complaint for recovery of land and damages for loss was not defective because seeking more than plaintiffs were entitled to.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Baker P. Lee and wife against Melvin L. Folcey and others. From a judgment for defendants, plaintiffs appeal.

Reversed, with directions.

E. J. Miller and Henry St. Rayner, both of Los Angeles, for appellants.

Dan V. Noland, of Las Vegas, Nev., for respondents.

NOURSE, P. J.

Plaintiffs sued for the cancellation of a number of separate written instruments conveying separate pieces of realty and for an accounting of the rents, issues, and profits of such realty. Demurrers to the fifth amended complaint were sustained without leave to amend, but the trial court granted plaintiffs leave to move to amend if a proposed amendment was presented with the motion. This was done, and the trial court again denied leave to amend and entered judgment for the defendants. The plaintiffs appeal upon a typewritten clerk's transcript which contains the fifth amended complaint and the proposed amendment.

In the fifth amended complaint it is alleged that the plaintiffs were owners of several distinct pieces of real property situated in Los Angeles and Imperial counties; that on July

22, 1922, the defendants conspired for the purpose of defrauding plaintiffs out of said properties, and that, as a part of said conspiracy, induced plaintiffs to enter into a contract with defendants Hesse and wife for the construction of an apartment house building on one of said lots located in the Crown Hill tract in the city of Los Angeles; that, as a part of said conspiracy, the plaintiffs were induced to execute and deliver to the Hesses two promissory notes amounting to \$50,000 secured by mortgages on said Crown Hill lot; that the Hesses fraudulently delayed the completion of said building for a period of more than fourteen months, and transferred to other of the defendants the two notes and mortgages; that these latter defendants then threatened to foreclose said mortgages, unless the plaintiffs should convey to them other real property, which was done; that thereafter the defendant Folcey and wife came into the transaction, telling the plaintiffs that the other defendants were all crooks and were conspiring to defraud them of their properties, but that, if the plaintiffs would transfer to them other properties owned by them, they, these defendants, would clear the mortgages mentioned and save all these properties to the plaintiffs. All these acts were alleged to have been taken with the knowledge and connivance of all the defendants as part of a general conspiracy to defraud the plaintiffs. As a result of these transactions, it was alleged that the plaintiffs lost to the defendants all their real property valued at \$60,000. The prayer was for a cancellation of all the written instruments, a reconveyance of these properties, and for an accounting.

[1, 2] The fifth amended complaint manifestly stated a cause of action, and was good against the general demurrer. If it had pleaded damage in a specific amount and had prayed for a recovery of damages instead of for equitable relief, it would have been in line with *Mox, Inc., v. Woods*, 202 Cal. 675, 262 P. 302. As said in that case (page 677 of 202 Cal., 262 P. 302, 303): "The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. The cause of action is the damage suffered."

[3] The only substantial objection to the complaint is that it states several separate causes of action and does not state them separately, as required by section 427, Code of Civil Procedure. This arises because the complaint seeks the cancellation of separate written instruments affecting several pieces of property. If the plaintiffs had sued in tort for the monetary damages suffered from the entire transaction, their complaint would have been free from this objection as well, because, each separate overt act being alleged to be a part of the whole conspiracy, each conspirator is rendered responsible for the wrongful act, irrespective of the degree of his activity. *Mox, Inc., v. Woods*, supra, page 678 of 202 Cal., 262 P. 302.

Such being the rule applicable in action sounding in tort, we are confronted with the question whether, when the action is in equity and seeks the return of specific real property, a different rule should be applied. Manifestly, in such a case some of the alleged conspirators might be improper parties because no relief could be given against them, but otherwise we see no reason why the action cannot be maintained in equity as well as in tort.

[4] The general demurrer to the fifth amended complaint should have been overruled. The special demurrer raising the objection of separate causes of action not separately stated was properly sustained. The proposed amended complaint removed this objection limiting the cause to the Crown Hill lot together with plaintiffs' pecuniary damage for loss of possession of that lot. The cause as pleaded in the proposed sixth complaint is one for the recovery of a specified tract of land and damages for its loss. This proposed complaint is precisely the same as that which was held good in the *Mox Case*, with the single exception that it seeks recovery of specific property in addition to the prayer for damages. If, in respect to the real property, the plaintiffs seek more than they are entitled to, their complaint is not defective for that reason.

The judgment is reversed, with directions to permit plaintiffs to file the proposed amended complaint.

We concur: STURTEVANT, J.;
SPENCE, J.

110 Cal. App. 743

**SCHWANDT v. JUSTICE'S COURT OF
SAN DIEGO TP. et al.**
Civ. 538.

District Court of Appeal, Fourth District,
California.

Dec. 31, 1930.

As Modified Jan. 15, 1931.

1. Justices of the peace ☞59.

Nothing is to be presumed in favor of jurisdiction of justice's court.

2. Justices of the peace ☞48.

Justice's court *held* without jurisdiction of statutory proceeding to determine title to attached property after third party claim and indemnity bond given by attaching creditor (Code Civ. Proc. §§ 866-869, § 549 as amended by St. 1891, p. 20, § 1, and § 689 as amended by St. 1929, p. 661).

Petition for writ of prohibition by Erich P. Schwandt against the Justice's Court of San Diego Township and another.

Writ issued.

Brooks Gifford and William E. Fox, both of Pasadena, and Stickney & Stickney, of San Diego, for petitioner.

Chester Allan Smith, of San Diego, for respondents.

CARY, P. J.

The petition for a writ of prohibition alleges, in substance, that in an action to which petitioner is not a party a certain automobile upon which petitioner holds a \$1,500 mortgage has been attached under a writ issuing from the justice's court of San Diego township, that petitioner duly filed a third party claim for said property, that the plaintiff in said action filed a bond to indemnify the constable, that the constable now holds said property, and that proceedings have been instituted in said justice's court to try the title to said automobile under the provisions of Code of Civil Procedure, § 689, that petitioner filed objections in said justice's court upon the grounds that said court was without jurisdiction to try said title, that said objections were overruled, and that said court will proceed to try said title unless prohibited therefrom.

[1, 2] Petitioner's chief contention is that the justice's court is without jurisdiction for the reason that Code of Civil Procedure, § 689, in so far as it provides for a method of trying title to attached property, does not apply to justice's courts.

The article in the Code of Civil Procedure dealing expressly with procedure on attachment in justice's courts is very brief and includes but four sections, 866-869 inclusive,

but by the provisions of the last of these, section 869, certain other sections of that Code regarding attachments in the superior court are also made applicable to the justice's courts, among them being section 549.

That section as it has stood since amended in 1891 (St. 1891, p. 20, § 2) provides: "If any personal property attached be claimed by a third person as his property, the same rules shall prevail as to the contents and making of said claim, and as to the holding of said property, as in case of a claim after levy upon execution, as provided for in section six hundred and eighty-nine of the Code of Civil Procedure."

Turning now to section 689 and tracing its history we find that the same session of the Legislature which amended section 549 to read as given above, amended section 689 (St. 1891, p. 20, § 1) to read as follows: "If the property levied on be claimed by a third person as his property by a written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the Sheriff, the Sheriff is not bound to keep the property, unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the Sheriff against such claim by an undertaking by at least two good and sufficient sureties; and no claim to such property is valid against the Sheriff, or shall be received, or be notice of any rights, unless made as above provided."

As these two sections then stood, the construction of the language of section 549 presents no difficulty, since clearly its language related to and embraced the whole of the then provisions of section 689.

However, in 1929 the Legislature amended section 689 (St. 1929, p. 661), modifying in several particulars the procedure theretofore embodied in that section, and in addition adding an entirely new paragraph as follows: "Whenever a verified third party claim is served upon the sheriff, upon levy of execution, the plaintiff, or the person in whose favor the writ of execution runs, shall be entitled to a hearing within twenty days therefrom, before the court having jurisdiction of the action, in order to determine title to the property in question, which hearing must be granted by the said court upon the filing of an application or petition therefor. Ten days' notice of such hearing must be given to all parties claiming an interest in the property, or their attorneys, which notice must specify that the hearing is for the purpose of determining title to the property in question. The court may continue the hearing beyond the said twenty-day period, but good cause must be shown for any such continuance."

It is under this last-quoted provision that

the justice's court in the case at bar is assuming to act. The question presented then is: Where property has been attached under a writ issued from a justice's court, a third party claim made to said property, and an indemnity bond given the constable by the attaching creditor, does the justice's court have jurisdiction to hear a petition to determine title to the property under the provisions of section 689?

If section 549 stated merely that the same procedure should be followed in attachments as provided by section 689 for execution, no question such as that here presented could arise. But it does not so state. What it does state is that, "as to the contents and making of said claim and as to the holding of said property" the same rules as provided by section 689 shall prevail. This language is specific and, so far as attachments are concerned, limits the scope of section 689 to two matters—the making of the claim and the holding of the property. When we consider the further well-established principle that the justice's court is a court of limited jurisdiction and that nothing is to be presumed in favor of its jurisdiction, it is clear that, as applied to justice's courts at least, the language of section 549 may not be taken to include the new procedure for trying title provided for by the 1929 amendment to section 689.

It is ordered that the writ of prohibition issue as prayed for.

We concur: MARKS, J.; BARNARD, J.



110 Cal. App. 456

HUNT v. LOS ANGELES RY. CORPORATION.
Civ. 7656.

District Court of Appeal, First District,
Division 1, California.
Dec. 16, 1930.

1. Evidence ⇨586(3, 4).

Positive testimony that bus causing injury sounded warning did not conclusively establish that warning was given but merely created conflict with negative testimony that no warning was sounded.

2. Death ⇨23.

Contributory negligence may be invoked in action by parent for death of child of age sufficient to exercise discretion to avoid injury.

3. Negligence ⇨85(2).

Child need only exercise care ordinarily exercised by minors of like age and discretion.

4. Negligence ⇨136(29).

Capacity of particular child to exercise care to avoid particular danger is question for jury.

5. Automobiles ⇨212.

Bicycle riders have same right as automobile drivers to use streets, and are chargeable only with such ordinary care for own safety as prudent person of like age and experience would exercise.

6. Automobiles ⇨223(1).

Child in public street is not trespasser, but has same right as operator of automobile or other vehicle.

7. Automobiles ⇨172(13).

Bus driver ordinarily need not give warning in passing bicycle in business district, but must drive with due caution (St. 1923, p. 557, §§ 121, 125).

8. Automobiles ⇨151.

That operation of automobile produces noise does not relieve driver of duty to warn, where persons rightfully using highway are unaware of automobile's approach (St. 1923, p. 557, §§ 121, 125).

9. Negligence ⇨85(6).

Conduct by child which might otherwise constitute negligence cannot be so considered where done in emergency calculated to produce fright.

10. Automobiles ⇨168(1).

Automobile driver seeing child in place of danger, or reasonably apprehending that approach without warning would frighten child, must keep car under control reasonably necessary to avoid collision.

11. Negligence ⇨85(6).

If defendant's negligence caused fear impelling child to rush into danger, mere mistake of judgment does not necessarily constitute contributory negligence.

12. Automobiles ⇨223(7).

Child, after mounting bicycle and proceeding on his course, was under no duty to look back to see whether bus was approaching.

13. Automobiles ⇨245(74).

Contributory negligence of child eleven years old colliding with bus while riding bicycle held for jury (St. 1923, pp. 553, 557, §§ 113, 121, 125, and § 114 (page 554), as amended by St. 1925, p. 412, § 14).

Evidence tended to show that child eleven years old riding on bicycle turned

to left because of bewilderment of child caused by approach of bus; that bus was traveling 25 miles an hour, exceeding speed limit for business or residence district permitted by St. 1923, pp. 553, 557, §§ 113, 121, 125, and § 114 (page 554), as amended by St. 1925, p. 412, § 14; and that no warning was given by driver of bus.

14. Automobiles ⇨245(57).

Sudden warning by young girl to eleven year old boy riding bicycle of approaching bus held not necessarily sole proximate cause of accident; question being for jury.

15. Negligence ⇨61(1).

Where injury results from separate acts by different persons operating concurrently, both are proximate cause.

16. Automobiles ⇨245(74).

Contributory negligence of eleven year old child riding bicycle and turning in front of bus held for jury, though child was accustomed to operate bicycle and was of average intelligence.

17. Trial ⇨139(1).

To justify directed verdict, it must appear that any other holding would have to be reversed for lack of evidentiary support.

18. Automobiles ⇨245(8).

Where evidence was reasonably sufficient to support verdict for plaintiff for death of child struck by bus, directed verdict for defendant was erroneous.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Eugene Hunt against the Los Angeles Railway Corporation. Judgment for defendant, and plaintiff appeals.

Reversed.

Bertrand J. Wellman, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (Norman S. Sterry and Malcolm Davis, both of Los Angeles, of counsel), for respondent.

PER CURIAM.

An appeal by the plaintiff from a judgment entered on a directed verdict in favor of defendant Los Angeles Railway Corporation.

The plaintiff was the father of Gillard Hunt, a minor, who was run over and killed by a motorbus operated by the defendant. The complaint alleged that his death was due to the negligent operation of the bus; the defendant denied the negligence alleged, and as

a separate defense averred contributory negligence on the part of the minor. At the close of the evidence the court on motion directed the jury to return a verdict for the defendant.

It is urged as grounds for the appeal that, in view of the evidence, the case should have been submitted to the jury.

[1] The accident happened on September 15, 1925, at about 5 o'clock p. m. The boy, who was about eleven years old, was riding a bicycle in a southerly direction along La Brea avenue in Los Angeles. The motorbus was following him on the same avenue, and at a point between Eighth and Ninth streets, which intersect the avenue, overtook him. The testimony was conflicting as to whether the boy fell to the pavement in front of the bus or turned the bicycle to the left so that he was struck by the vehicle. The distance between the bicycle and the bus when the latter was about to pass was variously estimated. The driver estimated it was about four feet, and the estimates of other witnesses varied from two to four feet. It is certain, however, that the bus passed so close to the left of the bicycle that a slight swerve by the rider to the left was likely to cause him injury. According to the testimony, the boy was warned of the imminent approach of the bus by a young girl standing on the sidewalk south of the point where the collision occurred. He thereupon turned his body and head to the left and looked in the direction of the oncoming bus, and at the same time, according to some of the witnesses, swerved the bicycle to the left sufficiently to be struck by the front of the vehicle. Several witnesses also testified that upon discovering the proximity of the bus he appeared to be greatly frightened. The driver of the bus testified that he sounded a warning before the collision, but how long before he did not say. All the other witnesses, however, who were questioned on the subject—several of whom were passengers on the bus—testified that they heard no warning sounded. The fact that there was positive testimony on the subject did not conclusively establish that a warning was given; it merely created a conflict; and the evidence was sufficient to sustain a finding to the contrary. *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748, 134 P. 709; *Young v. Pacific Elec. Ry. Co.*, 208 Cal. 568, 283 P. 61. The driver further testified that the speed of the bus at the time of the accident was fifteen to eighteen miles per hour, but a witness who was following in an automobile estimated the speed at about twenty-five miles an hour. The latter speed in a business or residence district was in excess of that permitted by law. *Motor Vehicle Act*, § 113, Stats. 1923, pp. 517, 553, 554, and section 114, as amended by Stats. 1925, pp. 398, 412, § 14.

[2-4] The defense of contributory negligence may be invoked in an action by a parent to recover damages for the death of a child where the latter was of an age sufficient to exercise discretion for the avoidance of injury. *Studer v. Southern Pacific Co.*, 121 Cal. 400, 53 P. 942, 66 Am. St. Rep. 39. But a child is not held to the same degree of care as an adult, and is only required to exercise the degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion. There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age. The question as to the capacity of a particular child at the time to exercise care to avoid a particular danger is one of fact falling within the province of the jury to determine. *Cahill v. E. B. & A. L. Stone Co.*, 167 Cal. 126, 138 P. 712, 717. The rule has been applied in cases where the age of children sought to be charged with contributory negligence varied from twelve to fourteen years. *Cahill v. Stone Co.*, supra; *Bowdoin v. Southern Pacific Co.*, 178 Cal. 634, 174 P. 664; *Morris v. Standard Oil Co.*, 188 Cal. 468, 205 P. 1073; *Schroeder v. Baumgarteker*, 202 Cal. 626, 262 P. 740; *Greeneich v. Knoll*, 73 Cal. App. 1, 238 P. 163.

[5, 6] Bicycle riders have the same right as automobile drivers to the use of the streets, and the former are chargeable only with such ordinary care for their own safety as a prudent person of like age, intelligence, and experience would exercise under the same or similar circumstances. *Schroeder v. Baumgarteker*, supra. Nor is a child in a public street a trespasser; his right there being the same as the operator of an automobile or other vehicle. *Wong Kit v. Crescent Creamery Co.*, 87 Cal. App. 563, 262 P. 481.

[7, 8] While the accident appears to have occurred in a business district, and under ordinary circumstances the driver of the bus would not be required to give warning before passing the bicycle (Motor Vehicle Act, § 125, Stats. 1923, p. 557), nevertheless the statute required him to drive with due caution and circumspection, and forbade the operation of the bus in a manner endangering the life or limb of any person (Motor Vehicle Act, § 121, St. 1923, p. 557). And it has been held to be the duty of the driver to sound the horn when the conditions are such as to require timely warning of the approach of the automobile. *Dullanty v. Smith*, 203 Cal. 621, 265 P. 814; *McManus v. Arnold Taxi Corp.*, 82 Cal. App. 215, 255 P. 755. Nor under such circumstances does the fact that the operation of the automobile is productive of noise relieve the driver of the duty to give warning where it appears that persons rightfully using the highway are unaware of his ap-

proach. *Devecchio v. Ricketts*, 66 Cal. App. 334, 226 P. 11.

[9-11] Conduct which might otherwise constitute negligence on the part of a child may not be so considered where its acts or omissions were done or omitted in an emergency calculated to produce fright, bewilderment, or confusion (45 Cor. Jur., Negligence, § 559, p. 1011); and, while a driver in approaching a child upon a street or highway is not bound to guard against every possible contingency, nevertheless, where he sees a child in a place of danger, or might reasonably apprehend that if approached without warning the child would through fright or bewilderment place itself in a place of danger, it is his duty to keep his car under such control as would be reasonably necessary to avoid a collision (*Silberstein v. Showell, etc., Co.*, 267 Pa. 298, 109 A. 701; *Leonard v. Fowle*, 255 Mass. 531, 152 N. E. 240; *Chaar v. McLoon*, 304 Mo. 238, 263 S. W. 174; *Metcalf v. Romano*, 83 Cal. App. 508, 257 P. 114). As has been held with respect to the conduct of adults under similar circumstances, if the negligence of the defendant caused fear and loss of presence of mind on the part of the injured person so as to impel him to rush into danger, his mere error or mistake of judgment does not necessarily constitute contributory negligence as a matter of law. *Raymond v. Hill*, 168 Cal. 473, 143 P. 743; *Hatzakorizan v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027; *Randolph v. Hunt*, 41 Cal. App. 739, 183 P. 358.

[12, 13] Respondent cites numerous decisions in support of its contention that the child by his failure to observe the approaching bus, or to follow a direct course, or give the signal required by law if he intended to turn, was necessarily guilty of contributory negligence. These cases, however, involved the acts of adults and not of children. The child proceeded from a point about half a block north of the place where the accident occurred. There is no evidence that he looked to the north before mounting his bicycle, or that if he had he would necessarily have seen the bus; and there was no duty to do so after he had proceeded on his course. *Hatzakorizan v. Rucker-Fuller Desk Co.*, supra. While it is the rule that persons using the streets must anticipate and be prepared for the presence of vehicles thereon, and it is also the duty of operators of vehicles to give the proper signals before turning (*Litherbury v. Kimmet*, 183 Cal. 24, 195 P. 660), the evidence tends to show that the turn to the left was due to the bewilderment of the child; and, considering his age, the speed of the bus, the evidence that no warning was given by the driver, and the condition of fright into which he was apparently thrown by the sudden appearance of the vehicle, the question of

his negligence was, we think, properly one to be determined by the jury.

[14, 15] Nor is there any merit in the argument that the warning by the young girl mentioned must have been the sole proximate cause of the accident. Where the injury results from two separate and distinct acts by different persons operating simultaneously and concurrently, both are the proximate cause; and this question was also one for the jury. *Merrill v. Los Angeles G. & E. Co.*, 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; *Katz v. Helbing*, 205 Cal. 629, 271 P. 1062, 62 A. L. R. 825; *Parkin v. Grayson-Owen Co.*, 25 Cal. App. 269, 143 P. 257.

It has been held that the action of a trial court in determining whether a child was sufficiently familiar with the dangers incident to his acts or omissions to render him guilty of contributory negligence, and in granting or denying a motion for nonsuit on that ground, will not be disturbed on appeal in the absence of a clear abuse of discretion. *Wallace v. Great Western Power Co.*, 204 Cal. 15, 266 P. 281. In the case cited—which was one to recover for the death of a boy twelve years of age—it appeared that the deceased had climbed upon an electric power pole thirty-three feet in height, which carried a high-voltage cable, with which he came in contact and was killed. In view of these facts, it was held that there was no abuse of discretion in granting a nonsuit. The court referred to *Mayne v. San Diego Electric Ry. Co.*, 179 Cal. 173, 175 P. 690, wherein the above rule was declared, and in which it appeared that a boy about eight years of age was struck by defendant's car while attempting to cross the track in the middle of the block. It was claimed that defendant was negligent in keeping the roadbed alongside of the track in repair, due to which the boy stumbled and fell in front of the car. One of the defenses was the alleged contributory negligence of the child. A motion for an instructed verdict was denied. In affirming the judgment, which was for the plaintiff, the court, following *Cahill v. Stone Co.*, *supra*, held that there was no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age, and further, quoting from *Foley v. Cal. Horseshoe Co.*, 115 Cal. 184, 47 P. 42, 56 Am. St. Rep. 87, that "these matters, and the further question whether the minor duly exercised such judgment as he possessed, must therefore, as a rule, be left as considerations of fact for the jury's determination; and it would be an exceptional case which would present them as unmixed questions of law for the determination of the court."

[16, 17] Although the child appears to have been used to operating his bicycle over city

streets, and also to have been of the average intelligence of children of his age, nevertheless we think under the above rule the question of his negligence was one for the jury. To justify a directed verdict, it must appear that no other reasonable conclusion than that defendant was entitled to judgment was legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be bound to reverse it on appeal. *Bannister v. Los Angeles Ry. Corp.*, 203 Cal. 427, 264 P. 756; *Young v. Pacific Elec. Ry. Co.*, *supra*.

[18] The evidence was reasonably sufficient to have supported a verdict for the plaintiff; and, in view of the law, the order directing a verdict for the defendant was erroneous.

The judgment is reversed.

110 Cal. App. 722

CASSINELLI v. BENNEN.

Civ. 7425.

District Court of Appeal, First District,
Division 1, California.

Dec. 30, 1930.

1. Automobiles ⇨245(10).

Negligence of motorist striking pedestrian crossing from street car safety zone to sidewalk *held* for jury.

2. Automobiles ⇨245(76).

Contributory negligence of pedestrian struck by automobile while crossing from street car safety zone to sidewalk *held* for jury.

3. Appeal and error ⇨1001(1).

Jury's decision regarding negligence of motorist striking pedestrian, sustained by evidence, was controlling on appeal.

4. Trial ⇨191(7).

In personal injury action, instruction beginning, "If you believe from evidence," *held* not objectionable as assuming negligence.

5. Trial ⇨203(1).

Each party is entitled to instructions based on his theory of case, provided there is evidence to support it.

6. Trial ⇨219.

Instruction on motorist's duty to have automobile under proper control *held* not erroneous in not defining "proper control," especially where other instructions dealt with duties of motorist under the circumstances.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Giovanni Cassinelli against Herman Bennen, alias Herman Behnen. From a judgment for plaintiff, defendant appeals.

Affirmed.

Henry Heidelberg, of San Francisco, Alberta Belford, of Los Angeles (Emery H. Mitchell, of Los Angeles, of counsel), for appellant.

Edmund J. Holl, of San Francisco, for respondent.

PER CURIAM.

About 4:15 o'clock in the morning, in the month of July, 1927, respondent, Giovanni Cassinelli, while on his way to work, alighted from a south-bound Valencia street car at Eighteenth street in San Francisco, and after the car continued on he proceeded to cross to the east side of the street. Just as he was about to step on the sidewalk he was struck and injured by a jitney bus driven by the appellant Herman Behnen. As a result of the injuries received he brought this action for damages and a jury awarded him a verdict of \$3,000. From the judgment entered thereon this appeal was taken, three grounds for reversal being urged, first, that the evidence fails to show negligence on the part of the appellant; second, that the evidence shows contributory negligence on the part of respondent; and, third, that the court committed error in giving certain instructions to the jury.

The evidence relating to the cause of the accident consisted of the testimony given by the two parties. Respondent testified that when the street car stopped he stepped down from the rear platform thereof into the center of the safety zone and waited for the car to continue on; that after the car crossed Eighteenth street he looked in a northerly direction, toward Market street, and, no vehicle being in sight, he started to walk easterly across Valencia street; that when he reached a point between the north and south bound car tracks he again looked to the north and also to the south, up and down Valencia street, and observed an automobile approaching on Valencia street from the south; that it was then on the farther side of the Eighteenth street intersection, traveling northerly along the north-bound track; that when it neared the safety zone on the southerly side of the intersection it turned off the track to the right to go around the safety zone, and upon passing the safety zone and reaching the middle of the intersection it turned back again slightly toward the north-bound track, at which time he had reached a point about midway between the north-bound track and the east curb line of Valencia street; and that just as he was about to step up on the curb he was struck by the automobile and knocked

part way upon the sidewalk, the automobile proceeding on about 10 feet, and running part way up on the sidewalk before it was brought to a stop. He further testified that the weather was clear and dry. The driver's view of the Eighteenth street intersection was "obstructed," as that term is defined by section 113 of the California Vehicle Act (St. 1923, p. 517), and consequently the limitation of speed across the intersection was 15 miles an hour. Respondent testified that on approaching and entering the intersection the automobile was traveling between 25 and 30 miles an hour.

Appellant testified in substance that upon observing the approach of the south-bound Valencia street car he turned off of the north-bound car track to the right and proceeded to drive between the north-bound track and the east curb of the street; that he crossed the intersection at a speed of 15 miles an hour, and then increased his speed to 22 miles an hour, at which time he saw respondent approximately 30 feet in front of him and about 8 feet to his left, on the easterly rail of the north-bound track; that at that time respondent was running toward the east side of Valencia street, and that he continued to run in front of his automobile until he reached a point about 25 feet northerly of the northeast corner of the sidewalk, where the accident occurred.

[1-3] It is evident from the foregoing that there is a sharp conflict in the evidence as to all the essential facts, and, consequently, regardless of the exact speed the automobile was being operated across the intersection, it was purely a question of fact for the jury to determine from all the evidence before it whether the accident was caused, as respondent claims, by the negligent operation of the automobile, in that the driver thereof failed to see respondent until he was only 30 feet away; or whether, as appellant claims, respondent was guilty of contributory negligence in running heedlessly in front of the approaching automobile, thereby failing to use ordinary care for his own safety. And the jury having accepted and acted upon the testimony of respondent, which is legally sufficient to sustain the verdict, its decision in the matter is controlling on appeal. *Firth v. Southern Pacific Co.*, 44 Cal. App. 511, 186 P. 815; *White v. Davis* (Cal. App.) 284 P. 1086; *Darling v. Pacific Electric Ry. Co.*, 197 Cal. 702, 242 P. 703.

[4-6] Nor has appellant pointed out any error in the instructions which in our opinion would justify a reversal of the judgment. Instruction No. 2, fairly interpreted, is not open to the objection that it assumes negligence on the part of appellant, the words at the beginning thereof being: "If you believe from the evidence," etc. (*State Compensation Ins. Fund v. Lamb*, 96 Cal. App. 236, 273 P. 1080; *Dougherty v. Ellingson*, 97 Cal. App.

87, 275 P. 456; *Baillargeon v. Myers*, 180 Cal. 504, 182 P. 37); and the doctrine of proximate cause was amply covered in several other instructions. Appellant concedes that the substance of instruction 4 "strictly speaking * * * is true." It was to the effect that, if the defendant could by the exercise of ordinary care have avoided the accident, then it was not an unavoidable accident; and we find nothing in the wording thereof which is either argumentative or misleading. Instruction No. 6 was based upon the testimony given by respondent, and the objection appellant makes to it is grounded upon the assumption that the contradictory testimony given by appellant was true. It is well settled, however, that each party is entitled to instructions based on his theory of the case providing there is evidence to support it. *Brooks v. City of Monterey* (Cal. App.) 290 P. 540; *Raymond v. Hill*, 168 Cal. 473, 143 P. 743. Therefore instruction No. 6 was not erroneous. Instruction No. 7 was to the effect that the driver of an automobile must at all times have his automobile under proper control; and appellant contends that the instruction is erroneous in omitting to define what is proper control. The words "proper control," as used in this regard, are essentially no different from those of similar import, such as "proper lookout," "proper," "reasonable precaution," and "due care," etc., the use of which has been approved. *Burk v. Extra-fine Bread Bakery*, 208 Cal. 105, 280 P. 522; *Ballos v. Natural*, 93 Cal. App. 601, 269 P. 972; *Nichols v. Nelson*, 80 Cal. App. 590, 252 P. 739; *Raymond v. Hill*, supra; *City of Sacramento v. Hunger*, 79 Cal. App. 234, 249 P. 223. Moreover, the charge of the court covers 20 pages of the typewritten transcript, and many of the instructions given, of which a considerable number were proposed by appellant, dealt with the duties and obligations imposed upon the driver of an automobile under the circumstances here present. Therefore, reading the instructions as a whole, the jury was amply instructed upon the subject of proper control. The case of *Hesler v. California Hospital Company*, 178 Cal. 764, 174 P. 654, is not in point, for there the question of what constituted "proper care" had relation to the technical and professional skill required in the treatment of a patient in a hospital.

The court used the words "negligent defendant" in instruction 18, in stating the law as to contributory negligence, but upon reading the entire instruction it would seem that the words were used in a hypothetical sense; and there is no reason to believe that the jury did not so understand it. The words, "the proximate cause of," as used in instruction No. 19, were immediately followed by the words "or proximately contributed to." The instruction consequently correctly stated the

law. Instruction No. 20 was clearly proper. *Benjamin v. Noonan*, 207 Cal. 279, 277 P. 1045; *Loggie v. Interstate Transit Co.* (Cal. App.) 291 P. 618.

The judgment is affirmed.

110 Cal. App. 428

TYSON v. BURTON.
Civ. 4226.

District Court of Appeal, Third District,
California.

Dec. 15, 1930.

Rehearing Denied Jan. 14, 1931. Hearing Denied by Supreme Court Feb. 9, 1931.

1. Automobiles ⇨171(2).

Term "public highways" in statute defining intersection must be read as referring to definition in statute defining public highways (St. 1923, pp. 519, 520, §§ 21, 23).

California Motor Vehicle Act, § 23 (St. 1923, p. 520), defined "intersection" as area embraced within prolongation of boundary or property lines of two or more public highways, and section 21 (St. 1923, p. 519) defined "public highway" as every highway, road, street, or alley dedicated to public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks.

2. Statutes ⇨197.

Word "or" in statute defining intersection as prolongation of boundary "or" property lines is interpreted in ordinary or elementary sense as disjunctive particle indicating an alternative (St. 1923, p. 520, § 23).

[Ed. Note.—For other definitions of "Or," see Words and Phrases.]

3. Automobiles ⇨171(2).

"Intersection" embraced within prolongation of boundary or property lines of highways held intended to include area devoted to vehicular traffic between curb lines only and not sidewalks (St. 1923, p. 520, § 23).

[Ed. Note.—For other definitions of "Intersect; Intersection," see Words and Phrases.]

4. Automobiles ⇨246(9).

Requested instruction in action for injuries sustained in automobile collision at intersection enlarging intersections to include territory not available for vehicular traffic held properly refused (St. 1923, pp. 519, 520, §§ 21, 23, and p. 560, § 131, as amended by St. 1925, p. 412, § 15).

5. Trial ⇐256(10).

Appellant, if desiring more explicit instruction relative to intersections than reading of statute, should have requested correct instruction (St. 1923, p. 520, § 23).

6. Automobiles ⇐246(60).

Instruction that plaintiff motorist was presumed to have traveled at lawful speed in rightful place, and that presumption is evidence, *held* improper.

Instruction was improper where each party to automobile collision charged the other with negligence and the circumstances of the collision were fully testified to by eyewitnesses.

7. Automobiles ⇐245(1).

Where circumstances of automobile collision are fully testified to, jury should determine cause on testimony, not presumption that one party obeyed law.

8. Appeal and error ⇐1067.

Refusal to instruct that automobile collision raised no presumption that defendant was responsible was not prejudicial error, since applicable to both parties.

9. Automobiles ⇐245(14, 80).

Whether one or both drivers of automobiles colliding in daylight at intersection is negligent is for jury.

10. Appeal and error ⇐1068(3).

Error in instruction on presumption of care in automobile collision did not require reversal, where testimony showed defendant's responsibility.

11. Automobiles ⇐171(5).

That defendant motorist erred as to true boundary line of intersection would not relieve him from responsibility for collision with plaintiff having right of way (St. 1923, pp. 519, 520, §§ 21, 23, and p. 560, § 131, as amended by St. 1925, p. 412, § 15).

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by W. O. Tyson against James R. C. Burton. Judgment for plaintiff, and defendant appeals.

Affirmed.

H. T. Morrow and Henry L. Knoop, both of Los Angeles, for appellant.

John A. Rush and John L. Rush, both of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in an action to recover damages for injuries suffered to his person, and also to his property, resulting from an automobile collision. From this judgment the defendant appeals.

The allegations of the complaint are that the injury to the plaintiff was caused solely by the negligence of the defendant. The answer denies the allegations of the complaint, and charges that any injury suffered by the plaintiff was due to his own negligence.

No issue is made as to the amount of damages awarded the plaintiff. The collision occurred at about 9:30 a. m., at the intersection of Vermont avenue and Los Feliz boulevard, in the city of Los Angeles. The plaintiff was driving in an easterly direction on Los Feliz boulevard, and the defendant was driving in a northerly direction on Vermont avenue. A map attached to the transcript and used as an exhibit upon the trial of this cause, and presented to this court as correctly delineating the point of impact of the two automobiles, indicates that the collision took place on Los Feliz boulevard at a point a trifle to the eastward from a line which would be coincident with the east curb line of Vermont avenue if extended northerly across Los Feliz boulevard. The car owned by the plaintiff, and which he was driving, was overturned at a point 72 feet from the east curb line of Vermont avenue, and at a place near the south curb line of Los Feliz boulevard. Los Feliz boulevard is 40 feet wide between the curb lines. Vermont avenue is 56 feet wide south of Los Feliz boulevard, and is divided by a parkway to the north of Los Feliz boulevard. The south property line of Los Feliz boulevard is 40 feet south of the south curb of that street. The west property line of Vermont avenue is 12 feet west of the west curb line of that avenue. Two questions are presented for consideration: The right of way of the respective drivers at the intersection of Los Feliz boulevard and Vermont avenue, depending upon whether section 23 of the California Motor Vehicle Act (St. 1923, p. 520) as it read at the time of the collision was intended to apply to and fix the intersection as being that portion of the respective streets which lay within the boundaries of the curb lines, or whether the intersection, as then defined by section 23 of the California Motor Vehicle Act, included the space within the property lines adjoining said intersection; and alleged errors on the part of the trial court in giving and refusing instructions.

[1] Section 23 of the California Motor Vehicle Act, as it read at the time of the collision which took place on January 19, 1926, in defining "intersection," read as follows: "The area embraced within the prolongation of the boundary or property lines of two or more public highways which join one another

at an angle, whether or not one such public highway crosses the other." Section 131 of the Motor Vehicle Act, as amended by St. 1925, p. 412, § 15, as then in effect, relative to the right of way, so far as applicable here, read as follows: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." The term "public highway," as defined in section 21 of the act (St. 1923, p. 519), reads: "Every highway, road, street, alley, * * * dedicated or abandoned to the public, or intended or used by or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks," etc. Section 23 of said act, in the use of the term "public highways," must be read as referring to the definition of a public highway, as contained in section 21, and the right of way thereon must be determined by section 131. The court gave to the jury as an instruction section 23 of the California Motor Vehicle Act as it then read.

Upon this appeal, it is urgently insisted that the words "boundary" and "property," as used in section 23, are synonymous, and that the boundary of the intersection involved in this action must be read as though it included the space between the curb lines and the adjoining property lines, which would place the south boundary line of what is meant by section 23 as 40 feet south of the south line of Los Feliz boulevard and 12 feet west of the west curb line of Vermont avenue. This construction would give the right of way to an automobile traveling northward on Vermont avenue over an automobile traveling eastward on Los Feliz boulevard, provided it entered the area described as lying between the south curb line of Los Feliz boulevard and the line drawn coincident with the property line 40 feet south of the south line of Los Feliz boulevard, over an automobile entering the area described as lying between the west curb line of Vermont avenue and a line drawn parallel therewith and coincident to the property line 12 feet west of the west curb line of Vermont avenue; the contention of the appellant being that the automobile driven by him had entered this 40-foot area, or had crossed the line coincident with the property line south of Los Feliz boulevard before the plaintiff had crossed the 12-foot area west of the west curb line of Vermont avenue. This construction would give to the defendant 28 feet advantage in determining who had the right of way to cross the intersection of Vermont avenue and Los Feliz boulevard lying between the curb lines of the boulevard and the avenue.

[2] In support of their contentions, counsel have cited a long list of authorities where it has been necessary to interpret and give meaning to the use of the word "or" as it ap-

pears in statutes and contracts. A reference to "Words and Phrases," both to the first and third series, indicates that the meaning is given to that word according to the sense in which it is used, and as nearly as possible to effect the intent and purpose of the Legislature. Unless otherwise necessitated, the use of the word "or" is interpreted in its ordinary or elementary sense, which, as stated in *Pompano Horse Club v. State*, 93 Fla. 415, 111 So. 801, 52 A. L. R. 51, is as follows: "In its elementary sense, the word 'or' is a disjunctive particle indicating an alternative. It often connects a series of words or propositions, presenting a choice of either." We find also, in "Words and Phrases," that the word "or" is sometimes used as a conjunctive as well as a disjunctive, and that the word "or" is frequently used interchangeably with the word "and," and, if it becomes necessary to correctly interpret and apply the meaning of the Legislature, the word "and" will be read in place of the word "or." See 5 Words and Phrases, Third Series, p. 654 et seq.

[3] To properly interpret the use of the words which we are considering, we must first ascertain the intent actuating the Legislature. By reading sections 21, 23, and 131 together, it is evident that the Legislature had in mind the purpose of setting forth a rule of law which would define the right of way to automobile drivers about to use the public highway as defined by section 21; that is, the portions thereof as are used by vehicles as contradistinguished from other portions used by pedestrians, or reserved for sidewalk or other kindred purposes; and that the location of the property line outside of the area devoted to vehicular traffic was not intended to be included within a street or highway intersection. That the Legislature intended to, and the language of the sections considered, include only the area bounded by the curb lines of the streets involved, where the intersection of the public highway chances to be a city street, is further supported by the fact that outside of incorporated cities the boundary or exterior lines of public highways are almost universally coincident with adjoining property lines, thus in both cases enforcing the idea that the portion of the public highway, whether outside or inside incorporated cities, when intersections are mentioned, refers to and means only that area available for vehicular traffic.

[4] This interpretation fully answers the contention of the appellant that the court erred in refusing requested instructions which would enlarge the area of street intersections so as to include considerable territory not available for use by vehicular traffic. The interpretation which we think is the common sense view of the sections considered also determines the right of way between the parties to this action. This is shown by the

testimony of the defendant himself, only one sentence of which we need to here set forth, to wit: "Assuming that the intersection on the south side is marked by the property line prolonged by Vermont avenue, and on the west by the property line prolonged across Los Feliz, I was in the intersection long before Mr. Tyson, to my recollection." As we have heretofore shown, the area in which the defendant placed himself and his automobile began at a line 40 feet south of Los Feliz boulevard, and within which territory he may have been, as testified by himself, and yet the right of way would unquestionably belong to the plaintiff Tyson, if the automobile driven by him were nearer the intersection than the distance within the 40-foot area claimed by the appellant as marking the line where their respective rights began. All the credible testimony in the case is to the effect that the plaintiff was nearer the intersection than the defendant, and actually entered the intersection, as we have defined it, before the defendant did so. We say "credible testimony" because the testimony of the one witness for the defendant, when analyzed, shows a complete misconception of both time and distance.

[5] It may be further said that, if the appellant desired a more explicit instruction be given to the jury, relative to intersections, than the reading of section 23 of the California Motor Vehicle Act, it was appellant's duty to ask for a correct instruction more fully defining the area included within the term "intersection," and not to rest his case upon the requesting of instructions manifestly erroneous.

[6] It is further insisted that the court erred in giving to the jury an instruction in these words: "You are instructed that the presumption is that every man obeys the law, and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and in his rightful place. This presumption is in itself a species of evidence, and it shall be considered by you in your deliberations." This instruction was given to the jury on the theory that certain subdivisions of section 1963 of the Code of Civil Procedure warrant the application of the presumptions there mentioned. Just how this instruction can be considered proper, where each party to an automobile collision charges the other with the sole negligence which resulted in the collision, and the circumstances attending the collision are fully testified to by the respective parties and also by eyewitnesses, does not clearly appear. It would seem that both parties would be equally entitled to the presumption of taking ordinary care for his own welfare, and also that he was obeying the law. In support of the instruction, however, we are cited to the case of *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393, 395,

where a somewhat similar instruction was given to the jury reading as follows: "The presumption is that every man obeys the law and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence." At first reading it might seem that the approval of the instruction which we have just quoted is conclusive in favor of the instruction involved in the instant case. A closer inspection of the instruction given in the *Olsen Case*, and relied upon by the respondent in support of the instruction given in the instant case, shows that the two instructions are readily distinguishable. In the instant case no limitation is placed upon the instruction, and the presumption was not only declared to be a species of evidence, but was to be considered by the jury at all times in its deliberations, and in that particular differs very materially from the limitation placed upon the instruction in the *Olsen Case*. There it is said: "This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence." It may be further observed that the opinion in the *Olsen Case* does not cite or analyze any former cases where a like presumption has been held applicable to instances where all the parties are alive and the circumstances are fully testified to by them and by eyewitnesses. The cases which have been called to our attention, and which we have been able to discover where the presumption as to taking care of one's self and obeying the law, relate to instances where one of the parties is deceased. As said in *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 P. 1083, 1085: "There is also another well-recognized rule of law applying to accidents like the one in the case at bar, to wit, that deceased is presumed to have exercised ordinary care for his own safety." This rule is fully and fairly stated by Mr. Justice Henshaw in the case of *Crabbe v. Mammoth Channel G. M. Co.*, 168 Cal. 500, 143 P. 714, 716, as follows: "Where death is occasioned under circumstances such as this, without eyewitnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death, and that law is found in the presumption of the Code of Civil Procedure, namely, that a person takes ordinary care of his own concerns. Code Civ. Proc. § 1963, subd. 4. * * * This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide"—citing *Boyle v. Coast Imp. Co.*, 27 Cal. App. 714, 151 P. 25; *Kreitzer v. Southern Pacific Co.*, 38 Cal. App. 654, 177 P. 477. And as said in the leading case of *Larrabee v. Western Pac. Ry. Co.*, 173

Cal. 743, 161 P. 750, 751: "But, touching the presumption that the deceased exercised ordinary care, it is to be noted that that presumption is given weight only in the absence of evidence on the subject of the deceased's conduct. It has been declared to be 'an artificial presumption of so weak a character that it is not to be allowed to have the effect of evidence before the jury where the uncontradicted evidence of the circumstances attending the accident overthrows it.'" A large number of cases are cited in this opinion.

A well-considered opinion citing authorities on the subject of the application of the presumption that a party takes due care of his own welfare is to be found in the case of *Ross v. Railways Co.*, 47 Cal. App. 753, 191 P. 703. It is there held that the presumption is applicable where one party is deceased, and the death of the party alleged to be due to the negligence against whom the action is prosecuted where there were no eyewitnesses to testify to facts controverting the presumption. To the same effect is the case of *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027. In that case there was no testimony as to the conduct of the defendant, and the presumption of due care was allowed to support the judgment. See, also, *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999; *Carpenter v. A. T. & S. F. Ry. Co.*, 51 Cal. App. 60, 195 P. 1073.

In the case of *Ryan v. Union Ry. Co.*, 46 Utah, 530, 151 P. 71, 74, the Supreme Court of Utah, considering the question of presumptions, held as follows: "In the absence of evidence there is a presumption that the deceased used due care and, for his protection, did all that reasonably was required of him. * * * When, however, facts and circumstances are proven to show just what the deceased did, or failed to do, then his care, or the want of it, is to be determined not on the presumption, but upon the facts and circumstances proven."

It is further held that, where all the facts and circumstances were proven, the court is not authorized to cast a presumption into the scales in favor of the plaintiff.

In the case of *Osterholm v. Butte Electric Ry. Co.*, 60 Mont. 193, 199 P. 252, 255, the Supreme Court of Montana thus speaks of the presumption we are considering: "This statute, however, applies to a defendant as well as to a plaintiff, and one of the questions at issue here is whether the proper kind of care was used. The plaintiff charges negligence on the part of the defendants; the defendants charge negligence on the part of the plaintiff. The court has no more right to presume that the deceased used ordinary care than it has to presume that the defendants used ordinary care. This is one of the questions of fact at issue."

[7] A number of the decisions are to the effect that the presumption is not to be considered evidence in any case, but, irrespective of those decisions, the overwhelming weight of authorities, as shown by the long list of cases cited in appellant's brief, is to the effect that, where all the circumstances attending the collision of two automobiles is fully testified to by eyewitnesses, including the testimony of the parties themselves, the cause is to be determined by the jury upon the facts and circumstances testified to, and not upon a presumption that one of the parties obeyed the law, and that the other party did not.

Our attention is also called to the recent case of *Western & Atlantic Railroad v. Mary E. Henderson and Maryland Casualty Co.*, decided May 27, 1929, 279 U. S. 639, 49 S. Ct. 445, 447, 73 L. Ed. 884, where the United States Supreme Court has held that a Georgia statute declaring that a railroad company shall be liable for damages to person or property, by the running of its trains, unless the company shall make it appear that their agents have exercised all reasonable or ordinary care and diligence, the presumption in all cases being against the company, to be violative of the Fourteenth Amendment of the United States Constitution. The action was prosecuted to recover damages for a death occurring at a grade crossing on a public highway, the appellee's husband, the driver of a motortruck, having been killed in a collision between the motortruck which he was driving and a train operated by the company. In considering the question of the presumption, the Supreme Court said: "Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and that every act or omission in plaintiff's specifications of negligence was the proximate cause of the death, and it makes defendant liable unless it showed due care in respect of every matter alleged against it. And, by authorizing the jury, in the absence of evidence, to find negligence in the operation of the engine and train, the court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect." The court further held that the mere fact of the collision between the railway train and vehicle at a highway crossing furnishes no basis for any inference as to whether the accident was caused by the negligence of the railway company or the traveler on the highway, or of both, or without fault of any one. It was further held that the presumption provided for in that case was unconstitutional, in that it violated the due process clause of the Fourteenth Amendment. The presumption provided for in the Georgia statute,

to be indulged in against the defendant in the event of a collision, is the counterpart of the presumption awarded to the plaintiff in the instant case, in determining who was at fault.

[8, 9] It is further contended on the part of the appellant that the court erred in refusing to give to the jury the following requested instruction: "You are instructed that the mere fact, alone, that there was a collision between defendant's automobile and plaintiff's automobile, raises no presumption at all that the defendant was in any way responsible for such occurrence." While the language of this requested instruction may be a correct statement of the law, it is apparent that it sets forth only a principle that is applicable to both parties. As a matter of common knowledge, the conclusion is unescapable that where two automobiles collide in broad daylight, upon an open intersection, one or the other of the drivers is negligent, and possibly both, and the question as to which driver is negligent should be left for the jury to determine upon the facts and circumstances testified to by the eyewitnesses and the parties involved.

[10, 11] What we have said herein, however, does not necessitate a reversal of the judgment. The testimony is overwhelming that the defendant in this case is and was responsible for the injuries resulting from the collision. The testimony is all to the effect that the automobile driven by the plaintiff was within the intersection before the entry thereof by the defendant, and, as we have said, the testimony of the defendant himself practically admits this contention. The fact that he was in error as to the true boundary line of the intersection does not relieve him from responsibility, and, even though it be held that under the circumstances of this case the giving of the challenged instructions was improper, there has been no miscarriage of justice, as the jury could not very well have brought in any other verdict.

The judgment is affirmed.

110 Cal. App. 691

KELLETT v. KELLETT.

Civ. 7581.

District Court of Appeal, Second District,
Division 2, California.

Dec. 29, 1930.

1. Divorce ⇨161.

Refusing plaintiff additional time to file affidavits to support motion to vacate interlocutory divorce decree and to rebut defend-

ant's counter affidavit held not abuse of discretion under circumstances (Code Civ. Proc. § 2044).

The circumstances disclosed that while the defendant's counter affidavit was not filed until time set for hearing, it had been served on plaintiff's counsel two days before the hearing and that the hearing was continued from 10 o'clock in the morning until 2 in the afternoon at plaintiff's request, at which time affidavits were filed by plaintiff, and that the additional affidavits were desired to support plaintiff's affidavits rather than to rebut defendant's counter affidavit.

2. Divorce ⇨161.

Defaulting defendant has such standing in court as entitles him to insist on integrity of interlocutory divorce decree (Civ. Code, § 131).

3. Divorce ⇨161.

Defaulting defendant may introduce evidence to show that interlocutory divorce decree should not be vacated (Civ. Code, § 131).

4. Divorce ⇨184(6).

Court's decision that interlocutory divorce decree should not be disturbed, based on conflicting evidence in affidavit form, could not be disturbed on appeal.

5. Divorce ⇨161.

Court cannot set aside property settlement executed by parties to divorce action on motion to vacate interlocutory decree.

6. Judgment ⇨382.

Plaintiff, obtaining judgment for all relief possible under complaint, could not have judgment set aside under statute by reason of mistake or excusable neglect (Code Civ. Proc. § 473).

Under Code Civ. Proc. § 473, courts may relieve party from judgment taken against him through his mistake, inadvertence, or excusable neglect, but are not authorized to relieve party from judgment in his favor.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Marion Clara Kellett against Thomas N. Kellett. The plaintiff obtained an interlocutory divorce decree. From an order denying a motion to set aside the interlocutory decree and contract of property settlement, the plaintiff appeals.

Affirmed.

Betty Graydon, of Los Angeles, for appellant.

Wm. M. Morse, Jr., of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

This is an appeal from an order of the trial court denying a motion made by appellant, as plaintiff in such court, under section 473, Code of Civil Procedure, for an order setting aside the interlocutory decree of divorce entered in her favor, and also to set aside a contract of property settlement between the parties and two deeds executed at the same time in connection with the property settlement, and to reopen the cause for further hearing.

The record shows that appellant filed her complaint for divorce in the superior court of Los Angeles county on July 29, 1927; that the default of respondent was entered therein August 10, 1927; and that an interlocutory decree in favor of appellant thereupon issued. On motion of appellant's attorney the case was thereafter reopened to prove a property settlement between the parties, and the decree as amended awarded the real property mentioned in the settlement to respondent, certain personal property to appellant as well as the sum of \$2,400, to be paid in monthly installments, and created a lien on the real property described to secure the payment of said sum. Thereafter and within the six months' period appellant filed her motion under section 473, Code of Civil Procedure, for the order first mentioned and attached to it her supporting affidavit. For the purpose of this appeal it is sufficient to say that the affidavit states that the defendant, about a month after the marriage, commenced treating the plaintiff unkindly and persisted in such course of conduct for a period of about six months, when he abandoned her and went to live with his sister, leaving plaintiff without means of support; that the latter filed suit for separate maintenance against defendant and about two months later he came back to her, said he was in the wrong and sorry and asked her to take him back, promising that he would conduct himself as he should and would convey to her one-half of his property; that plaintiff was anxious for a reconciliation, accepted his promises, effected a reconciliation, and that defendant conveyed to her a one-half interest in his two pieces of real estate; that they lived happily together for three or four months, when defendant again resumed his unkind conduct and former accusations that she married him for his property; that he kept that up for about a year, and as a result plaintiff became physically weak and mentally incapable of resisting his "persistent requests and demands that she reconvey said property to him"; that finally she told him that she did not marry him for his property and would do anything he wanted her to do to prove it; that he then

said that if "she would reconvey to him said property that it would satisfy him that she had not married him for his property alone"; that he promised her "that if she would make said conveyance to demonstrate her love for him he would again reconvey the said property to her after he was convinced of her love"; that he employed his own attorney and told her to go to him; that he instructed the attorney to prepare deeds and a property settlement contract which she signed solely "to demonstrate to the defendant that she really loved him and relied on his promise that he would reconvey said property to her and that they would thereafter live happily together"; that after the execution of said deeds and contract the defendant suggested to her that she should get a divorce from him, and then talked over the matter of a divorce with said attorney; that thereupon she told defendant she did not want a divorce "and that they had not talked that matter over," and she refused to do so; that defendant said she must get a divorce from him, "that there must be a divorce in order for the property settlement to be good," and that "she could only prove her love by getting a divorce from him"; that he would "later on remarry her and redeed said property to her if he was entirely convinced that she had not married him for his property"; that she could only convince him by getting a divorce; that she informed him she would do anything to satisfy him of her love, and at his direction went to the same attorney whom defendant had employed and caused the divorce action to be filed; that after it was filed she told him she did not want to go ahead with it, but he told her she must and resorted "to threats and violent methods" in order to intimidate and coerce her into complying with his said demands; that since the rendition of said decree of divorce she has become convinced that all of defendant's representations were false and fraudulent and made for the "purpose of reacquiring said property."

On the day the motion in question was heard, April 23, 1928, defendant filed a counter affidavit denying the serious statements contained in plaintiff's affidavit and placing a version on some of the incidents alleged in the affidavit quite inconsistent therewith. The counter affidavit was served on opposing counsel on April 21, 1928. It also appears from the records of the case that the motion was called at 10 a. m. on April 23d, at which time plaintiff's counsel stated that they had not had time to file affidavits in opposition to defendant's counter affidavit and asked the court for time in which to do so; that thereupon the court continued the hearing of said motion to 2 o'clock p. m. of the same day and at the further hearing allowed plaintiff, over defendant's objection, to file the affidavit of Mrs. Clara Bailey, the mother of plaintiff; that plaintiff then requested time to prepare

and file further affidavits of witnesses "in support of plaintiff's motion and in opposition to defendant's affidavit," which request the court denied, proceeding to hear arguments of counsel and rendering its decision denying said motion on said day. Notice of appeal was filed May 7, 1928.

There is no question but that it is the policy of the law to guard against collusion and fraud in divorce cases and that it should be its aim to afford the fullest possible hearing in such matters (*McBlain v. McBlain*, 77 Cal. 507, 20 P. 61), and it is appellant's contention that the court erred in denying her request for time to file further affidavits and her motion for leave to bring in witnesses to testify in open court.

[1] While it was not filed until the time set for the hearing, the counter affidavit of defendant was served on counsel for plaintiff two days before the hearing, and the hearing was continued from 10 o'clock in the morning until 2 o'clock in the afternoon at plaintiff's request, at which time the court permitted the affidavit of Mrs. Bailey to be filed by plaintiff. The contents of this affidavit, however, are more in corroboration of the affidavit of plaintiff than in rebuttal of that of defendant; and the record seems to indicate that the additional affidavits were desired to support plaintiff's affidavits rather than to rebut the counter affidavit of defendant, which for the most part consists of denials only, the few affirmative allegations, with the exception of the statement of an occurrence in the attorney's office, being statements of matters of conversation between the parties themselves. We see no abuse of discretion in not allowing more time than was given to file counter affidavits. As to additional affidavits "to support" that of plaintiff, they would seem to be cumulative and within the discretionary power of the court to limit. Section 2044, Code Civ. Proc.; *Estate of Wineteer*, 176 Cal. 28, 167 P. 516.

[2-4] Counsel who filed the opening brief for appellant on this appeal seem to urge that there was error in denying the motion because it was based on an affidavit setting up collusion and fraud. Section 131 of the Civil Code, referring to divorce proceedings, among other things provides: "After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other." And a defaulting defendant has such standing as entitles him to insist on the integrity of the interlocutory decree. *Suttman v. Superior Court*, 174 Cal. 243, 162 P. 1032. That means necessarily that he may introduce evidence to show that it should not be vacated when, after notice, the validity of the decree is attacked. Respondent did so in this case, and the court having decided the question on extremely conflicting evidence, we are not au-

thorized to interfere with its decision even though the evidence is in affidavit form. *Kataoka v. Hanselman*, 150 Cal. 673, 89 P. 1082; *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001. And that would seem to be true regardless of the grounds alleged.

[5] It is hardly necessary to say that the court cannot set aside contracts such as deeds and property settlements executed by the parties to an action, on a motion. A plenary action is required for that purpose.

[6] Appellant based her right to the relief asked on section 473 of the Code of Civil Procedure, by reason "of a mistake, excusable neglect and fraud, coercion and undue influence practiced upon her by the defendant," as shown by her affidavit. Such section provides that "the court * * * may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding *taken against him* through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken; and provided, further, that said application must be accompanied with a copy of the answer, or other pleading proposed to be filed therein, otherwise said application shall not be granted." (Italics ours.) The motion was filed in time, but the judgment which appellant asks to set aside is one *in her* favor and *not against her*, as the section provides, and no copy of any pleading accompanied the application, nor could it, as appellant apparently desires to have the interlocutory decree set aside so that she can dismiss the action or at least not have a judgment in her favor, as her affidavit impeaches her action in filing the complaint. By the judgment which she seeks to set aside she obtained all the relief possible under her complaint, and it is that she is objecting to. She says she did not want a divorce but was forced into it by her husband, against whom the judgment ran. She might be entitled to relief by a plenary action if she could convince a court of equity that she came into the court with clean hands, but she certainly shows nothing that brings her within the section upon which she relied in the instant case. Her affidavit does not show mistake, inadvertence, surprise, or excusable neglect, but fraud, and would not seem to make out a case to which the section applies even if the judgment were not *in her* favor but *against her*.

It was the duty of the court, inasmuch as the affidavit filed by appellant showed collusion, to make such inquiry as was necessary to satisfy it that there was no imposition, which was undoubtedly done. But even if the evidence produced had convinced the judge that collusion was involved, it would

have been necessary, in our opinion, to deny appellant's motion and on the court's own motion to have set aside the decree. Evidently the court did not conclude from the evidence that such should be done, and we can see no error in the denying of appellant's motion for relief.

It is only fair to present counsel for appellant to say that she did not come into the case until the matter had already been submitted on appeal, and then only for the purpose of endeavoring to reopen the proceeding.

Judgment affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

110 Cal. App. 738

GONZALEZ v. NICHOLS et al.
Civ. 174.

District Court of Appeal, Fourth District,
California.

Dec. 31, 1930.

Rehearing Denied Jan. 26, 1931. Hearing Denied by Supreme Court Feb. 19, 1931.

1. Automobiles ⇨245(17).

Negligence of truck driver in leaving truck parked during dark night on pavement, with rear light obscured, resulting in collision with automobile, *held* properly submitted to jury.

2. Automobiles ⇨245(83).

Automobile driver traveling 35 miles an hour during nighttime, colliding with truck parked on pavement with rear light obscured, *held* not contributorily negligent as matter of law.

3. Appeal and error ⇨1050(1).

Plaintiff's physician's testimony that plaintiff told him another physician removed glass from plaintiff's arm *held* not prejudicial in action for injuries.

4. Appeal and error ⇨1048(5).

Error in form of question to rebut truck driver's denial to making statement *held* not prejudicial, where answer was incoherent and truck was stationary at time of accident.

Driver of truck collided with while parked on highway denied on cross-examination making of statement that he was tired driving immediately before collision and turned truck over to another whom he regarded as incompetent driver. On rebuttal, plaintiff stated substance of conversation in an incoherent manner from which it was impossible to tell what he meant.

5. Automobiles ⇨242(2).

Doctrine of *res ipsa loquitur* *held* inapplicable to collision between automobile and truck parked on highway.

6. Appeal and error ⇨1170(9).

Instruction on *res ipsa loquitur* in automobile accident case was error, but harmless, where court otherwise placed burden of proving negligence on plaintiff (Const. art. 6, § 4½).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by S. M. Gonzalez against H. S. Nichols and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Swing & Wilson, of San Bernardino, for appellants.

John H. Corning, of San Francisco, and Dean Sherry, of San Diego, for respondent.

CARY, P. J.

This action was brought by plaintiff to recover damages for injuries received in a collision between plaintiff's automobile and defendant's truck. From a judgment entered upon a verdict in favor of plaintiff Gonzalez and against defendant, defendant appeals.

As grounds for reversal the defendant contends: (1) That the evidence fails to establish negligence; (2) that the evidence shows contributory negligence as a matter of law; (3) that the court erroneously admitted certain evidence; (4) that the court erred in giving and refusing certain instructions; and (5) that the court erred in permitting certain questions to be asked on the examination of the jurors.

Viewed in the light most favorable to the plaintiff, the facts follow: The accident took place between 1 and 2 o'clock in the morning on the main highway leading from Imperial Valley north to the city of Riverside, at a point some 8 or 10 miles south of the station of Whitewater. The road is paved, and on either side of the pavement are shoulders of hard-packed sand sufficiently wide to allow a vehicle such as defendant's truck to be parked thereon. There are several storm drains or dips in the road in this vicinity, and in the bottom of one of these a large truck belonging to the defendant was standing close to its right edge of the pavement and headed towards Riverside. All of its wheels were on the pavement. Two employees of the defendant, assisted by two other men, were engaged in replacing on the truck a load of baled alfalfa which had previously fallen off. Some of these bales had already been loaded on the truck while others were scattered

along the roadway, some of them on the pavement in rear of the truck. The truck had a lighted tail-light located two inches underneath and some three feet forward of the rear end of the bed of the truck. The plaintiff with a single passenger in his automobile was driving north along this highway. The night was unusually dark. The lighted headlights and the brakes on the plaintiff's machine were in good condition and he was watching the road ahead. Driving at from 30 to 35 miles an hour plaintiff, due to the combination of the dip in the road, the bales of hay in rear of the truck, the position of the truck's tail-light underneath the bed of the truck, and the headlights of a car coming from the opposite direction, did not see the truck until he was within 15 or 20 feet of it. The car coming in the opposite direction was just passing the truck, making it impossible for plaintiff to swing to his left. Plaintiff immediately slammed on his brakes with such force that his passenger was hurled forward against the windshield with sufficient force to break the glass. The right front fender of plaintiff's automobile collided with the left rear portion of defendant's truck with the result that plaintiff's machine was severely damaged and the plaintiff seriously injured. Evidence was introduced on behalf of the plaintiff without objection that the driver of the truck had, after the accident, stated that he saw plaintiff's headlights and tried to get out a flashlight and signal him, but was unable to do so on account of his nervousness and excitement.

[1, 2] Under these circumstances the question of the negligence of the defendant was properly submitted to the jury, nor can it be said as a matter of law that plaintiff was guilty of contributory negligence in failing to discern the truck sooner.

[3] Defendant complains that the court, over objection, allowed plaintiff's physician to state that plaintiff had told him another physician had removed a piece of glass from plaintiff's arm. We fail to see how prejudice could have resulted therefrom.

On cross-examination of defendant's truck driver he was asked the question: "Did you state in substance at that conversation that you had been working about 18 or 20 hours for Mr. Nichols on the day immediately, and the time immediately preceding the collision, and that you were tired out, so tired that you were unable to drive any more and had turned the truck over to Mr. Hedgpeth, whom you regarded as an incompetent driver?" A. "I do not remember of making it." Upon rebuttal plaintiff was asked the question: "State the substance of that conversation if you remember it." Over objection plaintiff replied: "He said, 'I have been on the road over 24 hours and I was too tired, and if my helper was incompetent enough to drive the truck,

and the helper had been driving before, on the last load.'"

[4] While the proper question to have asked plaintiff on rebuttal would have been whether or not at the stated time and place and in the presence of the stated witnesses the truck driver had made the statement asked in the cross-examination, quoting it, and while this method was not pursued, yet the error cannot be considered prejudicial for two reasons: First, the answer is so incoherent that it is impossible to tell what it means, and, second, even if we should assume that the answer meant that the truck driver had turned the truck over to his assistant, whom he regarded as an incompetent driver, yet whether the truck driver's assistant was competent or incompetent to drive the truck could in no wise have prejudiced the defendant, since the truck was stationary at the time of the accident.

Several other assignments of error of similar nature are made. These we have carefully examined, but find nothing prejudicial. We find no error in the court's rulings on the examination of the jurors.

[5, 6] Defendant complains of the giving and refusing of certain instructions, but the only one which requires special notice is the following: "The court further instructs you that the plaintiff is not required to show particularly what the specific act of negligence was which produced the accident, but is only required to show that the collision is one which would not ordinarily occur had due care been employed by the defendants. The burden of proof then shifts to the defendants to show their freedom from negligence." The theory under which this instruction was given is not clear. It is apparently an attempt to state the doctrine of *res ipsa loquitur*, and plaintiff, in support of this instruction, cites *Soto v. Spring Valley Water Co.*, 39 Cal. App. 187, 178 P. 305, where a similar instruction was approved. That case was one in which the doctrine of *res ipsa loquitur* was applicable. But under the circumstances in the case at bar that doctrine has no application. The giving of this instruction was therefore error. It remains to be determined whether this error is sufficient to require a reversal of the cause. Elsewhere in the instructions the jury were repeatedly told that the burden was on the plaintiff to prove by a preponderance of the evidence that the negligence of the defendant was the proximate cause of the injury. In *Tower v. Humboldt Transit Co.*, 176 Cal. 602, 169 P. 227, an instruction on the doctrine of *res ipsa loquitur* was held erroneous because not applicable to the facts. While the Supreme Court reversed the case because of that and other instructions, yet the court pointed out that the proof of negligence in that particular case was so unsatisfactory that the errors in instructions could not be

disregarded under the provisions of section 4½ of article 6 of the Constitution. Here, however, an exceptionally clear case of negligence is presented. We are therefore of the opinion that the giving of this instruction cannot be said to have resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: MARKS, J.; BARNARD, J.

110 Cal. App. 248

CITY OF LOS ANGELES v. OLIVER et al.
Civ. 7216.

District Court of Appeal, Second District,
Division 2, California.

Dec. 5, 1930.

Rehearing Denied Dec. 30, 1930. Hearing Denied by Supreme Court Feb. 2, 1931.

1. Eminent domain ⇨262(5).

That affidavit, basis of order to show cause why order should not be made giving city immediate possession of land condemned, did not show costs had been deposited, held not prejudicial, where costs were deposited before motion to quash was heard.

2. Eminent domain ⇨244.

"Judgment" referred to in statute regarding taking possession of condemned land is judgment awarding damages and not final judgment condemning land (Code Civ. Proc. § 1254; St. 1903, p. 385, § 31, and section 12 [page 379], as amended by St. 1909, p. 1040, § 7).

Code Civ. Proc. § 1254, provides that, whenever plaintiff shall have paid into court for defendant full amount of "judgment," Superior Court in which proceeding was tried may authorize plaintiff, if already in possession, to continue therein, and, if not, to take possession of and use property during pendency of and until final conclusion of litigation.

[Ed. Note.—For other definitions of "Judgment," see Words and Phrases.]

3. Eminent domain ⇨244.

Interlocutory judgment in condemnation proceeding awarding damages is "final judgment," warranting order for immediate possession (St. 1903, p. 379, § 12, as amended by St. 1909, p. 1040, § 7; Code Civ. Proc. § 1254).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

4. Eminent domain ⇨247(1).

Statute providing for interest on damages awarded, where order is made letting condemnor into possession, is inapplicable under present statute (Code Civ. Proc. §§ 1249, 1254).

Code Civ. Proc. § 1249, provides that, if order is made letting plaintiff into possession as provided in section 1254, compensation and damages awarded shall draw lawful interest from date of such order. Such provision is, however, held not to apply to section 1254 as it now exists.

5. Eminent domain ⇨247(4).

City's payment into court of amount of interlocutory judgment in condemnation proceedings was equivalent to tender and stopped running of interest (St. 1903, p. 385, § 31).

The condemnation proceedings were brought under Street Opening Act of 1903, St. 1903, p. 385, section 31 of which provides that, as soon as there is sufficient money in hands of city treasurer in fund devoted to proposed improvement to pay, amount awarded defendant by interlocutory judgment shall be paid to parties entitled or into court for their benefit. As soon as city had sufficient money on hand, award was paid into court.

6. Eminent domain ⇨244.

Where order is made in condemnation proceedings letting plaintiff into immediate possession, requirement of deposit of sum, in addition to amount of judgment, is in discretion of court (Code Civ. Proc. § 1254).

7. Eminent domain ⇨244.

Refusal to fix further sum, in addition to damages awarded on letting condemnor into immediate possession, being discretionary and based on conflicting evidence, would not be disturbed by appellate court.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by the City of Los Angeles against J. G. Oliver, Leonard J. Woodruff, and others. From the judgment, defendant Woodruff appeals.

Affirmed.

J. A. Coleman and Ed. Fitzpatrick, both of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Arthur Loveland, Arthur W. Nordstrom, and Frederick Von Schrader, Deputy City Attys., all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

This is an appeal by Leonard J. Woodruff from an order made by the honorable Walter

S. Gates, judge of the Superior Court in and for Los Angeles county, giving respondent immediate possession and use of the real property belonging to appellant, described in said order.

Appellant was one of the defendants in an action brought by the city of Los Angeles to condemn for street purposes a portion of a lot belonging to him, as well as property of the other defendants. The defendant Woodruff waived a jury trial, and the hearing before referees appointed in said action was held in September, 1927. On April 12, 1928, the referees returned and filed their report, fixing the value of the land to be taken from appellant at \$162,496, and his damages at \$16,000, or a total damage of \$178,496. The damages were fixed as of the date of the issuance of the summons, August 6, 1926. The report came on for hearing before the honorable Hartley Shaw, a judge of said Superior Court, on the 16th day of July, 1928, on the objections and exceptions filed thereto by the appellant herein, at which hearing witnesses were examined on behalf of both respondent and appellant, and on November 28, 1928, said judge made his findings of fact and conclusions of law, to the effect that the value of the land taken and severance damages were as found by the report of the referees; that the use to which said property sought to be condemned was to be applied was one authorized by law; that the acquisition thereof was necessary to such use; and that upon payment of said sum so awarded to the defendant or into court for his benefit, together with costs of suit, the plaintiff should be entitled to a decree condemning such land to the use of the plaintiff and the public for the widening of Cahuenga boulevard. A judgment based on such findings and conclusions was also signed the same day, to the effect that, upon payment to the several defendants or into court for their benefit severally of the amounts awarded them, the land sought to be condemned should be condemned for the use of said city and the public for such purposes, which judgment fixed appellant's costs at \$21.50. An appeal was taken from said judgment by the defendant Woodruff, appellant here, which was decided by this court on December 3, 1929 (102 Cal. App. 299, 283 P. 298). It was appellant's contention on such appeal that the 1927 amendment of section 10 of the Street Opening Act of 1903 (St. 1903, p. 379, § 10, as amended by St. 1927, p. 1146, § 8) did not apply to pending actions, and that the damages should have been based on the value of the property at the time of trial instead of the date of the issuance of the summons. While that appeal was pending, the city of Los Angeles filed an affidavit in said action for an order directing the defendant Woodruff to show cause before said court why an order should not be made giving the city immediate

possession of the land of defendant described in said findings and interlocutory judgment, reciting that the amount fixed as compensation, \$178,496, was paid into court on August 17, 1929. Defendant Woodruff appeared in opposition thereto, and filed a motion to quash said order to show cause and an affidavit by one R. E. Bonsall, which stated that he had resided in Hollywood for eight years, and that during such time was dealing in real estate, specializing in Hollywood boulevard business property, particularly from Vine street on the east to La Brea on the west; that appellant's property is on the south side of Hollywood boulevard one block west of Vine street; that for eight years he as a realty salesman had made investigation and inquiry as to sales, leases, and transactions concerning real property in the vicinity of that of defendants, and that the reasonable market value of defendant's property per front foot was as follows: July 30, 1927, \$7,500; September 28, 1927, \$7,500; July 16, 1928, \$8,000; and August 6, 1928, \$6,000. The width of defendant's property so sought to be taken was 40 feet. The hearing on said order to show cause was argued before Judge Gates on December 6, 1929, at which time both sides stipulated that the amount of the judgment, together with the costs, had been paid into court by plaintiff for the benefit of the defendant Woodruff, and on January 3, 1930, an order was made by Judge Gates granting immediate possession and use of the property of the defendant described in the complaint to the city of Los Angeles.

Appellant contends that the lower court erred (1) in overruling appellant's motion to quash said order to show cause and (2) in making the order for immediate use and possession of said land, and in refusing to fix a sum as a fund to pay further damages and costs.

[1] (1) Counsel for appellant urge that, inasmuch as the affidavit on which the order to show cause was based did not show that the costs of \$21.50 had been deposited, the motion to quash should have been granted. The record shows that the costs were deposited before the motion was heard, and consequently there would not seem to be any merit in the contention or any prejudice resulting to defendant.

(2) Appellant under his second contention urges that the order for immediate possession should not have been made (a) because there was no final judgment entered in the case as provided by section 31 of the 1903 Street Opening Act (St. 1903, p. 385), nor any final order condemning the land at the time the order was made, (b) because at such time full compensation had not been deposited in court, for the reason that no interest had been paid on the interlocutory judgment, and, (c) because the

order did not provide a fund to insure the payment of any further damages and costs that might be awarded.

(a) Appellant contends that there should have been a final judgment under section 31 of the Street Opening Act of 1903. Section 12 of such act (St. 1903, p. 379, as amended by St. 1909, p. 1040, § 7), provides: "Upon the confirmation of the report of the referees, or receipt of the verdict of the jury, or the filing of the findings of the court, the court shall make and enter an interlocutory judgment in accordance with such report, verdict or findings, adjudging that upon payment to the respective parties, or into court for their benefit, of the several amounts found due them as compensation, and of the costs allowed to them, the property involved in the action shall be condemned to the use of the plaintiff, and dedicated to the use specified in the complaint." Section 31 provides: "* * * On satisfactory proof being made to the court of payment of the amounts awarded by the interlocutory judgment to the respective parties entitled thereto, or into court for their benefit, it shall direct the interlocutory judgment to be satisfied, and shall make and enter a final judgment, condemning the lands described in the complaint to the use of the plaintiff for the purposes specified in such complaint."

[2, 3] The provisions of section 12 have been strictly followed in the instant case. An appeal was taken from the interlocutory judgment rendered, and the proceedings for the order for possession under section 1254 of the Code of Civil Procedure were taken while such appeal was pending. It is very evident from a reading of section 1254 that the judgment referred to there is the judgment referred to in section 12 of the Street Opening Act awarding damages to the plaintiff, and not the final judgment condemning the land. The language of section 1254 is so clear that it is doubtful if appellant would have made this contention if it were not for certain language appearing in the case of *County of San Mateo v. Coburn*, 130 Cal. 631, 637, 63 P. 78, 80, 621, where the court says: "A final decree of condemnation can be made only after full compensation has been made to the owner, or ascertained and paid into court for him; and, as the order for possession pending the appeal must have this final decree for its foundation, it must fall with the reversal of the decree." (Italics ours.) In that case the court reversed the judgment entered below condemning the land and used the language quoted. The case is to be distinguished, we believe, in view of the fact that section 1254 of the Code of Civil Procedure as it existed then is not the one in force now, and, as a matter of fact, the section then in force was afterwards held unconstitutional by the Supreme Court. *Steinhart v. Superior Court*, 137 Cal. 575, 70 P. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183. The present section was enacted in 1903, after such decision.

There can be no question but that the interlocutory judgment, so called, is a final judgment. The Supreme Court, in the case of *California Southern R. R. Co. v. Southern Pacific R. R. Co.*, 67 Cal. 59, at page 63, 7 P. 123, 126, uses the following language as to such a judgment: "The judgment based in part on the assessment of damages, and adjudicating that the use is public, and the taking necessary, etc., is the 'final judgment' from which an appeal may be taken." In the case of *City of Los Angeles v. Pomeroy*, 132 Cal. 340, 64 P. 477, which was a motion in the Supreme Court to stay proceedings pending an appeal from a final order of condemnation made by the lower court, the court, in speaking of the order, said: "This was a special order made after final judgment"—citing *California Southern R. R. Co. v. Southern Pacific R. R. Co.*, supra.

The case of *Heilbron v. Superior Court*, 151 Cal. 271, 90 P. 706, grew out of a condemnation proceeding in which the plaintiff had judgment for the value of the land and injury resulting to the remaining land. Defendant then gave notice of intention to move for a new trial, and at the same time perfected his appeal from the judgment, which appeal was pending when the plaintiff made a motion in the trial court for an order under section 1254, Code of Civil Procedure, authorizing it to take immediate possession of the land described in the complaint. When the motion came on for hearing in the court below objection was made that the court had no jurisdiction to entertain the same, which objection was overruled, whereupon application for a writ of prohibition was made to the Supreme Court and decided in the opinion cited. The point raised here was not called to the attention of the court in the *Heilbron* Case. However, the court acted on the application, and, in view of that fact, and of the clear reading of section 1254, as well as the further fact that this section was not in force when the facts under the case of *San Mateo v. Coburn*, supra, arose, and in view of the decisions of the Supreme Court on the finality of the interlocutory judgment both before and after the *Coburn* Case, it would seem that the statement quoted from the *Coburn* Case is not now the law of this state.

[4, 5] (b) Counsel for appellant urge that interest should have been computed on the award made, citing Act 3757, page 1384, § 1, *Deering's General Laws of California 1923*, which provides that "the rate of interest * * * on * * * judgments rendered in any court of this state, shall be seven dollars upon the one hundred dollars for one year." Counsel urge that, interest not having been so computed, either from a date commencing thirty days after entry of the interlocutory judgment or from August 17, 1929, the date when plaintiff had sufficient money on hand to pay the judgment, and such amount not hav-

ing been deposited, full compensation was not paid into court. Section 1249, Code of Civil Procedure, provides, among other things: "If an order be made letting the plaintiff into possession, as provided in section 1254, the compensation and damages awarded shall draw lawful interest from the date of such order." Such provision, however, is held by the Supreme Court to not apply to section 1254 as it now exists. *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 177 Cal. 249, 170 P. 426. The proceedings in this case were brought under the Street Opening Act of 1903, section 31 of which provides that, as soon as there is sufficient money in the hands of the city treasurer in the fund devoted to the proposed improvement to pay the amounts awarded defendant by the interlocutory judgment, it shall be paid to the parties entitled or into court for their benefit. The appellant concedes that plaintiff did not have such money on hand until August 17, 1929, and the record shows that the award in question here was paid into court that same day. The payment into court of the amount of the interlocutory judgment is equivalent to a tender thereof, and stops the running of interest. *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, supra.

[6] (c) Must the court, in making an order under section 1254 of the Code of Civil Procedure, in all cases require the deposit of a sum in addition to the amount of the judgment? The facts involved in the case of *Spring Valley Water Works v. Drinkhouse*, 95 Cal. 220, 30 P. 218, 219, arose at the time section 1254 was in all substantial matters the same as now, and the court in discussing it said: "This section of the Code is not violative of any provision of the constitution, but directly in line with that instrument wherein it treats of such matters. Section 14, art. 1, provides: 'Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.' It would seem that the framers of both the constitution and the statute had in view the delays incident to condemnation proceedings, and the necessity in many cases of allowing property to be taken and used for a public use during the progress of the litigation, provided an adequate fund to fully reimburse the landowner was first paid into court." It is interesting to note that section 1254 was amended in 1897 (St. 1897, p. 186, § 1) to provide for the making of an order for possession "at any time after the filing of the complaint, and the issuance and service of the summons thereon." Such provision was held violative of section 14, article 1, of the Constitution, as it then existed, because it permitted the taking of property without a judicial determination of the amount constituting "just compensation." *Steinhart v. Superior Court*, supra. Section 1254 was thereafter amended (St. 1903, p. 109, § 1) to provide that the property could be taken "at

any time after trial and judgment entered," so as to meet the requirement of the Constitution, and in 1928 section 14 of article 1 of the Constitution itself was amended to provide that the state or a county, etc., may take "immediate possession and use of any right of way required for a public use * * * upon first commencing eminent domain proceedings * * * and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct." So it will be seen that now there would be no constitutional objection to a section similar to 1254 of the Code of Civil Procedure as it stood prior to its present form, even though the amount deposited would be entirely at the discretion of the court. The industry of counsel has not produced a case passing upon the point appellant urges here, nor has the court found one; but the plain reading of the section shows that the matter of any deposit, in addition to the full amount of the judgment, is in the discretion of the court. After providing for the payment of the amount of the judgment into court the section provides: "And such further sum as may be required by the court." Certainly, if the Legislature had intended to require the judge in every case to order the deposit of an additional sum, it would have used language expressing such intent, such, for example, as "and a further sum in such amount as the court may direct," leaving the amount only discretionary. But the language used leaves the matter of the payment into court of "such further sum" entirely to the court.

In section 1254 we find this language: "In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate." It is plain that the Legislature in this cautionary advice to the court shows its desire that, in so far as is humanly possible, considering the discretion it gave the court in fixing the amount, an amount should be paid sufficient to cover any award that might be made in case the judgment or order is reversed on appeal and a larger sum fixed on the new trial; and it might be argued that, inasmuch as the interlocutory judgment is a fixed amount, the court could only need such advice in fixing the "further sum" mentioned, implying that in every case such "further sum" would be a part of the amount to be "ascertained" by the judge and "paid into court." We must take notice, however, of the fact that all appeals taken are not by the defendant by reason of inadequacy of the award, but that the plaintiff as well may appeal because of its exorbitance. Again, not every appeal is successful, nor does every new trial increase the amount of the former judgment, and the section plainly recognizes this well-known fact by providing that "in all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater

compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him." Such argument does not give effect to what would seem to be the clear language of the section, and the cautionary advice would seem to apply only if in the discretion of the judge such "further sum" is required.

Are we compelled to read the word "may" as "must"? Such a change would not only be doing violence to the section as it seems to read, but to the English language as well; and reading it as "shall" would not, in our opinion, change the discretionary form of the sentence. The legislative intent was, as we have said, to provide, so far as humanly possible, to have deposited a sufficient sum to cover any award that might be made, but that intention is not helped, so far as we can see, by trying to make the section mandatory in the respect claimed by appellant, inasmuch as even then the amount would necessarily be in the discretion of the court, while the clear reading leaves the requiring of the further amount discretionary, and many cases would clearly not need such further sum to sufficiently secure the payment of the award. If the Legislature had desired to remove the chance of failure in the sufficiency of the deposit by reason of the exercise of discretion on the part of the court, it would no doubt have required the deposit of the amount fixed by the defendant in his answer, as the New York Code provides (Code Civ. Proc. § 3380), or in the largest amount testified to by any expert at the time of trial. So long as an appeal is pending, the action of the court in satisfying the judgment under section 31 of the Street Opening Act of 1903 is stayed (sections 946 and 949, Code Civ. Proc.), so there would seem to be no possibility of obtaining the final order of condemnation until the interlocutory judgment becomes final, unless the defendant is consenting thereto either expressly or by necessary implication; and, if the award should be increased as a result of the appeal, there would be no final judgment condemning the land until deposit or payment of the additional amount, and, if such deposit or payment were not made, the court having jurisdiction of the subject-matter and parties would oust the party seeking to condemn the property and mete out to the owner adequate damages for the temporary use and injury, applying the deposited sum thereto. *State ex rel. Volunteer Mining Co. v. McHatton*, 15 Mont. 159, 38 P. 711. And "as the detriment caused by the permanent taking of this land must certainly be greater than the detriment caused by its temporary use, we have in the award of the jury in the condemnation proceeding a fund of money which, as it is sufficient to pay all loss to the owner by reason of the permanent taking, is certainly sufficient to pay the minor loss caused by the temporary taking."

Heilbron v. Superior Court, supra, page 277 of 151 Cal., 90 P. 706, 708.

[7] The fixing of the "further sum" being in the discretion of the court and based upon conflicting evidence, viz., the interlocutory judgment, report of referees, etc., and the affidavit filed by appellant, it will not be disturbed by us. *Daniels v. Church*, 96 Cal. 13, 30 P. 798. It is to be remembered also that at the time the order was made by the lower court the interlocutory judgment had been affirmed on appeal, and a hearing has since been denied by the Supreme Court, so no abuse of discretion would appear to have been shown, even though the case is now pending on appeal before the United States Supreme Court. 51 S. Ct. —, 75 L. Ed. —.

There would seem to be no error committed by the court below in denying the motion to quash the order to show cause or in making the order for immediate possession.

Judgment affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

110 Cal. App. 375

WOODRUFF v. CITY OF LOS ANGELES et al.
Civ. 7560.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1930.

Eminent domain ☞258.

Judgment in condemnation proceeding having been affirmed on appeal, temporary supersedeas should not stand while case remained in appellate court for possible petition for rehearing.

Application by Leonard J. Woodruff against the City of Los Angeles and others for writ of supersedeas asking for stay of proceedings in trial court pending appeal.

Order for temporary supersedeas vacated.

J. A. Coleman and Ed. Fitzpatrick, both of Los Angeles, for petitioner.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Loren A. Butts, Deputy City Atty., all of Los Angeles, for respondents.

WORKS, P. J.

This is an application for a writ of supersedeas, presented some time ago, asking for a stay of proceedings in the trial court in the

case of *City of Los Angeles v. J. G. Oliver, Leonard J. Woodruff, and others*, then pending on appeal in this court and still pending here for certain purposes. Upon the presentation of the application a temporary supersedeas was ordered. Upon oral argument the order was not disturbed. On December 5, 1930, we filed our opinion disposing of the appeal, by it affirming the judgment, 294 P. 760.

This conclusion having been reached by us, we think the temporary supersedeas should not stand for the few remaining days during which the cause in which the appeal was taken will be sub judice in this court for the purpose of passing upon a possible petition for rehearing. All points presented on the appeal having been determined adversely to petitioner, appellant on the appeal, the cause is in a very different situation from that it occupied when the temporary supersedeas was issued. We are satisfied that the appeal is without merit.

The order for a temporary supersedeas is vacated.

I concur: IRA F. THOMPSON, J.

Neither CRAIG, J., nor ARCHBALD, Justice pro tem., who is now with the court, was present at the oral argument. Neither, therefore, participates in the foregoing decision.

110 Cal. App. 470

HAYES v. EMERSON et al.

KING v. SAME.

Civ. 3941, 3942.

District Court of Appeal, Third District,
California.

Dec. 16, 1930.

Rehearing Denied Jan. 15, 1931. Hearing Denied by Supreme Court Feb. 9, 1931.

1. Evidence ⇨359(1).

Photograph shown to be faithful representation of what it purports to reproduce is admissible as approximate aid in applying evidence.

2. Appeal and error ⇨970(2).

It is for trial court to determine whether photograph is correct representation of object, and its ruling will be sustained unless there has been abuse of discretion.

3. Appeal and error ⇨1050(1).

Evidence ⇨359(1).

In automobile collision case, admission of photograph of skid marks after they were

painted held not abuse of discretion and not prejudicial.

A number of witnesses testified to the length and character of the skid marks, and also to the unlawful speed of defendant's automobile, so that facts in issue and sought to be proved by such marks were in evidence from several other independent sources.

4. Appeal and error ⇨699(4).

Instructions held reviewable, though record did not indicate whether they were proposed by appellant or respondents (Code Civ. Proc. §§ 953a, 650).

Respondents contended reviewing court must presume that instructions were proposed by appellant, and that he therefore could not attack them, but opportunity was offered to have incorporated in record information as to who proposed instructions, record being brought up under Code Civ. Proc. § 953a.

5. Automobiles ⇨246(60).

Instruction that defendant exceeding speed limit at obstructed intersection was conclusively presumed as matter of law guilty of negligence held not erroneous (St. 1923, p. 553, § 113(b)(2), as amended by St. 1927, p. 1436, § 30).

The instruction was challenged because it did not follow California Vehicle Act (St. 1923, p. 553) § 113(b)(2), as amended by St. 1927, p. 1436, § 30, providing that in all charges made thereunder proof of speed exceeding that allowed should be taken as prima facie evidence of violation, but not conclusive. However, language used in such section applied to facts involved in a criminal charge, and has nothing to do with negligence as matter of law.

6. Trial ⇨296(3).

Instruction respecting right of way of automobiles at intersection held not erroneous when considered with other instructions (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15).

The instruction attacked because it was claimed defendant had the right of way at the intersection over car in which plaintiff was riding because entering intersection first, though other car was coming from defendant's right, stated that right of way is right to immediate use of highway, but that before driver of any vehicle is entitled to right of way he must be operating his vehicle within law. Other instructions were in the exact language of California Vehicle Act (St. 1923, p. 560) § 131, as amended by St. 1925, p. 412, §

15, relating to right of way when two vehicles approach intersection at approximately the same time.

Appeals from Superior Court, Sacramento County; Peter J. Shields, Judge.

Actions by Anna A. Hayes and by Genevieve M. King against Ralph W. Emerson and others were consolidated. Judgments for plaintiffs, and named defendant appeals.

Affirmed.

See, also, 288 P. 1099, 294 P. 768.

Len H. Honey, of Stockton, and J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Dutton & Gilkey, of Oakland, for respondents.

Mr. Justice pro tem TUTTLE delivered the opinion of the court.

These are actions brought to recover damages on account of personal injuries received in an automobile collision. The two actions were consolidated and tried together. In each case the jury brought in a verdict for plaintiff against appellant only, and this appeal is taken from the judgments so rendered.

The plaintiffs were passengers in the automobile of defendant Fairfield, and the collision occurred at the intersection of two streets in the city of Roseville. Reversal of the judgments is sought upon the following grounds: Firstly, that the court erred in admitting a certain photograph in evidence, and, secondly, upon the ground that the court erred in giving two instructions.

The charge of negligence against defendant Emerson was that of excessive speed in approaching an intersection of highways when the driver's view is obstructed, in violation of the California Vehicle Act, § 113, subsection (b), subdivision 2 (St. 1923, p. 553, as amended by St. 1927, p. 1436, § 30). This act fixes the lawful speed under such circumstances at 15 miles per hour. It is not disputed that there is evidence which would justify the jury in finding that the physical facts made this section of the law applicable to the case.

[1-3] Within an hour after the accident, witness Edwin Overhalter testified that he arrived at the scene from Sacramento; that along the street where defendant Emerson's car approached the intersection he found skid marks four inches in width; that these marks extended from 40 to 45 feet; that these skid marks were on the pavement and showed black burned rubber; that he had the marks painted with white lime, and that they were photographed the next day. The photograph was admitted in evidence, and this is assigned as prejudicial error.

The rule of evidence with reference to admitting photographs in evidence is found in 10

California Jurisprudence, page 896: "Where a photograph is shown to be a faithful representation of what it purports to reproduce, it is admissible as an approximate aid in applying the evidence, and this is equally true whether the photograph be of persons, things, or places. * * * It is for the trial court to determine whether a photograph offered is a correct representation of the object or scene in question, and its ruling will be sustained on appeal unless it is apparent that there has been an abuse of discretion."

It is not seriously questioned by appellant that, if a photograph of the marks had been taken before they were painted, it would have been admissible. The chief objection appears to be that the marks were painted before being photographed. The cases relied upon by appellant are those which involve a reproduction by photography of a planned or hypothetical situation or condition, and the photographs were offered more for the purpose of illustrating certain theories as to how the accident happened. In the instant case several witnesses testified that the painting followed the line of the skid marks. It may be true, as appellant says, that "it (the photograph) formed a graphic and inescapable representation of appellant's skid marks which no amount of oral testimony could contravene." This is simply an admission that the facts sought to be proven were true, but that they were too vividly portrayed before the jury. We are satisfied that the instant case does not come within the rule contended for by appellant. No object in the photograph was placed before the jury which was not there at the time of the accident. We see no reason why the mere painting of an object, in order that it may be more vividly reproduced by means of photography, renders the photograph inadmissible. This is always subject to the rule that the trial court must be satisfied that the object photographed is a faithful representation of what it purports to reproduce. If the color of the marks were an issue in the case, a more serious question would be presented. No such contention is made here. Necessarily, a large measure of discretion is vested in the trial court in ruling upon a question of this character. We cannot say that the court here abused its discretion. Furthermore, we are not prepared to hold that this evidence was prejudicial to defendants or that the jury would have arrived at a different conclusion if it had been excluded. A number of witnesses testified to the length and character of the skid marks and also to the unlawful speed of defendant's automobile. Thus the fact in issue (and sought to be proved by these marks) was in evidence from several other independent sources.

[4] Error is assigned in the giving of two instructions. There is nothing in the record to indicate whether they were proposed by ap-

pellant or respondents. The latter now contend that this court must presume that these instructions were proposed by appellant, and that he therefore cannot attack them, under the authority of 2 Cal. Jur., p. 870; *Fawkes v. Reynolds*, 190 Cal. 204, 211 P. 449, 451; *Finkelstein v. Cosgrove*, 83 Cal. App. 201, 256 P. 605; *Gray v. Eschen*, 125 Cal. 1, 57 P. 664, and other cases. The case of *Fawkes v. Reynolds*, appears to be the most recent pronouncement of the Supreme Court upon this question. In that case the record failed to show by whom the instructions were offered, but the court considered the sufficiency of the instructions, over the objections of respondent. While stating the rule to be that under such circumstances instructions would not ordinarily be reviewed, the court went on to say: "In the bill of exceptions now before us it appears that the instructions were all given by the court, and under the law since 1909 each party has an exception thereto. Code Civ. Proc. § 647; Stats. 1909, p. 586. Without further showing in the bill of exceptions the plaintiff is entitled to attack the correctness of the instruction. If the instruction was given at the request of the plaintiff, that fact should have been made manifest by the incorporation of plaintiff's instruction in the bill of exceptions or by a statement that the instruction was given at plaintiff's request."

While the record in the instant case is brought up under section 953a of the Code of Civil Procedure, we see no reason why the same rule should not apply. Under the terms of that section a phonographic report of the trial is filed, and the clerk of the court is required to give the attorneys five days' notice of the settlement and allowance of the same before the trial judge. Thus an opportunity was offered respondent to have incorporated in the record information as to who proposed the instructions in question. In this respect respondent had the same rights as are afforded a litigant where an appeal is taken under a bill of exceptions. Code Civ. Proc. § 650. Adopting the conclusions and reasoning of the *Fawkes* Case, we hold that the instructions are reviewable.

[5] The court instructed the jury in the following language:

"If you find from the evidence that defendant Emerson, or the defendant Fairfield, at the time immediately preceding the collision mentioned in the complaints in these actions, was traversing the intersection of Oak and Judah Streets, in the City of Roseville, California, at the time mentioned in said complaints, and that at any time while he or they were traveling the last one hundred feet of his or their approach to such intersection he or they did not have a clear and uninterrupted view of such intersection and of the traffic upon the streets entering such intersection for a distance of 200 feet from such intersec-

tion, and that in traversing such intersection he or they was traveling at that time at a speed in excess of fifteen miles an hour, then, and in that event you are instructed that defendant Emerson, or the defendant Fairfield, or both of them as the case may be, is or are conclusively presumed as a matter of law to have been guilty of negligence at the time of said collision.

"If you further believe from the evidence that plaintiffs or either of them sustained injury or injuries by reason of said collision and that such negligence if any, on the part of said defendant or defendants proximately caused or contributed in any way to the injuries if any, of plaintiffs or either of them, and that the plaintiffs were free of contributory negligence, then your verdict must be in favor of either or both of the plaintiffs and against such defendant or defendants, or either of them, as the case may be."

It is contended that this instruction is erroneous in that, under the facts recited therein, the jury is told that "defendant Emerson, or the defendant Fairfield, or both of them as the case may be, is or are conclusively presumed as a matter of law to have been guilty of negligence at the time of said collision." The only authority submitted by appellant is the California Vehicle Act, section 113, subsection (b), subdivision 2 (St. 1923, p. 553 as amended by St. 1927 p. 1436, § 30), which read, at the time of the accident, as follows:

"(b) * * * it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following: * * *

"2. Fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed. * * * [The statute then defines an obstructed view intersection.] * * *

"(c) In all charges for a violation of this section, speeds in excess of those set forth in subdivision (b) of this section shall be taken as prima facie but not as conclusive evidence of a violation of this section. * * *

The only point made by appellant is that this instruction does not follow the section which provides that in all charges made thereunder proof of speed in excess of that allowed shall be taken as prima facie, but not as conclusive evidence of a violation of the section. We are of the opinion that the language used in said section applies to facts involved in a criminal charge, and that it has nothing to do with negligence as a matter of law. An instruction upon this section of the California Vehicle Act was given in the case of *Benjamin v. Noonan*, 207 Cal. 279, 282, 277 P. 1045, 1046, where the court charged the jury to the effect "that a violation thereof constituted negligence as a matter of law." In that case the court said:

"Appellants complain of an instruction giv-

en by the court at its own instance which first stated the provisions of the Motor Vehicle Act (Stats. 1923, p. 517) to the effect that vehicles shall be driven on the public highways at a careful, prudent, reasonable, and proper speed, so as not to endanger the life, limb, or property of any person and that it shall be lawful to drive at a speed not exceeding 15 miles an hour in traversing an intersection of highways where the view is obstructed, etc., and then charged that a violation thereof constituted negligence as a matter of law. They contend for the distinction that an infraction of said provisions would constitute not negligence per se, but mere evidence of negligence which might or might not amount to proof of negligence.

"We find no error in said instruction. As said in *Scragg v. Sallee*, 24 Cal. App. 133, 144, 140 P. 706, 710: 'While it is undoubtedly correct to say that the act of driving a vehicle over a street or public highway beyond the speed limit established by a municipal ordinance or a statute merely constitutes evidence of negligence in cases where damage has followed the infraction of such an ordinance or law, the rule in this state is, however, that it is conclusive evidence of negligence (citing cases). Therefore, the statement that such an act is "of itself negligence," or "negligence as a matter of law" or "negligence per se" (equivalent expressions) is, in this state, strictly correct'"—citing cases.

The instruction in the instant case is to the same effect as that given in the *Benjamin Case*. Here defendant is conclusively presumed, as a matter of law, to be guilty of negligence, while in the other case the jury is told that a violation of the section is negligence as a matter of law. Under either instruction, if the facts recited are found to be true by the jury, it has nothing further to do with negligence as a matter of law, its sole function in this connection being to decide, as a matter of fact, whether or not such negligence is actionable, that is, whether or not it proximately caused the injury. Such was the effect of the instruction in this case, and we do not question its correctness.

[6] The other instruction attacked by appellant reads as follows: "Right of way is defined by the law to be the right to the immediate use of the highway and certain rules have been laid down as to which of two or more vehicles has the right of way under certain specified conditions; before the driver of any vehicle is entitled to the right of way such driver himself must be operating his vehicle within the law and not in violation thereof, and no operator of any vehicle has the right of way at a time when he himself is violating the law."

Section 131 of the California Vehicle Act (St. 1923, p. 560 as amended by St. 1925, p. 412 § 15) in force at the time of the accident pro-

vided: "(a) When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed."

Appellant's argument is "that if appellant's car, as the jury was entitled to find, entered the intersection at a time substantially prior to Fairfield's car, then the appellant had the right of way, even though Fairfield was approaching from the right." If there were any force or merit to this contention, it is entirely dissipated by the fact that the jury was elsewhere charged exactly in the language of the section last cited. We see no prejudice in the giving of the instruction complained of. Construing these two instructions together, there is nothing in them which is contrary to the law as contended for by appellant. If appellant desired the jury to be informed upon the law with reference to the relative rights of two vehicles approaching an intersection, where the one upon the left enters prior to the one upon the right, he should have submitted such an instruction to the court. We are satisfied that the instructions, as a whole, stated the law with clarity and precision, and that the jury were not misled upon the law of the case.

There being no error in the record, it is ordered that the judgments be affirmed.

110 Cal. App. 414

Mae KING, Plaintiff and Respondent, v. Ralph W. EMERSON et al., Defendants; C. R. Fairfield, Appellant.

Mae KING, Plaintiff and Respondent, v. Ralph W. EMERSON et al., Defendants; Ralph W. Emerson, Appellant.

Mae KING, Plaintiff and Respondent, v. Ralph W. EMERSON et al., Defendants; Monroe, Lyon & Miller, Inc., and W. B. Moyle, Appellants.

Civ. 3876-3878.

District Court of Appeal, Third District,
California.

Dec. 15, 1930.

Rehearing Denied Jan. 14, 1931.

Hearing Denied by Supreme Court Feb. 9, 1931.

Appeals by defendants from judgments of the Superior Court of Sacramento County, Peter J. Shields, Judge, in actions for damages for personal injuries arising out of a collision between two automobiles. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco; Theodore W. Chester, of Sacramento, J.

Hampton Hoge, of San Francisco, and Irving D. Gibson, of Sacramento, for appellants.

Dutton & Gilkey, of Oakland, for respondent.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

The appeal of defendant Fairfield is based upon the sole contention that the right of the guest in this case to recover for personal injuries received in an automobile collision was destroyed by section 141½ of the California Vehicle Act of 1929 (St. 1929, p. 1580). In our original opinion (288 P. 1099) this point was decided adversely to this appellant. A rehearing was granted upon the showing that the question involved was pending before the Supreme Court. In the case of *Callet v. Alioto*, 290 P. 438, the Supreme Court definitely determined that this section is not retroactive, and this decision has become final. We therefore adopt the conclusion reached by this court in the original opinion.

As to the other appellants, after a further consideration of the case, we see no reason why the conclusion reached by the court in the original opinion should be disturbed, and it is therefore adopted as the opinion of the court upon this rehearing.

The order granting a new trial in respect to appellant Emerson is affirmed, and the judgment against appellants Fairfield, Monroe, Lyon, and Miller, Inc., and W. B. Moyle is affirmed.

110 Cal. App. 731

FENDLEY et al. v. CITY OF ANAHEIM et al.
Civ. 169.

District Court of Appeal, Fourth District,
California.

Dec. 31, 1930.

Rehearing Denied Jan. 26, 1931. Hearing Denied by Supreme Court Feb. 19, 1931.

1. Appeal and error ⇨931(1).

Evidence supporting finding must be accepted as true and reasonable inferences therefrom considered in examining sufficiency of evidence to support finding.

2. Appeal and error ⇨931(1).

In examining sufficiency of evidence to support finding, appellate court must resolve every substantial conflict in testimony in favor of finding.

3. Nuisance ⇨49(5).

Evidence *held* insufficient to support finding that vibrations from operation of machinery caused no personal discomfort nor damage to property of adjoining owners.

4. Evidence ⇨597.

Evidence must be substantial to support questioned finding.

5. Nuisance ⇨49(5).

That property of complaining owner was located within 150 feet of plant, and that owner lived therein before operation of plant, must be considered in determining whether nuisance existed, but is not conclusive.

6. Nuisance ⇨43.

Zoning for semi-industrial purposes of territory in which complaining owners resided did not preclude recovery of damages by operation of machinery constituting private nuisance.

7. Nuisance ⇨5.

Owner of property must not use it even in lawful business as to interfere with another in legitimate use of his property.

8. Nuisance ⇨19.

If nuisance invades private right, cause of action for injunction exists.

9. Nuisance ⇨3(5).

Operation of machinery for light and power plant causing vibrations to property of complaining owner *held* private nuisance.

10. Trial ⇨375.

Observation by trial court in inspecting premises claimed to have been damaged by operation of machinery is evidence.

11. Trial ⇨375.

Inspection by trial court of premises claimed damaged by operation of machinery not made during nighttime, when most of discomforts complained of appeared, *held* insufficient to sustain finding that operation did not cause damage.

12. Nuisance ⇨49(5).

Evidence of vibrations caused by operation of light plant, though not showing vibrations loosened and cracked plaster of residence, showed value of residence was diminished.

13. Nuisance ⇨4.

Law of nuisances, where personal discomfort is ground of complaint, is only applied to normal persons.

14. Nuisance ⇨49(5).

Evidence *held* to show that vibrations to residence caused by operation of light plant resulted in personal discomfort to persons of ordinary sensibilities.

15. Nuisance ☞19.

To justify abatement of nuisance, it is not necessary that health of complaining owner or his family should have been impaired.

16. Nuisance ☞3(2).

That neighborhood was devoted to some extent to industry did not authorize conduct of business interfering with right of complaining owner to comfort of residence.

17. Nuisance ☞53.

Where injury to property of complaining owner and comfortable use of residence by operation of plant was appreciable, quantum thereof must be fixed by trial court.

18. Nuisance ☞3(5).

That plant was properly installed and skillfully operated did not authorize invasion of rights of neighborhood residents.

Appeal from Superior Court, Orange County; S. M. Marsh, Judge.

Action by Eva H. Fendley and others against the City of Anaheim, a municipal corporation, and others. Judgment for defendants, and plaintiffs appeal.

Reversed.

R. T. Walters, of Los Angeles, for appellants.

George F. Holden, of Anaheim, for respondents.

WARMER, Justice pro tem.

The complaint, so far as pertinent here, alleges damage to the properties owned and occupied by the plaintiffs and damages for the personal discomfort of plaintiffs because of the vibrations, noises, shaking, and jarring of the residences of plaintiffs caused by the operation of a certain gas engine, compressor, and machinery of the defendants operated in the neighborhood of the residences of said plaintiffs.

The answer denies the damage, but admits the operation of said machinery; alleges that the plant is operated in what might be termed an industrial part of said city; that said plant was necessary in the opinion of said city for the purpose of supplying light and power for said city; that said plant was constructed and operated in a skilful and reasonable manner.

The court found that the plant was properly constructed and installed, and skillfully operated; that the operation thereof caused vibrations of, and in, the residences of plaintiffs, but caused no damage to the properties, neither did said operation of said plant cause personal discomfort to the plaintiffs or any

of them, and gave judgment for defendants. From this judgment plaintiffs appeal.

[1, 2] Appellants urge the insufficiency of the evidence to support the findings. In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been drawn by the trial court to lead to the same conclusion; and every substantial conflict in the testimony is to be resolved in favor of the finding. *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157.

The evidence most favorable to respondents to sustain the questioned finding is as follows: First, that there were vibrations in the residences of the appellants to such an extent that a bouquet of flowers on a dining room table shook slightly; that a picture hanging on the wall of one of the residences shook slightly, such shaking was apparent by the changing reflections of the light on the picture; that the perfume in a small bottle placed on a dresser moved slightly on account of the vibrations; that the lace or fringe on the shade of a small floor lamp shook slightly; that no vibrations were noticeable while standing on the floor of either house, but that, when a person leaned against the door or doorframe a vibration was noticeable; that some of respondents' witnesses did not observe any vibration while sitting in a chair of the residences of the plaintiffs, while others did; that such vibrations were continuous when plant was operating; that plant operated more or less continuously day and night; that vibrations were more noticeable at some hours than at others; second, that the residences of appellants were in a section of the city where there was a lemon and orange association building, a junk yard, a building that had been formerly used as a livery stable but was then being used as a transfer and truck building; that there had been a marmalade factory in the neighborhood which was then being used as a fertilizer plant; that the railroad main track and switches were close by; and that the property of the appellants was on a main public thoroughfare upon which there was heavy traffic; third, that the court visited the premises on two occasions during the course of the trial; that on one occasion the Fendleys, appellants, were having the plaster on their house repaired and the plasterer testified that he had difficulty in getting the plaster to stick to the lath because of vibrations in the building; fourth, that such a plant cannot be operated without vibration and the load thereof does not affect the vibrations caused; that the plant was skillfully installed and reasonably operated.

The appellants testified, and it is not denied, that Mrs. Fendley and Mrs. Timme were disturbed in their sleep, became nervous and irritable after and during the operation of said plant; that they had no such trouble or difficulty before said plant was put in operation; that Mrs. Timme's tenants complained of the vibrations and others threatened to leave the premises if the vibrations continued; that appellants, on a number of occasions, got up during the night and plugged the doors and windows to stop their rattling; that a guest member of the Fendley home was unable to sleep on at least one occasion and left the Fendley house in the nighttime; that another guest member of the Fendley family was unable to partake of a meal at the Fendley home because of sickness caused by the vibrations; that dishes on the dining room table rattled during the mealtime. The evidence on the part of appellants described the vibrations, shaking, and jarring over a period beginning with the installation of the plant and as very much more pronounced than respondent's evidence indicated, and continuing to the time of the trial, while respondent's evidence consists largely of persons who made a more or less casual inspection and observation of the premises during the course of the trial. No observations were made by respondent, so far as the record goes, during the nighttime.

[3, 4] Applying the rule for the appellate court in examining a questioned finding, we are of the opinion that the evidence is insufficient to sustain the finding, in fact, we cannot perceive how a residence could escape some appreciable damage from a vibration that would cause a bouquet of flowers on the dining room table to reveal the vibrations, and liquid in small bottles to manifest the presence of vibrations; in fact, it appears by respondent's own evidence that they were of such a nature as to declare the presence of vibrations or shaking that would materially damage property. The evidence of respondent does not meet the requirement of law that the evidence must be substantial in order to support a questioned finding.

[5, 6] The fact that appellants' properties were located within one hundred to one hundred fifty feet of respondent's plant constitutes one of the circumstances that must be taken into consideration in arriving at a conclusion as to whether or not a nuisance existed, also the fact that appellants resided there prior to the installation and operation of this plant by respondent, but are not conclusive. *McIntosh v. Brimmer*, 68 Cal. App. 770, 230 P. 203. Respondents rely upon the fact that the territory in which the property of appellants is located having been zoned by the respondent for semi-industrial purposes places the appellants in a different situation than

they would have been had no zoning existed, and therefore they are not entitled to the relief sought. The appellate court in the case of *Williams v. Blue Bird Laundry Company*, 85 Cal. App. 388, at page 392, 259 P. 484, 485, said: "It seems to be assumed that because the premises on which the laundry is situated were zoned to permit the maintenance of such establishments, all persons building residences in that vicinity must submit to such discomforts and injuries as are ordinarily incident to the operation of similar industries in the manner in which they are customarily conducted. We do not understand this to be the law. The doctrine of coming to a nuisance was long ago exploded. The operation of a business under municipal permission does not justify the creation or continuance of a private nuisance. [Citing cases.]"

[7, 8] An owner of property must not use it even in a lawful business in such a manner as to interfere with another in the legitimate use of his property. *Tuebner v. California Street, etc.*, 66 Cal. 171, 4 P. 1162. If a nuisance invades a distinct private right, a cause of action for injunction exists. *Williams v. Blue Bird Laundry*, supra.

[9] Applying the rules above stated we are of the opinion that the operation of the gas engine and compressor and machinery of respondents under all the circumstances here was a private nuisance, and was an invasion of a distinct private right of the appellants, both as to property and personal right of comfortable use of their residences.

[10-12] The trial court having inspected the premises, of course what it observed is evidence. However, after such inspection we find that the record discloses the court, in a summary of the case, at the conclusion of the trial, says that (which is not evidence) he discovered vibrations, the presence of which was made manifest in the same manner as the witnesses had described, and he also observed a rattling of the windows. Under such circumstances, at most the observations of the court while viewing the premises were simply in corroboration of the evidence. However, there is no evidence that any observation of the conditions present upon the premises of appellants were made by the court at nighttime when most of the discomforts complained of appeared. We are of the opinion that under such circumstances the inspection of the premises by the court cannot add sufficient weight to sustain the questioned finding. Under all the circumstances disclosed here it would be scarcely necessary to produce evidence that the vibrations would not have a tendency to, and, in fact, loosen and crack the plaster. However, the plasterer testified that he had difficulty in making the plaster stick to the laths because of the vibrations present. We are of the opinion that said plant as op-

erated by said respondent diminished the value of appellants' property.

[13-15] The law of nuisances where personal discomfort is the ground of complaint is only applied to normal persons, to persons of normal sensibilities. *McIntosh v. Brimmer*, supra. The record is silent as to any evidence from which a conclusion or inference could be drawn by the appellants, Mrs. Timme and Mrs. Fendley, were persons of other than ordinary sensibilities. The evidence, without contradiction, shows that they were each disturbed by the conditions created by the operations of respondent's plant. If evidence were offered tending to show that the conditions here would have no detrimental effect upon a person of ordinary sensibilities, common experience would dictate that such evidence would necessarily be subjected to great scrutiny because of its inherent improbability. The fact that tenants of Mrs. Timme were leaving, or threatening to leave, her premises unless such vibrations ceased, would indicate the vibrations were of such character as not to comport with comfort; the fact that guests of Mrs. Fendley left in the nighttime because of their inability to sleep on account of such vibrations, and that certain guests could not eat a meal at the home of Mrs. Fendley because the vibrations caused illness, does not comport with a right of comfort in the use of the premises. In order to justify an abatement of a nuisance it is not necessary that the health of the plaintiff or members of his family should have been impaired. *Judson v. Los Angeles, etc.*, 157 Cal. 168, 106 P. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247.

[16-18] The fact that the neighborhood in which the plaintiffs' residence was located was devoted to some extent to industry did not authorize the defendant to conduct his business in such a manner as to interfere with the right of plaintiff to the comfort of her residence. *Dauberman v. Grant*, 198 Cal. 586, 246 P. 319, 48 A. L. R. 1244. In the instant case, taking all the evidence most favorable to the respondents, together with every legitimate inference that could be drawn therefrom, shows beyond doubt that the operation of respondent's plant detrimentally affected the value of appellants' property and infringed upon the rights of appellants to a comfortable use of their residences to their damage. The injury being appreciable, the quantum thereof must be fixed by the trial court. The fact that the plant was properly installed and skillfully operated gives no right to the respondent to thus invade the rights of appellants.

For the foregoing reasons, the judgment is reversed.

We concur: CARY, P. J.; BARNARD, J.

WOLFSON v. HADDAN.

Civ. 7509.

District Court of Appeal, Second District,
Division 1, California.

Dec. 20, 1930.

Rehearing Denied Jan. 8, 1931. Hearing Denied by Supreme Court Feb. 16, 1931.

1. Vendor and purchaser ⇨351(1).

Damages for vendor's breach of executory contract would, under statute, be amount purchaser had paid, less proportionate share of loss in operating land (Civ. Code, § 3306).

Under the executory contract, the purchaser was to receive one-third interest in the land and one-third of profits, and take proportionate share in losses, if any. Civ. Code, § 3306, provides that detriment caused by breach of agreement to convey an estate in real property is deemed to be price paid, plus certain charges and interest.

2. Vendor and purchaser ⇨351(1).

Statute could not be invoked to limit damages which purchaser could recover for vendor's breach of executory contract, where nothing showed what full performance on both sides would have cost purchaser (Civ. Code, § 3358).

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by M. Wolfson against P. I. Haddan. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harry W. Horton, of El Centro, for appellant.

Fall & Fall, Lucius M. Fall, and J. Gilbert Fall, all of Los Angeles, for respondent.

YORK, J.

Plaintiff and defendant entered into a written agreement of exchange, in words and figures as follows:

"November 17th, 1921.

"This Agreement made and entered into this day by and between P. I. Haddan, party, of the first part, and M. Wolfson, party of the second part, to-wit, 'party of the second part has this day agreed to sell or exchange his ½ (one-half) interest in the Broadway Luggage and Jewelry business, including lease, fixtures and loan business, situated at 288 E. Broadway, San Diego, California, also his luggage and jewelry stock at 6th Street and E. Street, No. 534 San Diego, California, said stock free and clear from all indebtedness, as per inventory taken by Mr. I. Fream

on or about the 17th day of October, except amount sold since that date as follows: about \$500.00.

"It is hereby agreed and understood that first party is trading the above mentioned property for 508 acres of land situated about 2½ miles east of Brawley, Imperial Valley, California, consideration of said land to be about \$81,000.00 including stock and implements for which second party is to receive contract for a 1-3 interest and be credited for his 1-3 interest \$11,500.00 and receive 1-3 the profits and share in the losses if there be any of said farm. It is understood and agreed that second party will furnish one man competent to do farm work who will be under the supervision of First Party at all times and should he at any time fail to furnish a competent man, then first party can at his option hire a man and pay him out of the proceeds of second party's 1-3 interest. First party will look after and manage said farm without any expense to second party. It is understood and agreed that First Party will discharge the wholesale bills now as debt against the Broadway stock as per list attached hereto. It is agreed that for the difference between \$11,500.00 and the purchase price of the land that first party will wait on second party until such time as the land shows sufficient profit to take care of said difference, or a sale is made, or second party may at his election have his 1-3 interest set off after the expiration of one year, commencing at the southeast corner and taking a strip along the east side equal to the 1-3 interest by paying First Party whatever amount is due and unpaid at said time of division. First Party may also call for a division of said land on same basis as above stated. In case of a division of said land both parties shall choose an Imperial man acquainted with values of such land and they shall choose a third man and the three shall determine the price of land and their decision shall be the basis of settlement. It is agreed and understood that First Party shall have full supervision and management of said farm at all times with authority to buy and sell stock and feed as he may elect, that he will keep a set of books and make a complete accounting of all transactions to second party at least once a year for the term of this contract.

"Should First Party fail to make the exchange as above stated then this contract is null and void.

"It is understood and agreed that First Party is not contracting or obligating himself to pay any debts or obligations of second party other than those mentioned in the sheet hereto attached.

"It is further agreed that unless land is sold or divided as heretofore stated there is sufficient profit to take care of the interest

and principle, First Party will not force payment for ten years from date.

"Second Party M. Wolfson.

"First Party P. I. Haddan.

"Witness D. J. Fream."

In pursuance thereof, plaintiff delivered to defendant his interest in the business, receiving credit therefor in the sum of \$11,500, and in addition thereto paid to the defendant \$4,152.03 in cash, making a total of \$15,652.03 which was applied upon the contract price. Defendant, after operating the ranch for some time as provided in the contract, repudiated the contract with plaintiff and sold the ranch to third parties. Plaintiff brought suit for damages for the breach.

In addition to above facts, the findings of the court show, among other things, that the defendant did not act in bad faith in permanently putting it out of his power to perform said contract; that the value of the land at the date of the breach of the contract was \$45,720, and that the value of plaintiff's one-third interest therein, had the contract been fully performed at the date of said breach, would have been \$15,240; also that in the operation of the ranch there was a loss and the share of said loss chargeable to plaintiff was the sum of \$1,894.04.

As conclusions of law from these facts, the court found that, by section 3306 of the Civil Code, plaintiff would be entitled to judgment against defendant in the sum of \$15,652.03 (the amount paid on the purchase price), less a credit in defendant's favor of \$1,894.04 (the proportionate share of loss sustained in operating the ranch), or the sum of \$13,757.99, together with interest at 7 per cent. per annum from January 5, 1924 (the date of breach); but the court further found that recovery under section 3306, supra, was limited by section 3358 of the Civil Code, and that plaintiff therefore was entitled to but $15\frac{1}{27}$ of \$15,240 (the value of plaintiff's interest in the ranch at the date of the breach), which would be the sum of \$8,466.60, less the credit of \$1,894.04, or the sum of \$6,752.56, together with interest at 7 per cent. per annum from January 5, 1924, and costs of suit.

[1] From the judgment entered pursuant to these findings and conclusions, defendant appeals on the ground that the court erred in calculating the matter of damages and did not apply the proper rule therefor. Defendant takes the position that, while the exact proposition here involved has not heretofore been decided in this state, the courts of other jurisdictions, as well as text-writers on the subject of damages, have definitely laid down the rule that in cases of this character, where part of the purchase price is paid and the purchaser sues for damages, the amount of damages allowable is the difference between the

balance owing on the agreed purchase price and the actual value of the property at the time of the breach; and that, since the sum of \$13,242.01 is still due on the contract, and \$15,240 is the value of the plaintiff's interest in the ranch at the date of the breach, plaintiff is entitled to the sum of \$1,997.99 only.

Assuming that the rule in many jurisdictions is as appellant contends, yet that is not the law in California. Section 3300 of the Civil Code definitely declares the general rule of measure of damages for breach of contract to be the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. Section 3306, Civil Code, makes the pronouncement that "the detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid," plus certain expenses and interest, with an additional allowance in case of bad faith. Therefore, under this latter section, plaintiff would be entitled to the sum of \$15,652.03, the amount which he has paid on the contract, with said expenses and interest, less his proportionate share of the loss sustained by defendant in operating the ranch.

[2] If, however, the right of recovery is limited by section 3358 of the Civil Code, it would cause considerable reduction in the amount of the judgment for damages. The contract in question is uncertain as to what amount would have to be paid to fully perform it and is uncertain as to the time of performance. There is no evidence as to what the value of the ranch would be at any time, except only at the date of the breach.

Apparently, from the record, the agreement had been fully performed by plaintiff up to the time the contract was breached by the defendant by a sale of the land itself. It will be observed that the contract does not provide anything definite as to time of payment, except that first party would apparently not be able to force payment until ten years from its date. Under the contract the first party had the right to buy and sell stock and feed, as he might elect, but it would evidently take the consent of both parties for a sale of the land to be made.

It will also be noted that it was also agreed that for the difference between \$11,500 and the purchase price of the land that the first party would wait on second party until such time as the land showed sufficient profit to take care of said difference, or a sale was made. The first party did not call for a division of the land, but sold the same and placed it beyond his power to comply with the terms of the contract. As there is nothing in the record to show what full performance of

the contract on both sides would have cost the plaintiff, section 3358, supra, cannot be invoked to limit the amount of damages which may be recovered by plaintiff. The trial court having limited recovery to a sum less than plaintiff was entitled to, even though he were allowed the \$1,000 referred to in appellant's second point, and as the plaintiff is not appealing, appellant cannot now be heard to complain.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOLLZER, Justice pro tem.

110 Cal. App. 621

MERRILL v. NORMANDIE CORPORATION
(WALKER et al., Interveners).

Civ. 7635.

District Court of Appeal, First District,
Division 2, California.

Dec. 24, 1930.

1. Appeal and error ⇨1039(4).

Failure to allege consideration was unavailable on review where parties went to trial and proved, and trial court found, consideration.

2. Appeal and error ⇨1012(1).

Weight of evidence and burden of proof become academic, where trial court has found essential facts upon substantial evidence.

3. Corporations ⇨519(3).

Evidence held to sustain finding of consideration supporting corporation's notes to director.

4. Corporations ⇨309(2).

Single director is not precluded from taking notes or other security for money advanced to corporation's use, if transaction is free from fraud (Civ. Code, § 2235).

5. Corporations ⇨309(2).

In assignee's action on corporation's notes to director, court having found that notes were valid and assigned for valuable consideration, plaintiff's knowledge was immaterial.

6. Corporations ⇨518(1).

In assignee's action on corporation's notes executed to director, evidence of directors' incapacity to bind corporation because of transaction occurring subsequent to assignment held irrelevant, especially where not pleaded.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by George E. Merrill against the Normandie Corporation, in which A. R. Walker and others, preferred stockholders of defendant corporation, intervened. From a judgment in favor of plaintiff, interveners appeal.

Affirmed.

Sparling & Teel, of Los Angeles, for appellants.

William A. White, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued as assignee of six promissory notes executed by the defendant corporation. The cause was tried without a jury and resulted in a judgment for plaintiff as prayed. The appellants are all preferred stockholders of the defendant corporation who intervened and who appeal from the judgment on type-written transcripts.

Karl Elliott, Kathryn Elliott, his wife, and one Bowman, his grandfather, composed the board of directorate of the Normandie Corporation. The notes in suit were executed by the officers of the corporation by authorization of the board of directors in consideration of money loaned to the corporation by Karl Elliott, who was named as payee in each note. All were assigned by Elliott to the plaintiff in consideration for money advanced by plaintiff to Elliott.

On this appeal the appellants advance four points for a reversal of the judgment which we will consider in order.

[1] 1. The complaint fails to state a cause of action because it appears on the face of each note that it was issued to one of the trustees of the stockholders of the corporation, but the complaint fails to allege that the notes were executed for a good and valid consideration. If the point were good on demurrer to the complaint, it is not good here, because the parties went to trial and proved a good and valid consideration and the trial court held accordingly. *Etienne v. Kendall*, 202 Cal. 251, 255, 256, 259 P. 752.

[2, 3] 2. There is no presumption of consideration in the execution of the notes, and the burden of proof is therefore upon the plaintiff. Upon the same line of reasoning the point is of no interest on this appeal. Assuming that the usual presumption of consideration from the written instrument does not apply to a note executed under these circumstances, and assuming that the burden of proof is then upon plaintiff to show consideration, these issues lose their importance when the issues have been fairly tried and the trial court has affirmatively found that the consideration was good and valid. In other words, the

question of the weight of evidence and the question of upon whom rests the burden of proof become purely academic when the trial court has found upon substantial evidence that the essential facts have been proved.

Appellants merely suggest in their opening brief that the finding of consideration is not supported by the evidence, but we cannot take them seriously in this, as the evidence is clear that the notes were executed in payment for moneys advanced to the use of the corporation by the payee, and there is not an iota of evidence to the contrary.

[4] In this connection it is argued strenuously by appellants that, as the directors were trustees for the stockholders, every transaction by which they obtained any advantage from the corporation is presumed to have been without sufficient consideration in accordance with the provisions of section 2235, Civil Code. Numerous cases are cited following the Code section, some of which deal with directors of corporations. Nothing would be served by analyzing these cases here. It is sufficient to say that the rule which they follow does not preclude a single director from dealing directly with a corporation, and does not preclude him from taking a note or other security for money advanced by him to the use of the corporation. The rule applicable here is found aptly stated in *Schnittger v. Old Home, etc., Min. Co.*, 144 Cal. 603, 606, 607, 78 P. 9, and in *Todd v. Temple Hospital Ass'n*, 96 Cal. App. 42, 273 P. 595, where numerous authorities are cited. We have not overlooked the point at which the two paths diverge—that the transaction must be free from fraud. But, though we find some suspicions of fraud in counsel's briefs, there is no evidence of it. On the other hand, we find that the appellants did not plead fraud in the execution and delivery of the notes. They alleged circumstances occurring after the notes were delivered, but these allegations were made solely for the purpose of showing the need of intervention. Hence the trial court's finding that the transaction was in good faith and for a valuable consideration takes the case out of the rule of the cases cited by appellants.

[5] 3. The plaintiff was not an innocent purchaser for value. The argument on this point is predicated on the proposition hereinbefore discussed—that the notes were void under section 2235, Civil Code. But, as the notes were found to be valid obligations of the corporation which were assigned to the plaintiff for a valuable consideration, the "knowledge" of the purchaser is of no moment.

[6] 4. That the directors who authorized the execution of the notes were not de jure, but were merely de facto and hence incapable of binding the corporation in this manner. The argument is based upon the assertions

made in appellants' briefs that the corporation had failed to comply with the conditions of the state commissioner of corporations relating to the transfer of real property to the corporation. We cannot see how the issue is properly before us. It was not pleaded in the complaint in intervention, and was not found by the trial court. This case, with case No. 7636, *Elliott v. Normandie Corp.*, 294 P. 776, which follows, was jointly tried with another action brought by these interveners against the three directors of the corporation. At the opening of the trial a stipulation was made that the evidence taken might apply to all three cases. When testimony relating to the transfer of this real property was offered, it was objected to by counsel representing the plaintiffs in each of the suits on these promissory notes, but the testimony was received under interveners' promise to connect it up. Near the end of the trial motions were made to strike this testimony, and these were denied. Thereupon counsel for these interveners, plaintiffs in the accounting suit, dismissed their action for an accounting.

Now the only testimony in the record upon which the argument can be predicated is that the Elliots deeded the real property to the corporation in full accord with the demands of the commissioner of corporations and thereafter issued certificates of stock to themselves and to the interveners as well. Though this deed was not recorded, it was delivered to and held by the corporation secretary. It was then shown that in February, 1927, long subsequent to the execution of the notes in suit, and some three months after the assignment of the last of these notes, the directors purported to reconvey this property to the Elliots in exchange for other property conveyed to the corporation—that they then personally conveyed the property mentioned in the commissioner's certificate to another. Though the evidence of these transactions would have been relevant to an issue of fraud

involving the directors of the corporation, it had no relevancy to the issues raised in this action on the promissory notes, first, because the facts were not put in issue by any pleading, and, second, because the transactions occurred subsequent to the assignment of the notes and had no bearing upon the validity of the notes nor upon the assignment to the respondent.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.

110 Cal. App. 763

**Nathan H. ELLIOTT, Plaintiff and Respondent,
v. NORMANDIE CORPORATION, a Corporation, Defendant and Respondent (A. R. WALKER, P. A. Eisen, Christ Thoren, and P. A. Behannesy, Interveners and Appellants).**

Civ. 7636.

District Court of Appeal, First District,
Division 2, California.

Dec. 24, 1930.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Sparling & Teel, of Los Angeles, for appellant.

J. K. Tuttle, of Fresno, and William A. White, of San Francisco, for respondents.

PER CURIAM.

The questions involved in this appeal are identical to those considered in *Merrill v. Normandie Corporation* (Cal. App., No. 7635) 294 P. 774, this day decided, and, for the reasons there given, the judgment is affirmed.

211 Cal. 249

SMITH v. STATE BAR OF CALIFORNIA.

L. A. 12468.

Supreme Court of California.

Dec. 31, 1930.

Attorney and client ☞ 53(2).

In disciplinary proceedings against attorney, evidence showing attorney's connection with ambulance chasing organization held to warrant suspension for limited period.

LANGDON and CURTIS, JJ., dissenting.

In Bank.

Petition by Ray L. Smith to review a recommendation by the Board of Governors of the State Bar of California for the suspension of petitioner as an attorney at law.

Recommendation modified, and petitioner suspended until January 1, 1931.

Ray L. Smith, of Los Angeles, in pro per.

George S. Dennison and Philbrick McCoy, both of Los Angeles, for State Bar of California.

PER CURIAM.

The petitioner herein has applied to this court for a review of the findings and decision of the board of governors of the State Bar of California recommending the suspension of this petitioner from practice as an attorney and counselor at law in this state for the period of fifteen months. Upon the filing of said application, an order was duly made requiring the certification of the record of the proceedings before the board of governors of the State Bar to this court, and, this having been done, and the matter having been argued, it has been submitted to us for decision.

On or about the 18th day of December, 1929, the Los Angeles Bar Association presented to the local administrative committee of the State Bar of California four separate complaints against the petitioner herein, charging him with various acts of professional misconduct and violations of the rules and regulations of the State Bar of California having reference to the professional conduct of the members thereof. In each of these complaints reference was made to a particular case in which the unprofessional acts and conduct charged against the accused were alleged to have occurred. These cases are referred to in the record transmitted to us as the "Benanti," "Taylor," "Grubb," and "Pena" cases. These are the names of persons who were parties plaintiff in the several personal damage actions, in the course

and conduct of which the petitioner's professional misconduct is asserted. Upon the presentation of the aforesaid accusations, the petitioner was duly served with orders to show cause as to each before the local administrative committee of the State Bar; and on or about January 3, 1930, he appeared and filed his answers as to each of these accusations. In each of his said answers he specifically denied the commission of any acts of professional misconduct with respect to his engagement and professional services in each and all of said cases. The matter came on for consideration before the local administrative committee of the State Bar, which held several hearings thereon, in the course of which considerable testimony was adduced, and at the conclusion of which the said committee, on February 17, 1930, made and filed with the board of governors of the State Bar its findings and conclusions recommending that the accused be disbarred. Upon consideration of the matter as thus presented to the board of governors, the latter body, on April 19, 1930, adopted a resolution disagreeing in certain respects, to be hereinafter noted, with the findings of its local administrative committee, but recommending to the Supreme Court of California that the accused be suspended for the period of fifteen months, accompanying the same, however, with a further resolution "that the Board is largely influenced in not recommending a longer suspension or disbarment by the comparative youth and inexperience of the accused." Having been formally notified of the aforesaid action of the board of bar governors on May 10, 1930, the petitioner in due time presented to this court his application for a review of the foregoing proceedings and the recommendation based thereon of the board of bar governors of the State Bar as above set forth.

The facts of this matter as the same were developed at the hearing before the aforesaid committee of the State Bar may be summarized as follows: The petitioner, Raymond Lester Smith, was born on September 14, 1904, in Detroit, Mich., and grew up in that region. He was educated in the grammar schools of Youngstown, Ohio, attended Michigan University for a year, taking the academic courses, studied law in Southwestern University, graduating in 1927, when he came to California and shortly thereafter took the law examination and was admitted to practice in October, 1927. He was then of the age of twenty-three. His father was a retired lawyer who had not sought to be admitted to California. The young man began with desk room in the office of another attorney, and became one of the large and increasing list of young attorneys in search of a practice. Shortly thereafter he happened to meet a man named Lauden whom he had

known several years before, and who, while living in Cleveland, Ohio, had been engaged in the business of a licensed adjuster, and who had recently come to California to engage in the same business, which, according to the frank admission both of himself and of the petitioner herein, was that of an "Ambulance Chaser." Upon arriving in California, Lauden adopted the fictitious name and style of "The Prudence Service Company," and seems to have filed and published the certificate required under the provisions of section 2466 et seq., of the Civil Code, of those persons or partnerships seeking to do business under fictitious names. He opened offices under that pretentious title, and apparently had several assistants of the class commonly known as "chasers." He required the services of an attorney, and, meeting this rather immature and inexperienced young lawyer, offered him the alluring retainer of \$250 a month to become the regular attorney for "The Prudence Service Company." He seems to have told the young man that he had a license to do business as an "adjuster," although neither of them apparently knew of the existence of section 633e of the Political Code providing for the licensing of adjusters of a certain sort, but which section of the Political Code has no relation or application to the business, if it be such, of "ambulance chasing." The young man was glad to receive this assurance of a regular livelihood, and opened law offices of his own. His duties apparently were those of giving legal advice when required to his immediate employer, Lauden, or his assistants; to receive statements of the facts with regard to such damage cases as Lauden and his corps of assistants had procured through prompt interviews with persons injured, chiefly in automobile accidents, and from whom they had been able to obtain contracts authorizing the Prudence Service Company to undertake the settlement of the claims of such persons for damages, or to bring suits on their behalf in the courts for recovery upon such claims. The Prudence Service Company had quite an elaborate printed contract defining the terms of its employment, providing for a 50 per cent. contingent fee in the event of compromise or recovery in a legal action, and authorizing the company to employ attorneys to represent the claimant in the event such suits were to be brought and prosecuted. The only fee, however, which the young Smith was to receive for his legal services in any event was the sum of \$250 a month from the Prudence Service Company.

When a "case" was sent up to his office with its accompanying memoranda, he drew the complaint and other papers required for the institution of the action, sent them to the office of the "Company," and had nothing further to do with the matter until the action

having been filed under his name as attorney of record therein, he was supposed to assume charge of the case, interview for the first time the plaintiff and witnesses, and prepare for the trial of the case. The business prospered. Sometimes, as the record discloses, the young lawyer would be required to prepare as many as ten complaints in a single day. Many of these were never filed, the matters involved therein having been settled by the "Company," in which instances the lawyer heard nothing more of the case. Matters went on in this wise for a year or so, in the course of which the four cases above referred to arose and were finally selected by the Los Angeles Bar Association to form the gravamen of these four separate accusations to be laid before the local administrative committee of the State Bar. In the meantime rumbles of a growing agitation against the business of ambulance chasing and against the unethical practices of attorneys directly or individually engaged therein began to penetrate the understanding of the petitioner herein. He went, in the month of September, 1929, to attend the annual session of the State Bar held at Del Monte, where the subject was fully discussed, and where he very definitely learned that the sort of connection which he had been sustaining toward the business of ambulance chasing constituted a violation of certain rules of professional behavior which had already been promulgated by the board of governors of the State Bar. Smith came back from said meeting to Los Angeles, and very shortly thereafter began severing his relations with Lauden and the Prudence Service Company. Early in October, 1929, he addressed a letter to Lauden notifying him that beginning with January, 1930, he must obtain another lawyer; that between the date of said letter and January he (Smith) would not prepare or file any more personal injury complaints, but would only take care of such cases as had been commenced prior to his trip to Monterey. The petitioner appears to have carried out his purpose as outlined in his said letter, and ceased thenceforth accepting from Lauden or the Prudence Service Company, or from others, any ambulance chasing cases. The four cases referred to in the accusations against him were each and all cases which had arisen prior to October, 1929, and in each of which, with one exception, the petitioner's activities or participation had terminated prior to October, 1929.

Referring to these four cases more specifically, the evidence taken before the administrative committee discloses that as to the Benanti case the accident in which Mrs. Benanti's minor son was injured occurred July 15, 1929. Lauden either directly or through one of his agents, solicited the case, and procured from Mrs. Benanti her signa-

ture to one of the contracts of the Prudence Service Company. A complaint was prepared by the petitioner herein upon the statement of the case sent him by the company, but without any meeting or previous interview with the client, and which complaint was sent to the office of the Prudence Service Company for verification and filing and for the issuance of a summons thereon, which, when issued and served, was to be returned to the office of the petitioner. This complaint was filed but never served, for the reason that two or three days thereafter Mrs. Benanti wrote a letter to the Prudence Service Company requesting it to withdraw from the case, and that another attorney named Irving be substituted in place of the petitioner in the case, which substitution was sent to the petitioner's office and signed, and he heard nothing more about the case until the service of the accusation of the Bar Association upon him. It appears, however, that there were certain irregularities in the verification of the complaint before filing, the name of Mrs. Benanti having been forged thereto, but of this the petitioner asserts that he knew nothing, but the administrative committee made a finding upon evidence which seems to us to be quite insufficient that the petitioner filed the complaint in the Benanti case knowing that the verification and signature of Mrs. Benanti thereto had been forged.

In the Taylor case the accident to her occurred on February 19, 1929. A day or two later Mr. Lauden solicited her case and offered her a contract which she signed. The petitioner prepared a complaint in this case also without having seen Mrs. Taylor and which was sent to the company for verification and filing, and which complaint was filed but not served. A few days later a settlement was made by the company acting on behalf of Mrs. Taylor for the sum of \$100, of which she received \$54, which was satisfactory to her, and the case was dismissed. It was claimed upon the hearing that there were some irregularities as to the verification of the complaint in this case also, but the administrative committee made a finding upon no sufficient evidence whatever that the petitioner had filed the complaint in the Taylor case knowing that Mrs. Taylor's verification and signature thereto were forgeries. In the Grubb case, when the witnesses were about to be called before the administrative committee, the petitioner offered a stipulation to the effect that this case was also solicited by the Prudence Service Company and was referred to the petitioner as in the other cases, and that a complaint was prepared by him and subsequently filed by the company, and that the case came on for hearing before the Superior Court, at which time the petitioner appeared representing the plaintiff, whereupon a settlement was made and approved by the court and the case dismissed. In the Pena case the

accident occurred to Mrs. Pena on July 5, 1929. The case was solicited by one of the agents of Lauden or the Prudence Service Company on the following day, when the usual contract was signed. The petitioner prepared the complaint in the customary way, and the same was filed on July 12, 1929, and, no settlement having been made, the case was still pending trial at the time of the hearing before the administrative committee. Some effort was made at the hearing to show that the verification in this case was also forged, but the committee made no specific finding upon the subject.

With respect to the above several falsifications and forgeries as to the verifications of the complaints in the foregoing cases, it was made to appear that there was a man named Raspon in the employ of the Prudence Service Company as an ambulance chaser and that it was probably this man who wrote the names of the several plaintiffs to the verifications of these complaints and who procured a complacent notary to affix his certificate thereto. Raspon at the time of the hearing had disappeared. The petitioner denied in each instance that he knew of or had participated in Raspon's nefarious acts and conduct in the foregoing regard, and the evidence, fairly considered, fails to fix a stigma upon the petitioner in the foregoing regard. The main gravamen of the several accusations against the petitioner and of the affidavits offered in support thereof consist in the charge and proof that a year or so prior to the filing of the charges against him by and on behalf of the Los Angeles Bar Association he had accepted regular employment from Lauden, doing business under the fictitious name of the Prudence Service Company, knowing him to have formerly been, and to being then, engaged in the business of soliciting damage cases as an ambulance chaser; and to have during the year succeeding his said employment prepared complaints and other papers for filing in such cases without seeing or consulting with the parties on whose behalf actions were to be brought, or having any other relation to or contact with such parties than that resulting from his agreement to act as an attorney representing the Prudence Service Company for a specified monthly retainer. The petitioner freely admitted, and now and here admits, the truth of these accusations, and offers in defense, or rather in mitigation, thereof that at the time he accepted employment from the Prudence Service Company, knowing that its main business activities were those of soliciting employment as adjusters of damages in accident cases through the means of what has come in common parlance to be known as "ambulance chasing," he honestly believed the same to be a legitimate employment, that his monthly retainer therein was honestly and fully earned, and that he continued in such belief until

he attended the annual meeting of the State Bar held at Del Monte in September, 1929, and there and in the discussions held thereat he first came to realize that his relations with the aforesaid ambulance-chasing institution and with the persons operating under the name thereof were being frowned upon as unethical by the organized bar of California, and that upon returning from said convention he took immediate steps to sever such relation, and had practically done so prior to the presentation of the aforesaid accusations against him.

Upon the conclusion of the hearing before the local administrative committee of the State Bar, certain findings of fact were made and filed by that body, accompanying the recommendation of three of its five members that the petitioner should be disbarred. The committee found that it was not true that the accused had employed either Louden or the Prudence Service Company to solicit or obtain professional employment for him, and that the accused had not remunerated either of the above parties for soliciting and obtaining professional employment for him. The committee further found that it was not true that the accused had shared with any unlicensed person or persons compensation arising out of or as an incident to his professional services and conduct, and that it was not true that the accused had aided or abetted an unlicensed person or persons to practice law or to receive compensation therefrom. The committee, however, found that it was true that the accused had knowingly accepted professional employment on behalf of the several claimants in personal injury cases whose names are above set forth, and which employment was offered to him as a result of, or as an incident to, the activities of an unlicensed person, who for compensation controlled, directed, or influenced such employment. The foregoing findings of the committee relate to the alleged violation by the accused of rule III of the rules of professional conduct by the board of bar governors of the State Bar and approved by the Supreme Court of California on May 24, 1928. The committee further found that the accused had been guilty of violating rule X thereof, which provides that "a member of The State Bar shall not advise the commencement, prosecution or defense of a case unless he has been consulted in reference thereto, except when his relation to a party or a subject matter is such as to make it proper for him so to do." The specific respect in which the accused was alleged and found to have violated this rule of professional conduct consisted in the fact that he had in the four instances above stated prepared the pleadings and other papers for the commencement of an action on behalf of each without having seen or consulted with the respective parties for whom he was to appear

as attorney of record in the actions to be commenced, and which were actually commenced, on behalf of each of these. As to the other findings which the aforesaid committee made herein, we are satisfied from a careful examination of the record that they are not sufficiently sustained by the evidence, and that the gravamen of the case against the accused herein consists in the extent to which the committee found him to have been guilty of violating rules III and X. The petitioner upon his hearing before the committee and also upon his final hearing before the board of bar governors of the State Bar freely admitted his violation of these rules, but pleaded his youth, ignorance, and inexperience in extenuation thereof, and also pleaded and showed that when, upon his attendance at the Del Monte convention, his eyes had been opened to the extent of his offending, he had immediately severed his connection with his former employer, Louden, or the Prudence Service Company, refusing as early as October, 1929, to accept any more ambulance chasing cases, and only retaining his connection with such actions as had actually been commenced until such time as these should be concluded, or as the parties interested therein could secure other counsel.

In finally passing upon this matter, the board of bar governors, while disagreeing with certain of the findings of its committee which were favorable to the accused, concluded to recommend a suspension of the petitioner for the period of fifteen months, basing their action in so doing and in thus softening the harsher recommendation of the administrative committee upon "the comparative youth and inexperience of the accused." We are of the opinion that the board of bar governors might well have taken into consideration in fixing the aforesaid penalty that this was a test case, being one of the first cases of like character brought before said board for investigation, and involving as it did the activities of ambulance chasers and the ethical relation and duties of members of the legal profession toward those who, not being themselves licensed attorneys, were largely engaging in that sort of discredited but apparently lucrative occupation; and that the said board might well also have considered in mitigation of the penalty to be imposed upon this petitioner that he had, apparently in good faith and some months prior to the accusations made against him, severed his connection with his ambulance chasing employer and practically ended his connection with the cases concerning which specifically these accusations have been made.

Under the foregoing circumstances we are disposed to the view that this young man has been sufficiently disciplined, and, having voluntarily suspended himself from the active practice of the law as of the date March 1,

1930, in conformity with the recommendation of the board of bar governors of the State Bar, it is therefore hereby ordered that the period of his suspension as recommended by the board of governors of the State Bar be so far shortened as to expire on January 1, 1931; and that said Ray L. Smith shall be, and he is hereby, as of the date of January 1, 1931, restored to the position of attorney and counselor at law of and in the state of California, and to full membership in the State Bar of California, subject to the rules and regulations of that body.

LANGDON, J.

I dissent. I am in accord with the majority opinion, except as to the judgment therein pronounced. The appropriate judgment, based on that opinion, is a dismissal of all charges against petitioner.

Upon the record, no other judgment seems warranted. This young man committed no crime, and this court so holds. Nevertheless, a local administrative committee of the State Bar stigmatized him as a criminal and recommended his disbarment. The board of governors of the State Bar disapproved the local committee's report, and reduced the punishment to suspension for fifteen months. Of the fifteen members of the board, only eight signed the order; two members dissented; and five were either absent or did not vote. This court disapproves the recommendation of the board, and further reduces the suspension to nine months; but its judgment nevertheless leaves the stain of suspension upon his record.

Does the punishment fit the offense? It is based on violations of rules III and X of the Rules of Professional Conduct of the State Bar. No moral turpitude confronts us in this case. The most that can be urged against petitioner is an unfortunate association and an error in judgment and interpretation on a question which has been highly debatable. With reference to rule III, in a situation akin to this, the State Bar committee on legal ethics ruled that the conduct complained of here was not improper. This ruling was later withdrawn, but the point is that, if the elders of the bar were perplexed by this ethical problem, is it not unreasonable to hold a mere fledgling in the law to a correct interpretation at his peril? With reference to rule X, on advising the commencement of actions without being consulted in reference thereto, petitioner believed that in dealing with his employer, Lauden, as the agent of the plaintiffs, he was well within the rule. While this rule is a salutary one, its strict provisions have been honored more in the breach than in the observance in many of the larger offices of this state. It is said to be a not uncommon practice for lawyers for banks, trust companies, insurance companies,

automobile associations, and as correspondents of foreign attorneys, to prepare and file papers without direct contact with parties in interest. I do not condone this procedure, but, judging from petitioner's attitude as disclosed by the record, if his attention had been called to these irregularities in his conduct, he would have promptly discontinued them. A mere suggestion of change in practice would have been sufficient. But no intimation or warning was ever given to this young man by any member or officer of the State Bar that his activities were questionable.

Both the board and this court have overlooked or disregarded the really important feature of this case. The outstanding constructive accomplishment of the State Bar since its organization, which in itself is sufficient to justify the experiment of a self-governing bar, is the corrective influence it has had over its membership through educational methods alone. Smith attended the Del Monte meeting of the State Bar. He heard there a denunciation of activities similar to those in which he had been engaged. Immediately upon his return, he announced to his employer that he would accept no more cases from him, but would only dispose of the unfinished business. Thereafter he completely severed his relations with Lauden, relinquishing a salary of \$250 per month. No charge had been made against him, but he voluntarily discontinued a profitable employment. To some of us this action may seem commonplace, but to this struggling young lawyer it meant starting anew. To the practitioner who can look back to the starvation period of the beginner, the action of this young man appears highly commendable. If, through education, the State Bar can induce its members voluntarily to clean house, its disciplinary powers need seldom be invoked. They were not called for in this case. Their purpose had already been fully achieved by this courageous step which petitioner had taken. We should not ignore this significant act. No parallel situation has yet been presented to this court.

There can be no justification for tarnishing this young man's name by a disciplinary judgment, unless it may serve to help him or others. He needed no help; he had voluntarily abandoned the activities which were frowned upon. With ten thousand lawyers in this state, and with ambulance chasing in one form or another a familiar practice for at least the last quarter of a century, this youth less than two years admitted to the bar was made the subject of a test case. I think that he is an unfortunate victim of the war against ambulance chasing, a war that must go on until the practice is eliminated, but, in this campaign, the guns might first be trained on the giants, instead of the pignies. . . I

agree with the majority that the petitioner has been sufficiently punished; but I think that justice can only be done by dismissing the charges and clearing his name.

I concur: CURTIS, J.

211 Cal. 239

**SIEBENHAUER v. BANK OF CALIFORNIA
NAT. ASS'N et al.
S. F. 14063.**

Supreme Court of California.

Dec. 30, 1930.

1. Sales ☞234(3).

If seller of property other than negotiable instrument has no title, buyer in good faith and for full value obtains no title.

2. Bonds ☞74.

Bond reciting unconditional promise to pay was not nonnegotiable because of conditions in trust indenture securing it (Civ. Code, § 3082, and § 3265 as amended by St. 1923, p. 193).

The bond, which was unregistered when purloined from owner's safety deposit box, undertook to pay to bearer, or to the registered owner, if bond be registered, or to trustee under trust indenture, \$1,000, and recited that it was a negotiable instrument. Negotiability was not destroyed by the numerous conditions recited in trust indenture because Civ. Code, § 3265, as amended by St. 1923, p. 193, provides that negotiability of promissory note otherwise negotiable in form secured by mortgage or deed of trust shall not be affected because of statement therein that it is so secured, nor by any conditions contained in mortgage or deed of trust securing it.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Sol Siebenhauer against the Bank of California National Association and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Superseding opinion of the District Court of Appeal reported in 290 P. 617.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for appellant.

Redman & Alexander and Redman, Alexander & Bacon, all of San Francisco (H. O. Mundhenk, of San Francisco, of counsel), for respondents.

PRESTON, J.

The complaint alleges conversion of a security denominated a Spring Valley bond in the principal sum of \$1,000. Defendant answered with a general denial. The court made findings and gave judgment in its favor. Plaintiff has appealed upon the judgment roll. The facts are not in dispute.

The case turns upon the question of whether the bond in suit is or is not a negotiable instrument within the meaning of the law merchant as disclosed by our negotiable instruments statute and supplementary enactments. The facts necessary to grasp the questions involved will now be set forth:

Plaintiff owned said bond in December, 1925, and kept it in a safe deposit box in a bank at Burlingame, Cal., to which box he allowed one Hirschman, with the bank's consent, to have access and to keep therein his own valuable papers. Hirschman, however, without the authority, consent, or knowledge of plaintiff, extracted said bond from said box and sold it. In other words, he purloined the bond. After several transfers it was finally purchased by defendant on January 5, 1926, in good faith and for full value at a time when neither the bond itself nor any coupon thereon had matured.

[1] It will be seen at once that unless the bond is a negotiable instrument, Hirschman could, by transfer and delivery, convey no greater title than he himself had. The general rule is that the seller of property can transfer to the buyer no better title than he has himself, and if at the time of the transfer he has no title, the purchaser, although buying in good faith and for full value obtains no title. Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113; Crocker Bank v. Byrne & McDonnell, 178 Cal. 329, 332, 173 P. 752. But if the instrument is negotiable within the meaning of the law merchant, such a purchaser is protected.

In this connection certain provisions of the bond and the trust indenture securing it should be noted. The bond was one of an authorized issue of twenty-two million dollars, bearing date of May 1, 1923, due in twenty years and issued by the Spring Valley Water Company, the first interest coupon maturing May 1, 1926; it was negotiated September 27, 1923. It undertakes to "pay to the bearer hereof, or to the registered owner hereof if this bond be registered, or to the trustee under the trust indenture hereinafter mentioned, one thousand dollars, * * *" and with further reference to the trust indenture, it recites that it is secured "by a trust in-

denture of even date herewith executed and delivered by the company to Union Trust Company of San Francisco * * * as trustee of the trusts therein declared, * * * and reference is made to the trust indenture for a description of the property conveyed and mortgaged, for the nature and extent of the security, the rights of the holders of said bonds thereunder and the terms and conditions upon which said bonds are issued and secured.

The trust indenture itself recites: " * * * In the event the City and County of San Francisco should become the purchaser of all or substantially all of the property conveyed by said trust indenture and assume the payment of the said bond, the company should be released from all liability thereafter to accrue thereon; that in case the company should make default in any of its covenants and conditions prescribed in said bond or in said trust indenture, then the trustee may and upon the written request of the holders of 25 per cent. in aggregate principal amount of all bonds then outstanding shall declare the principal of and accrued interest upon said bonds to be due and payable immediately, and upon such declaration the same should become and be immediately due and payable, provided, that if all arrears of interest upon said bonds and the expenses and charges of the trustee shall be paid by the company and default in the observance or performance of said bonds and said trust indenture shall have been made good, the holders of a majority in principal amount of the bonds outstanding could waive such default and obtain from the trustee a rescission of such declaration of maturity, also that in case the company should make default in any of the respects aforesaid the trustee should be entitled to sell the trust estate and apply the proceeds in the manner provided in said trust indenture, also that no holder of any bond should have the right to institute any suit, action or proceedings upon or in respect to said trust indenture or have any other remedy thereunder or thereupon or under or upon said bond unless the holder shall have previously given the trustee written notice of an existing default, nor unless also the holders of at least 25 per cent. in aggregate principal amount of all bonds then outstanding shall have requested the trustee in writing to take action in respect of such default and the trustee shall have declined to take such action or shall have failed so to do within thirty days thereafter."

[2] Appellant contends that the negotiability of said instrument is destroyed by reason of the several above noted provisions of said

bond and said trust indenture. Respondent replies that its negotiability is made conclusive by reason of the provisions of the act of 1921 (Stats. 1921, p. 471), as follows: "Bonds payable to bearer or holder shall be negotiable, notwithstanding any condition contained therein or in the mortgage, deed of trust or other instrument securing the same."

We think that the instrument, whatever its proper name, is embraced within the provisions of section 3265 of the Civil Code and under the test there set forth is a negotiable instrument. This section in its original form was a part of the uniform Negotiable Instruments Law adopted in California in 1917 (Stats. 1917, p. 1532). In 1923, however (Stats. 1923, p. 193), and subsequent to the 1921 legislation, this section was amended to read as follows: "A negotiable promissory note within the meaning of this title is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer but the negotiability of a promissory note otherwise negotiable in form, secured by a mortgage or deed of trust upon real or personal property shall not be affected or abridged by reason of a statement therein that it is so secured, nor by reason of the fact that said instrument is so secured nor by any conditions contained in the mortgage or deed of trust securing the same. * * *"

The instrument in suit on its face is an unconditional promise to pay, signed by the maker, engaging to pay at a fixed future time to bearer, a sum of money. In other words, it is negotiable in form. Section 3082, Civ. Code.

The conditions complained of are not in the instrument itself, but in the trust indenture securing it. But the above section plainly provides that where the instrument on its face is negotiable, such negotiability is not destroyed by "any conditions contained in the mortgage or deed of trust securing the same." We know of no reason upon which to question the efficacy of this amendment to the statute. Moreover, the instrument itself declares its negotiability. The effect of the provision allowing registration is not involved, as the instrument here in question was not registered.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

211 Cal. 341

**BRANDON v. INDUSTRIAL ACCIDENT
COMMISSION et al.**

S. F. 13926.

Supreme Court of California.

Jan. 8, 1931.

Master and servant Ⓒ405(4).

Finding that perforation of stomach ulcer causing death was not caused or exacerbated by muscular exertion in course of employment *held* justified.

In Bank.

Proceedings under the Workmen's Compensation Act by Albert W. Brandon, guardian ad litem and trustee of John Lynd and others, opposed by the State Compensation Insurance Fund, and the Old Gold Mining Company. The Industrial Accident Commission denied compensation, and claimant applied for certiorari.

Order affirmed.

A. Boyer, of Bridgeport, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

LANGDON, J.

Petitioner, as guardian ad litem of the minor dependents of James Lynd, deceased, seeks to review an order of the Industrial Accident Commission denying compensation for the death of said deceased.

James Lynd was employed as a miner by the Old Gold Mining Company at Bodie, Cal. He claimed to have suffered severe pain from lifting a heavy ore car about September 9, 1928. He continued to work, however, until September 11, 1928, when he attempted to pull a bell rope and collapsed. He was assisted to his home, where he was attended by a local doctor. The following day he was removed to a hospital under the care of another doctor. Subsequently he was taken to the University of California Hospital at San Francisco, where he died on December 15, 1928. The autopsy established the cause of death as peritonitis following a perforation of a duodenal ulcer. Although testimony was presented on behalf of petitioner that the deceased had never been sick, the deceased, himself, in the words of his doctor's report, "gave a previous history of hyperacidity of the stomach and upper abdominal indigestion." In addition to this, the autopsy of Dr. Reinhardt showed several other duodenal ulcers partially healed.

The sole question is whether the admitted cause of the death, namely, the perforation of

a stomach ulcer, was a result of muscular exertion in the course of the employment of the deceased. The only significant evidence is that of the attending physicians and other medical experts, which evidence is in substantial conflict. The first attending physician was of the opinion that the cause of the ruptured ulcer was a severe muscular strain. He says in his report: "It rarely happens that such an ulcer will break except when the party is under some severe strain." The same doctor, however, originally diagnosed the injury incorrectly as a partial hernia. The other attending physician was of the same opinion as to the cause of the rupture, but he also, in a subsequent letter, raised the question "whether or not this whole matter may not be a diaphragmatic hernia." In support of the commission's finding is the report of Dr. Newman, medical director of the state compensation insurance fund, and the opinion of Dr. Boardman, who states: "Perforation is one of the regular occurring complications of peptic ulcers. * * * It may occur under all sorts of conditions, rest, activity, full stomach or empty stomach, etc." Dr. Harbaugh, after reviewing all of the evidence, concludes: "I do not feel primarily, however, that the condition could be considered in the light of an industrial accident."

It is obvious that the above evidence presents a question of fact upon which the finding of the commission is conclusive. That the perforation of the ulcer caused the death is not doubted; but whether this perforation occurred as a result of muscular strain or wholly apart from the deceased's occupation is purely a matter of expert opinion. No direct evidence on this point was available. Consequently the opinions of the two doctors who attended the patient have no special significance by reason of this fact, particularly in view of their erroneous diagnoses. The evidence permits the inference that the rupture was the normal result of a continuous process of ulceration. The commission weighed the various opinions and concluded that "the evidence fails to establish that the death of James Lynd on December 13, 1928, was caused or exacerbated by injury arising out of and in the course of said employment." Upon the record we can only accept this conclusion and affirm the order. See *Walter v. Industrial Accident Commission* (Cal. Sup.) 289 P. 627; *Bethlehem S. Corp. v. Industrial Accident Commission*, 181 Cal. 500, 183 P. 179, 7 A. L. R. 1180.

The order is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

211 Cal. 243

CORNBLITH v. VALENTINE et ux.

L. A. 10465.

Supreme Court of California.

Dec. 31, 1930.

1. Appeal and error ⇨1071(1).

Where both parties relied upon agreement and judgment was based upon it, patent error, in findings contrary to evidence, to effect that no written agreement had been executed, *held* harmless.

2. Specific performance ⇨49(2).

In actions for specific performance, mere inadequacy of consideration is sufficient to deny relief (Civ. Code, § 3391, subs. 1, 2).

3. Specific performance ⇨121(8).

In action for specific performance of agreement to exchange real property, evidence sustained finding of inadequacy of consideration.

Evidence disclosed that plaintiff's equity had net value of \$4,100, while that of defendants had net value of \$6,200.

4. Specific performance ⇨53.

Contract will not be specifically enforced, where obtained by misrepresentations (Civ. Code, § 3391, subd. 3).

5. Specific performance ⇨123.

Findings that defendants were induced to enter exchange agreement by fraudulent representations and that consideration was inadequate were sufficient to sustain judgment denying specific performance.

6. Specific performance ⇨121(3).

In action for specific performance of contract to exchange real property, finding that defendants suffered damage in sum of \$250 by plaintiff's possession of defendants' premises *held* supported by evidence.

The evidence disclosed that plaintiff was in possession of defendants' premises for period of over five months, and that reasonable rental value of premises was \$57 per month.

7. Specific performance ⇨130.

In specific performance suit, where defendants' answer alleged plaintiffs were in wrongful possession of defendants' premises, court could render affirmative judgment for defendants, though defendants did not file cross-complaint or counterclaim.

8. Pleading ⇨4.

It is not what pleading is called, but facts alleged, that determine its character.

In Bank.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Henry Cornblith against Charles Gilmer Valentine and wife. From a judgment for defendants, plaintiff appeals.

Affirmed.

Lester C. Thorne, of Los Angeles, for appellant.

Charles C. Jones, and John L. Bland, both of Los Angeles, for respondents.

PER CURIAM.

This is an action for specific performance of an agreement to exchange real property. It appears that on October 4, 1926, plaintiff was the owner of an equity in certain improved real property in Hermosa Beach, and the defendants were the owners of an equity in certain improved real property elsewhere in Los Angeles county. On that date, the parties, by an agreement in writing, agreed to exchange their respective equities; each party to assume certain designated incumbrances. The amended complaint alleges full compliance with this agreement on the part of plaintiff, and alleges the failure and refusal of defendants to perform. In addition to asking for a decree of specific performance, plaintiff asks for \$500 damages, alleged to have been caused by defendant's delay in performance.

The answer first denies the execution of the contract and all of the other material allegations of the amended complaint, and in addition thereto, by way of affirmative defense, admitting the execution of the contract and the escrow, alleges the inadequacy of the consideration, and also alleges, in proper form, that defendants were induced to enter into the agreement by reason of certain false and fraudulent representations of plaintiff. The answer further alleges that plaintiff was in wrongful possession of defendants' property for a period of over five months, and that during that period collected the rentals thereof; that the reasonable rental value of the premises during the period of wrongful occupation was \$300; that while plaintiff was in possession of the premises he injured the real property of defendants to the extent of \$300. In the prayer of the answer, in addition to asking that plaintiff take nothing by his action, defendants ask for damages in the sum of \$600.

On the issues thus joined, the cause was tried by the court sitting without a jury. The trial court rendered judgment in favor of defendants, not only denying to plaintiff the relief sought, but also granting defendants damages in the sum of \$250. Among other things, the trial court found that the equity of plaintiff was not equal in value to that of

defendant, and that therefore the consideration was inadequate, and that the contract was not just, fair, or equitable to defendants. The court also found that defendants had been induced to enter the agreement by reason of certain false and fraudulent representations made by plaintiff. These representations which the court found were false and fraudulent and upon which defendants relied, were that the equity of plaintiff was equal in value to that of defendants; that plaintiff would convey to defendants all of the furniture in one of the houses; that a designated mortgage was the only incumbrance against plaintiff's property. The court found that plaintiff knew the equities were not equal in value; that shortly after entering into the agreement plaintiff carried away the furniture that he had agreed to convey and has ever since concealed and refused to deliver the same; that there were other incumbrances against the property than the one designated.

On this appeal plaintiff makes two main contentions: (1) The evidence does not support the findings; (2) the judgment in favor of defendants in the sum of \$250 is not only not supported by the evidence, but the court was without power to render the same for the reason that there are not proper pleadings in the nature of a cross-complaint or counterclaim upon which the same could be based.

[1] In reference to the first contention, little need be said. It is true that the trial court made a series of findings to the effect that no written agreement had been entered into, and that no escrow had been opened and that defendants had not cancelled the escrow instructions, and other preliminary and immaterial findings. It is likewise true that these findings are not supported by the evidence, being in fact contrary thereto, and obviously, through inadvertence, were copied from the answer and should not have been inserted, but as both sides necessarily rely upon the agreement of exchange and the court's judgment for either party must necessarily be based upon it, and its existence is conceded by the findings, no prejudice arises from the patent error. On the two vital issues the court, on sharply conflicting evidence, found in favor of defendants. These findings, as already set forth, were that the contract was unfair to defendants, and that the plaintiff was guilty of fraud and deceit.

[2, 3] On the issue of inadequacy of the consideration, the evidence most favorable to the defendants was that plaintiff's equity had a net value of \$4,100, while that of defendants had a net value of \$6,200. It is elementary that in actions for specific performance mere inadequacy of consideration, of itself, is sufficient to deny this relief. Civ. Code, § 3391, subds. 1 and 2. It has been held that a difference of \$1,000 in value in a \$14,000 transaction is sufficient to deny this relief. *Wilson*

v. White, 161 Cal. 453, 119 P. 895. In this case the evidence was more than sufficient to sustain the finding. This finding alone is sufficient to sustain the judgment.

[4, 5] In reference to the finding of fraud, the evidence may not be as clear as might be desired, but there is sufficient evidence to sustain the finding. It is well settled that a contract will not be specifically enforced if the defendant's assent "was given under the influence of mistake, misapprehension, or surprise" (Civ. Code, § 3391, subd. 4); or if his assent "was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled" (Civ. Code, § 3391, subd. 3).

These two findings, supported as they are by the evidence, are sufficient to sustain the judgment. They were the vital ones in this action, one or either of them being sufficient to deny the relief. The error of the trial court in making the findings which were not material to the issue is of no importance, and should be disregarded.

[6-8] The finding that defendants suffered damage in the sum of \$250 is likewise supported by ample evidence. The evidence indicated that plaintiff was in possession of defendants' premises for a period of over five months, and that the reasonable rental value of the premises was \$57 per month. This evidence alone is sufficient to sustain the finding of damage in the sum of \$250. Appellant contends, however, that the trial court was without power to render such an affirmative judgment in defendants' favor for the reason that defendants did not file a cross-complaint or counterclaim. In this regard appellant cites and relies on such cases as *Doyle v. Franklin*, 40 Cal. 106; *McDougald v. Argonaut Land Co.*, 117 Cal. 87, 48 P. 1021; *Brannan v. Paty*, 58 Cal. 330. We do not deem those cases in point. At most, they hold that where matter is set up by way of defense only, with no prayer for affirmative relief, such pleading cannot be used as the basis for granting affirmative relief. But that is not the situation here presented. In paragraphs VIII and IX of the second separate and further defense of the answer of defendants it is clearly alleged that plaintiffs were in wrongful possession of the premises of defendants for over five months; that during that period plaintiff collected all the rents; that the reasonable value of such use and occupation was \$60 a month, all to defendants' damage in the sum of \$300. It is also clearly alleged that during plaintiff's occupation he damaged the premises to the extent of \$300. In the prayer of the answer, based on the above allegations, defendants asked for judgment in the sum of \$600. Plaintiff did not demur specially to this

part of the answer, nor did he move to strike any part therefrom. At the trial plaintiff did not object to any of the evidence offered by defendants to prove these allegations. Although it would undoubtedly have been better pleading to have set forth the above matter in a pleading entitled a counterclaim or cross-complaint, the rule is well settled that it is not what a pleading is called but the facts that it sets up that determine its character. In *McDougald v. Hulet*, 132 Cal. 154, at page 160, 64 P. 278, 280, the rule is stated as follows:

"We do not think it necessary to go into any nice distinctions as to the name given to the answer. Plaintiff, by bringing the defendant Boggs into court and asking the court to find the amount due, and by allowing the court to pass upon the issue as though properly made, is estopped from now claiming that the matter was not the subject of a counterclaim. He will not be allowed to thus lull his adversary into repose until his claim is barred by the statute, and then raise a point which is lethal.

"It is not what a pleading is called, but the facts which it sets up, that determines its character. Its character and sufficiency will be determined by the court from the facts alleged in it."

The foregoing reasoning appeals to us as applicable here.

The judgment is affirmed.

211 Cal. 261

McINTOSH v. STATE BAR OF CALIFORNIA.

L. A. 12442.

Supreme Court of California.

Dec. 31, 1930.

Rehearing Denied Jan. 20, 1931.

1. Attorney and client ☞38.

Purpose of disbarment proceedings is to determine fitness of officer of court to continue in that capacity (St. 1927, p. 38, as amended).

2. Attorney and client ☞58.

Disbarment of attorney is not intended for punishment of individual, but for protection of courts and legal profession (St. 1927, p. 38, as amended).

3. Witnesses ☞293½.

Rule that defendant in criminal case cannot be compelled to testify against himself held inapplicable to disbarment proceeding

against attorney, though proceeding is quasi criminal.

4. Attorney and client ☞53(2).

Evidence held to establish deliberate attempt by attorney to defeat secured claim of minor against an estate through acts involving moral turpitude, warranting disbarment (St. 1927, p. 41, § 26, as amended by St. 1929, p. 1257, § 3).

In Bank.

Petition by Frazier McIntosh to review a recommendation of the Board of Governors of the State Bar of California for the disbarment of petitioner as an attorney at law.

Petitioner disbarred.

Charles C. Montgomery, Richard F. Bailey, Hal Hughes, Vincent Morgan, and Hill & Morgan, all of Los Angeles, for petitioner.

Thatcher J. Kemp, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

This is a proceeding to review the findings and the recommendation of the board of governors of the State Bar of California that the petitioner be disbarred from the practice of the law in all the courts of this state.

The decision of the board and of the local committee is claimed to be erroneous on the ground that the State Bar Act (St. 1927, p. 38, as amended) violates section 13, article 1, of the California state Constitution, in that the proceedings provided by it do not constitute due process of law and that the act violates certain sections of the United States Constitution or amendments thereto. It is also contended that certain findings of the board of governors and of the local committee are outside of any issue tendered by the pleadings, and that the evidence is insufficient to support the findings.

[1-3] We may at the outset remove from consideration the first ground presented, inasmuch as the questions attempted to be raised thereby have been settled adversely to the petitioner's contentions. *State Bar v. Superior Court*, 207 Cal. 323, 278 P. 432; *In re Cate*, 207 Cal. 443, 279 P. 131; *Matter of Shattuck*, 208 Cal. 6, 279 P. 998; *Matter of Richardson and Elconin* (Cal. Sup.) 288 P. 669. In this connection the petitioner also claims that his rights were violated by reason of the fact that over his objection he was compelled to testify and submit to cross-examination at the instance of the local committee. The contention in this regard is made that the proceeding before the local committee is in the nature of a criminal proceeding wherein a defendant may not be compelled to testify against his will. While this ground of objection appears to have been waived before the

committee, it may nevertheless be said that it is fully met by the decision in the case of *In re Vaughan*, 189 Cal. 491, 209 P. 353, 355, 24 A. L. R. 858, wherein the same contention was answered by the statement that: "This position cannot be maintained. Although it has been held that an accusation is in the nature of a criminal charge (*Matter of Haymond*, 121 Cal. 385, 53 P. 899) and that a proceeding on such a charge is a quasi-criminal action (*In re McCowan*, 177 Cal. 93, 170 P. 1100) 'this court has uniformly treated disbarment proceedings as peculiar to themselves, and governed exclusively by the code sections specifically covering them.' *Matter of Danford*, 157 Cal. 425, 108 P. 322. The purpose of such a proceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual, but for the protection of the courts and the legal profession. *Ex parte Finley*, 97 S. C. 37, 81 S. E. 279." It is also contended that the committee erred in calling the petitioner's stenographer over his objection in violation of section 1881 of the Code of Civil Procedure, providing that an attorney's secretary, stenographer, or clerk may not be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity. The record discloses that the stenographer was not examined as to any fact the knowledge of which was acquired in her capacity as the petitioner's stenographer, but was, in fact, examined in her capacity and in relation to transactions in which she participated or of which she had knowledge by virtue of her capacity as the secretary of the Mayer Investment Company.

Neither do we perceive any merit in the second ground presented. While the findings were not drawn to follow the language of the accusations and allegations contained in the verified complaint filed with the committee, nevertheless those objected to were related or were collateral to the main issues. The record shows that one amendment to the complaint was made during the course of the hearing, the evidence as to which the petitioner was given ample opportunity to meet. It also appears that the committee consistently ruled out and refrained from considering any offers of inadmissible evidence, and based its conclusions on legal evidence alone, and that the rights of the petitioner, as defined by the decision in *Matter of Richardson and Elconin* (Cal. Sup.) 288 P. 669, to a decision of the committee and the board based on competent and legal evidence, have not been violated.

[4] The remaining contention is whether the evidence is sufficient to support the findings and the conclusions reached by the board of governors.

The petitioner was admitted to practice law at the bar of this state in 1917, and at the

time of the hearing in this matter was pursuing the practice of the law in the city of Los Angeles. The complainant before the local committee, Mildred M. Sutliff, is the daughter of James B. Mayer, who in his lifetime created and became the principal stockholder and officer of the Mayer Investment Company, a California corporation. James B. Mayer died on October 5, 1923, and left surviving him his daughter, Mildred M. Sutliff, and two sons, Jay Mayer, an adult and full brother of Mildred, and James B. Mayer, Jr., at that time nine years of age, a half brother of Mildred and Jay. Prior to James B. Mayer's death the petitioner had been acting as attorney for the Mayer Investment Company.

On October 11, 1923, Mildred M. Sutliff filed a petition for letters of administration on her father's estate, on which application the petitioner acted as her attorney. She also in the same month filed a petition for letters of guardianship of the person and estate of James B. Mayer, Jr., also on this application being represented by the petitioner. The latter estate consisted mainly of the proceeds of a \$4,000 insurance policy on his father's life of which James B. Mayer, Jr., was the beneficiary. The petitioner continued to act as the attorney for the Mayer Investment Company.

On October 10, 1923, the petitioner and C. N. Hayes, an uncle of Mildred M. Sutliff, were appointed trustees of the Mayer Investment Company, with a power of attorney to transact its business, and they continued as such trustees until their discharge by the directors in June, 1924. In the latter month, or prior thereto, the petitioner became a stockholder of the company. On June 27, 1924, a directors' meeting was held in which, among the first order of business, the board elected the petitioner and C. N. Hayes as directors to fill vacancies caused by directors resigning. The petitioner was present and participated at this meeting. Practically the next order of business as shown by the minutes was the election of the petitioner as treasurer of the company. About the last order of business of the meeting was a discussion of a bill of \$6,500 for services as attorney and as trustee rendered by the petitioner, over which there had been some dispute and protest, and a settlement thereof by the adoption of the following resolution:

"Whereas in the opinion of the directors of the Mayer Investment Company, it is for the best interests of the company that the regular officers assume active management, control and operation of its affairs, Be It Resolved, That the trustees, Frazier McIntosh and C. N. Hayes, be and are hereby released from all authority and obligation vested in them as trustees, and Be It Further Resolved, That the Power of Attorney granted the trustees, be and hereby is terminated, and that the future operation of the company's affairs be

through the regular officers of the company as set forth in the by-laws. Be It Further Resolved, That Mr. McIntosh's bill of \$6,500 be approved, same to be payment in full for services to date as trustee and attorney for the company, which amount is to be paid as follows: \$1,250 at the end of this meeting, \$250 on the first of January, 1925, and \$5,000 on or before three years from date, no interest to be paid on said \$5,000."

A resolution was also adopted changing the company's principal place of business from Los Angeles to Corcoran, Cal. An additional resolution was passed that the petitioner be continued as the attorney for the company to serve without charge except in case of a suit. The sum of \$1,500 was paid pursuant to the foregoing resolution.

Subsequent to the time when Mildred M. Sutliff was appointed administratrix of the estate of her father and guardian of the estate of her brother, and while the petitioner was acting as the attorney and cotrustee for the Mayer Investment Company, and upon the petitioner's advice and suggestion and with his consent and approval, \$4,000 cash from the minor's estate was loaned to the Mayer Investment Company, and a mortgage on a crop of cotton executed by the company was given as security therefor. No permission to make this loan, nor any approval or confirmation thereof, was sought or obtained from the probate court. The cotton crop failed, and early in 1925 further discussion of security for the loan of \$4,000 from the minor's estate was had, and it was concluded, again with the consent and approval of the petitioner, that a second mortgage on the Whitley building in Corcoran, occupying lots 9, 10, 11, and 12 in block 31 of that city, owned by the Mayer Investment Company, be executed as security. The property was deemed to have a market value of about \$30,000, on which there was a prior recorded incumbrance of \$22,600, to which the mortgage to secure the \$4,000 loan, executed on February 1, 1925, by Mildred M. Sutliff as president and Jay Mayer as secretary, and delivered to Mildred M. Sutliff as guardian, was made subject. It was in evidence that, when asked by the guardian whether the mortgage should be recorded, the petitioner replied that it would not be necessary, as the only persons who could sign a deed to the property were herself and her brother. The mortgage was never acknowledged nor recorded, nor was any application ever made to the probate court to approve or confirm the loan and the taking of the second mortgage on the Whitley building as security.

Shortly subsequent to these events Mrs. Sutliff left Corcoran to reside in Chula Vista, Cal. She testified that at that time she effected the election of her brother, Jay Mayer, as president, and her uncle, C. N. Hayes, as secretary of the company, so that the affairs

of the company could still be carried on in her absence by members of the family. Although Mrs. Sutliff remained a director of the corporation, she ceased to attend directors' meetings.

In the meantime, the affairs of the corporation were becoming more embarrassed financially, and creditors were pressing for payment of their demands. On May 31, 1927, the petitioner mailed from Los Angeles to Jay Mayer at Corcoran a letter in which, among other things, he wrote: "I find that the by-laws of the corporation provide for a regular meeting of the board of directors to be held the first Wednesday of each month. As this comes tomorrow, I have made up the minutes of a meeting and a resolution authorizing the deed of the Whitley building. I have also prepared and am enclosing the deed. As soon as this is done you may file this letter as my personal undertaking to see that Jimmy gets his money in full. I think this action is imperative as I feel sure the National City Bank are preparing an immediate attachment of everything in sight. I hope to stall them off 48 hours while we can get this through. * * * P. S. Return the deed for notarial signature here. Don't forget corporation seal. Record Jimmy's mtg."

The directorate of the company consisted of four members, two of which constituted a quorum. The minutes of the meeting written as held on June 1, 1927, at 10 o'clock a. m., at the company's office, which then was relocated at Los Angeles at the office of the petitioner, recite: "A regular meeting of the board of directors of the Mayer Investment Company was held at the company's office the 1st day of June, 1927, at the hour of 10 o'clock a. m. The following directors were present: Jay Mayer and Frazier McIntosh. C. N. Hayes, the secretary, being absent, R. H. Golish was, by unanimous resolution, appointed acting secretary.

"Upon motion duly made and carried, the following resolution was unanimously adopted:

"Whereas, this corporation is indebted to Frazier McIntosh in the sum of \$5,000 upon an account stated for legal services incurred more than three years ago; and whereas, said account is now due; and whereas, Frazier McIntosh has agreed to accept a deed to lots 9, 10, 11 and 12, in block 31, of the city of Corcoran, as per map of the townsite of Corcoran, recorded in Book 1, page 85 of Maps, in the office of the county recorder of said county, in full satisfaction of said account and in full satisfaction of all other claims and demands which he has against this corporation; therefore, Be It Resolved, That this corporation, in consideration of the foregoing, execute its deed to the said lots to the said Frazier McIntosh, or his assigns."

R. H. Golish was the petitioner's secretary and stenographer. It was in evidence and es-

established that Jay Mayer was in Corcoran on June 1, 1927. The deed which was executed pursuant to that resolution was prepared by the petitioner, was signed and acknowledged by Jay Mayer as president and R. H. Golish as acting secretary, and ran to and was delivered to H. H. Krauch, a friend of the petitioner, as grantee. The deed did not mention, nor was it drawn subject to, the \$4,000 second mortgage. On June 3, 1927, H. H. Krauch, as the assignee of the petitioner, filed a complaint in the superior court in and for Los Angeles county on an account stated to recover from the Mayer Investment Company the sum of \$4,000 alleged to be due to Frazier McIntosh for professional services, together with interest from the 1st day of May, 1924. An attachment in that action was levied on the Whitley building, and judgment by default was entered on July 13, 1927, for \$4,896.78 and costs. In that action Krauch was represented by an attorney who was an office associate of the petitioner.

Subsequently the petitioner effected a grant of the Whitley building to Mrs. Harriette E. Wheeler, who was his client, in exchange for one hundred acres of incumbered ranch property in Riverside county. Title to the ranch property at the petitioner's request was taken in the name of E. E. Steuri. Shortly prior to the hearing before the local committee, the ranch property was conveyed to El Serita Land Corporation, a California corporation newly formed by the petitioner, and in which he expected to be the owner of practically all of the stock. Mrs. Harriette E. Wheeler remained the owner of the Whitley building until two days before her death, when, under a power of attorney from Mrs. Wheeler, the petitioner deeded the Whitley building to a Mrs. J. B. Kneeben. Mrs. Wheeler was an elderly woman who had been suffering from a paralytic stroke. She suffered an additional stroke about forty-eight hours before she died. The consideration for the conveyance from Mrs. Wheeler to Mrs. Kneeben was an undertaking on the part of the latter to pay to the former the sum of \$1,000 per month during Mrs. Wheeler's lifetime, but not to exceed the period of one year. The sum of \$1,000 was accordingly paid upon execution of the deed, and Mrs. Wheeler's death two days later terminated the obligation to make further payments. Subsequent to Mrs. Wheeler's death, the petitioner offered for probate the will of Mrs. Wheeler by which he was made the principal beneficiary of her estate.

The petitioner concedes that the security for the obligation of the \$4,000 loan from the estate of James B. Mayer, Jr., is lost. He also concedes that the obligation is his own, and expresses his intention to pay it, although he states that he has not set aside any property to cover or secure payment of the amount due. The petitioner paid the interest on the amount of the obligation up to January, 1928,

and admits that he then ceased making interest payments because of his financial inability to meet them.

We are at a loss to understand on what ground the petitioner could expect condonement at the hands of the State Bar or of this court for the results brought about by his own activities, viz., a loss of the minor's estate. The petitioner takes the position that, unless there was a motive or intent to defraud, he is entitled to remain in practice as a lawyer and officer of the courts of this state. He contends that his motive was to protect the minor's interest, which he states is evidenced by his request of May 31, 1927, that "Jimmy's" mortgage be recorded. It will be remembered that the mortgage at that time was unacknowledged, that the officers of the company had since been changed, and that the mortgage was in the possession of another than the recipient of the letter of May 31, 1927. We also have the petitioner's own statement before the local committee:

"I said to Mr. Krauch that we were endeavoring at that time to prevent the National City Bank getting in ahead of me. I felt I was entitled to my pay, and it was a deliberate move on my part to get in ahead of the other fellows.

"Mr. Owen: You were primarily interested in protecting yourself? A. No question about it. * * * I told them I would be willing to reconvey the property, if they would give me the money owing."

We cannot escape the conclusion that motive and intent to defraud the minor is evidenced by the petitioner's manipulations of the Whitley building transactions. He knew that the \$4,000 of the minor was loaned without authority of court. He knew that the mortgage on the Whitley building, prepared by himself and securing the \$4,000, had been executed and withheld from record at his suggestion. He knew that the deed prepared by him and conveying that building to Krauch, his dummy, was silent as to the unrecorded second mortgage of the minor. Admittedly the petitioner was bent upon a prior satisfaction of his own claim to the exclusion of the minor's interests. It must be held that his conduct discloses a deliberate attempt on his part to defeat the secured claim of the minor which he was bound, professionally and in good morals, to protect, and that the petitioner's machinations with reference to the transfer of title to the Whitley building to his own benefit involved a deliberate evil purpose, and resulted in acts of moral turpitude.

Evidence was introduced with relation to other matters complained of, but these matters it is not necessary herein to discuss in detail. It may be said that, if no other than the latter matters were involved, the record would not justify a judgment of disbarment. But it is apparent from the record that the

recommendation of the board was not based on those matters, but primarily was the outcome of the events and activities herein narrated. According to the petitioner every favorable inference and intendment, we must conclude that he has not met the burden imposed upon him by section 26 of the State Bar Act of showing wherein the decision of the board of governors is erroneous or unlawful.

It is ordered that the petitioner, Frazier McIntosh, be, and he is hereby, disbarred from the further practice of the law in this state as an attorney, and that his name be stricken from the roll of attorneys at law of the state of California.

POSTAL TELEGRAPH CABLE CO. v. INDUSTRIAL ACCIDENT COMMISSION
et al.*

L. A. 12455.

Supreme Court of California.
Dec. 27, 1930.

Rehearing Granted Jan. 26, 1931.

1. Master and servant ☞385(1).

Ability of workman to do exact work for which he had been employed is not the sole measure of disability under Compensation Act (St. 1917, p. 831, and amendments thereto).

2. Master and servant ☞385(17).

Employer held not entitled to credit against award of compensation for wages earned by employee subsequent to injury, which eventually left employee totally disabled (St. 1917, p. 839, § 9(b), as amended by St. 1919, p. 914, § 4).

Credit was not allowable, since the payments made to the employee subsequent to his injury and for which the employer sought credit as against the award of compensation were not intended nor accepted as disability compensation or gratuities, but represented wages for services performed.

3. Master and servant ☞385(1, 16), 386(1).

"Compensation," as used in statute, includes liability payments, medical and hospital treatment, and death benefit (St. 1917, p. 839, § 9(a)-(c), as amended by St. 1919, p. 914, § 4).

"Compensation," as used in the act, has been held to be a comprehensive term, including not only liability payments provid-

ed for in Workmen's Compensation Insurance and Safety Act (St. 1917, p. 839, § 9(b), as amended by St. 1919, p. 914, § 4), but also medical and hospital treatment provided for in section 9(a), as well as death benefits provided for in section 9(c).

[Ed. Note.—For other definitions of "Compensation," see Words and Phrases.]

4. Master and servant ☞416.

Industrial Commission could not amend award to provide for future medical and hospital treatment of injured employee after expiration of 245 weeks after injury (St. 1917, p. 850, § 20(d)).

In Bank.

Proceedings under the Workmen's Compensation Law by Jack J. Coen an incompetent minor, employee, by Henry Coen, his guardian ad litem and trustee, opposed by the Postal Telegraph Cable Company, employer. To review an order of the Industrial Accident Commission awarding compensation for injuries, the employer brings certiorari.

Award affirmed in part, and annulled in part.

Superseding opinion of District Court of Appeal in 288 P. 726.

Haas & Dunnigan, of Los Angeles, for petitioner.

John W. Carrigan, of Los Angeles, for respondent Jack J. Coen.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

WASTE, C. J.

Jack J. Coen, a minor, suffered a fracture of the skull on July 16, 1924, while acting within the scope and course of his employment as a messenger for petitioner, the Postal Telegraph Cable Company. Three months later he returned to his employment, and continued therein until June 1, 1926, receiving full wages during all of this period. On the latter date he left the employ of petitioner and engaged in other work. Application for adjustment of claim against petitioner was filed April 29, 1927, and the respondent commission, after hearing, found that temporary total disability had been caused from July 16, 1924, the date of the injury, to September 21, 1924, and from April 28, 1927, continuing indefinitely thereafter. Based on this finding, an award of \$8.55 a week was made in accordance with the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, and amendments thereto). Subsequently, and on March 7, 1929, pursuant to further petitions and hearings, the commission filed its amended findings and award, whereby it was determined, upon competent

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 3 P.(2d) 6.

evidence, that the injury had resulted in the mental derangement of the applicant causing permanent disability, the percentage being 100. The applicant was awarded \$20.83 a week for 240 weeks, beginning July 24, 1924, which was 8 days after the date of the accident, as required by section 9 (b) of the act, as amended by St. 1919, p. 914, § 4, and a pension thereafter at the rate of \$12.82 a week for the remainder of his life. Credit was allowed for all payments theretofore made as disability compensation and attorney's fees, but was refused as to all payments of wages subsequent to the injury. The commission filed its second amended findings and award on June 28, 1929, the amendments relating only to attorney's fees and to provisions for further medical and hospital treatment.

The employer, being self-insured, seeks to have the award annulled and set aside, contending that credit should have been allowed to it for all wages paid to the applicant upon his return to work subsequent to the injury. Reference is made to section 21 of article 20 of the Constitution and to section 1 of the Workmen's Compensation Act, supra, wherein it is provided that: "A complete system of workmen's compensation includes adequate provisions * * * to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment." Petitioner asserts that this language precludes the employee "from the benefit of an award for 240 weeks following July 24, 1924, as during such period was included a period from September 22d, 1924, until April of 1927, during which no consequences of the injury were sustained by the respondent Coen." Concisely stated, the question confronting us is this: Is an employer entitled to credit against an award of compensation for wages earned by and paid to an employee subsequent to an industrial accident, which accident eventually leaves the employee permanently and totally disabled?

Section 9(b) of the Workmen's Compensation, Insurance and Safety Act provides that an injury to the brain resulting in incurable imbecility or insanity is conclusively presumed to be permanent and total in character for which the compensation shall be "sixty-five per cent of the average weekly earnings for a period of two hundred forty weeks and thereafter forty per cent of such weekly earnings during the remainder of life." The award in the present case was computed on this basis, and is, therefore, in strict accord with the letter of the statute.

[1] In our opinion it was not error for the respondent commission to refuse to credit the employer with payment of wages made to the employee for services performed subsequent to the date of the injury. These payments were not made as disability compensation and were not intended as gratuities, but represented money earned by the employee. Primarily,

the question is, Has the workman's physical and mental efficiency been substantially impaired, and, if so, to what extent, and for what period of time will this impairment extend into the future? The statute is plain, and recovery is allowed for total disability because the employee is unfitted by his injury to follow any occupation. In *Burbage v. Lee*, 87 N. J. Law, 36, 93 A. 859, it is held that "the term 'disability' is not restricted to such disability as impairs present earning power at the particular occupation, but embraces any loss of physical function which detracts from the former efficiency of the body or its members in the ordinary pursuits of life." The injured employee in *Case of Clark*, 120 Me. 133, 113 A. 51, 52, lost the use of certain of his fingers by reason of an injury to the nerves of his arm, but he did not lose any time from his employment. The court there held: "Nor does the fact that there has been no loss of wages afford an answer to the application. By the injury to his hand, resulting in the permanent impairment of its usefulness the applicant has sustained a distinct loss of earning power in the near or not remote future." Some of the decisions go farther. The following appears in *Williams v. Industrial Comm.*, 303 Ill. 352, 135 N. E. 758, 759: "While the evidence shows that Paluch at the time of the hearing was earning more than he was earning at the time he was injured, it does not follow, as a proposition of law, that his capacity to earn has not been reduced. The statute does not require that there shall be a showing of loss of earning power before compensation can be made for a disfigurement, and we are not authorized to read such a provision into the statute." The ability of the workman to do the exact work for which he had been employed is not the sole measure of disability. *Frankfort General Ins. Co. v. Pillsbury*, 173 Cal. 56, 58, 159 P. 150. See, also, *Harvey v. Eldridge, etc., Co.*, 128 Kan. 403, 278 P. 16, 17. The United States Supreme Court in *New York, etc., Ry. Co. v. Bianc*, 250 U. S. 596, 602, 40 S. Ct. 44, 46, 63 L. Ed. 1161, held it could not "concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. * * * And we see no constitutional reason why a state may not, in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not."

In the case of *Mercury Aviation Co. v. Ind. Acc. Comm.*, 186 Cal. 375, 377-379, 199 P. 508, the employee involved had been paid his regular wage for a period of time subsequent to his injury. Following his discharge by the employer, he filed an application for adjustment of claim, and the employer claimed credit for the payments made. It was claimed that as

the employee did not in fact earn the full weekly payments received by him after the impairment to his arm, such sums, or at least some considerable portion thereof, were not paid in return for labor, but should be regarded as payments of compensation due under the Workmen's Compensation, Insurance and Safety Act. The court said: "An employer cannot escape the payment of compensation for a permanent partial disability solely upon the ground that the employee returned to work prior to the termination of the period covered by the payments and for the same wages received by him before the injury." After discussing subdivision g of section 11 of the Workmen's Compensation Act, the opinion continues:

"Under the provisions of section 11, subd. 'g', * * * where payments have been made by the employer during the period of incapacity without any agreement between the parties as to the application of the same, the Commission may take the voluntary payments into consideration to the extent that it sees fit in fixing the amount of compensation, but the employer cannot complain if the Commission declines to make deductions on account of such payments. In the instant case it is admitted that there was no express agreement that the payments were made in discharge of any legal liability of the employer. * * * Inasmuch as petitioner chose to continue full payments during the period of total disability in the absence of any agreement, and thereafter to accept services from the employee and make regular payments to him without any understanding that the services rendered were not worth the sums paid and that some portion thereof was paid as compensation, it is not entitled, as a matter of legal right, to insist upon the deduction of the payments from the amount of the award. * * *

"The extent to which the payments should be considered, if at all, was entirely in the discretion of the Commission. It was logical for the Commission to deduct the amount of compensation payable during the period of total disability to offset the payments made by the employer when it received no return whatever from the employee. There was no abuse of discretion in the refusal of the Commission to credit the employer with the amount by which payments actually made during the period of total disability exceeded the payments called for by the act, nor in refusing to make any allowance for payments made after the employee returned to work."

In the case of *De Zeng Standard Co. v. Pressey*, 86 N. J. Law, 469, 92 A. 278, 279; *Id.*, 88 N. J. Law, 382, 96 A. 1102, the principal question argued was whether the petitioner should receive an award for the permanent impairment of the function of his right arm, when it was shown that he had been earning the same pay as he had earned before the acci-

dent. The opinion states, in part: "Next it is argued that, because the petitioner worked for the prosecutor for 55 weeks at full wages, these 55 weeks should be deducted from the 60 weeks for which the award was made. The answer is that the prosecutor was under no obligation to employ the petitioner at \$20 a week or any other sum, and that inasmuch as he chose to do so without any understanding, express or implied, that petitioner was not worth those wages, or that part of them should be treated as moneys paid under the compensation act, he must be presumed to have paid the money as wages and because he thought the petitioner was worth that amount. Indeed, it was optional to petitioner to continue working for the prosecutor, just as it was optional with the prosecutor to employ him, and, if the petitioner had chosen to do no work, he would have been entitled to his compensation under the act just the same. We see no force whatever in this argument."

[2] We are of the view that it definitely appears from these cases, which indicate the trend of judicial decision, that the right to compensation is not lost or diminished by the injured employee's return to work at the same or a different wage than that theretofore earned by him. The statute does not require a showing of loss of earning power as a prerequisite to the payment of compensation for a permanent disability, but, on the contrary, provides for the payment in installments of a fixed and definite sum of money therefor. As stated in the early part of this opinion, mental derangement resulting from an industrial accident is conclusively presumed by section 9(b) of the act to be permanent and total in character, for which the definite rate of compensation prescribed was properly applied by the Commission. The payments made to the employee subsequent to his injury, and for which the employer now seeks credit as against the award of compensation, were not intended nor accepted as disability compensation or gratuities, but represented wages for services performed. The authority of the commission to refuse to allow credit therefor is beyond question.

Petitioner attempts to distinguish the present case from the decisions above referred to on the ground that in each of the cited cases there was present immediately following the date of the injury, and at all times thereafter, including the subsequent period of employment, a total permanent disability of some kind or nature, for which the award was later made. We cannot conceive of a more severe permanent disability than that resulting from a mental derangement which entirely unfits the person to follow the ordinary pursuits of life. The impairment of one's mental faculties certainly results in as great a detriment to the individual as the loss of feet or arms or fingers, even though the mental de-

rangement does not follow immediately upon the happening of the accident.

[3, 4] By its second amended findings and award, the Commission, on June 28, 1929, made provision for such further medical and hospital treatment as the employee might reasonably need from time to time to relieve him from the effects of the injury. Petitioner contends that this amendment was made more than 245 weeks after the date of the injury and is, therefore, in violation of section 20(d) of the act (St. 1917, p. 850). With this contention we must agree. As we compute it, this second purported amendment of the award was made 258 weeks and 2 days subsequent to the date of the injury. Section 20(d), *supra*, provides, in part, that "no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury." The word "compensation," as used in the act, has been held to be a comprehensive term, including not only liability payments provided for in section 9(b) of the act, but also medical and hospital treatment provided for in section 9(a), as well as death benefits provided for in section 9(c).

United States Fidelity, etc., Co. v. Department of Ind. Relations, 207 Cal. 144, 153, 277 P. 492. Awards or amendments of awards providing for future medical and hospital treatment of injured workmen must, therefore, in order to be effective, be made within the period prescribed by section 20(d). Of course, as held in the case last cited, the commission has authority beyond this period to enforce an award for medical treatment which has been timely made, but that is not this case. Here an attempt has been made to amend an award to provide for future medical and hospital treatment after the time, within which such an amendment might be made, has expired.

The award is affirmed, except as to the purported amendment of June 28, 1929, which amendment was without the jurisdiction of the commission to make, and is hereby annulled.

We concur: SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.; RICHARDS, J.

SIMONS BRICK CO. v. EAGLE INDEMNITY CO.**BLESSING v. SAME.**

Civ. 6113.

District Court of Appeal, Second District,
Division 1, California.

Dec. 27, 1930.

Rehearing Denied Jan. 23, 1931. Hearing Denied by Supreme Court Feb. 19, 1931.

Mechanics' liens Ⓒ317.

Amendment relieving subcontractor and materialman of necessity of filing claims before commencing suit *held* applicable to contractor's bond executed prior thereto (St. 1919, p. 487, as amended by St. 1925, p. 539, § 2).

When the contractor's bond was executed, St. 1919, p. 487, required filing of verified statement of claim before action could be commenced on bond, but St. 1925, p. 539, § 2, providing that filing of such claims should no longer be condition precedent to commencing of action, was applicable to bond executed prior thereto, since in no way impairing obligation assumed by defendant in bond, but merely effected a change in procedure whereby remedy might be secured.

Appeals from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Actions on contractor's bonds by the Simons Brick Company and by R. G. Blessing against the Eagle Indemnity Company. Judgments for defendant, and plaintiffs appeal.

Reversed, with directions.

Culver & Nourse, of Los Angeles, for appellants.

J. Karl Lobdell and H. L. Watt, both of Los Angeles, for respondent.

HOLLZER, Justice pro tem.

The above-entitled actions were tried together, and the appeals taken from the respective judgments entered therein are presented upon one and the same record. There is no real dispute as to the facts out of which the suits arose.

In March, 1925, one Callahan, as contractor, entered into an agreement with the Los Angeles city school district for the construction of two school buildings, and in connection therewith furnished a bond executed by the defendant, as surety, conditioned for the payment by the said contractor of all materials, etc., used upon said buildings. Said bond recited in part: "If said principal as contractor * * * fails to pay for any material * * * said surety will pay the sum * * * provided that a verified claim or

claims shall be filed as required by an act of the Legislature of the State of California entitled, 'An Act to secure the payment of the claims of persons employed by contractors upon public works, * * *' approved May 10, 1919."

At the time said bond was executed, the act (St. 1919, p. 487) referred to therein required that, before an action could be commenced on the bond, the claimant, within the period allowed by law to file claims of mechanics' liens, must file with the official body by whom the contract had been awarded a verified statement of his claim showing that the sum due had not been paid.

After the execution of said bond, said act was amended so as to provide that the filing of such a claim should no longer be a condition precedent to commencing an action on the bond; said act becoming effective July 23, 1925 (St. 1925, p. 539, § 2).

Between April 22 and July 14, 1925, Simons Brick Company, one of the appellants herein, furnished brick which was used on one of the school buildings, and between May 1 and July 21, 1925, furnished brick which was used on the other building, on account of which material a balance of \$2,392.33 still remains owing to said company.

On August 26, 1925, R. G. Blessing, the other appellant herein, completed his subcontract for the construction of a tile roof on one of said buildings, on account of which a balance of \$375 still remains owing to him.

On October 14, 1925, notice of completion respecting one of said buildings was recorded, and on October 30, 1925, notice of completion of the other building was recorded.

Neither of the appellants herein filed a statement of its or his respective claim with the Los Angeles city school district.

It is conceded that, if the amendment which became effective July 23, 1925, is applicable to the claims upon which these actions are being prosecuted, the appellants are entitled to judgments for the respective amounts above mentioned. The trial court, however, held that said amendment was not retroactive, and rendered judgment in favor of the defendant.

Appellants contend that the amendment of July 23, 1925, in no way impaired the obligation which defendant assumed under the bond, but merely changed the procedure whereby those entitled to the remedy afforded by the act requiring such bond might obtain such remedy. Accordingly, it is argued, since the amendment became effective before the expiration of the period within which, under the prior law, they might have been required to file a claim with the official body which had awarded the contract—indeed, the time for filing such claim had not commenced to run as to appellant Blessing on

the date the amendment went into effect—the provision under the prior law requiring the filing of such claims did not apply to the claims of the appellants, and hence they are entitled to recover on the bond.

The respondent, on the other hand, insists that the law, as it stood at the time the bond was executed, including the provision requiring the filing of the claim with the public body which awarded the contract, constituted a part of the obligation of such bond; that legislation relieving a claimant from such requirement with respect to any bond given prior to the enactment of such legislation would result in impairing the obligation of the bond, and hence would be unconstitutional. Respondent therefore contends that the failure of the appellants to file a verified statement of claim, as required by the statute at the time the bond was given, bars any right of recovery herein.

An examination of the authorities convinces us that the contention of the appellant must be upheld.

In *Asbestos, etc., v. American Bonding Company*, 25 Cal. App. 641, 145 P. 107, a bond was given pursuant to a statute enacted in 1897 (St. 1897, p. 202) requiring that the person seeking relief under the bond shall file with the board of public works a verified statement of his claim within 30 days from the time such work is completed, and providing further that suit may be filed by such claimant within 90 days after the filing of such claim. The work involved in that suit had been completed prior to February 26, 1912, but the claim was not filed until April 12, 1912, and the action was commenced July 18, 1912. However, the statute in force at the time of the execution of the bond was subsequently, to wit, in 1911, amended so as to extend the respective periods for the filing of claims and the commencement of suit thereon, and it was conceded that, if the act of 1911 was operative in that case, the claim was filed, and likewise the suit was commenced within the proper time.

In the cited case, the bonding company, as here, insisted that the amendatory act should not be construed as being retroactive, and that the provisions of the act in force when the bond was executed should be considered the sole criterion.

The court, however, overruled the contention of the bonding company, upon the theory that a change in remedy, or the time within which it must be sought, does not impair the obligation of a contract, provided an adequate and available remedy be left, and that the amendment in question involved merely a change of that character, citing in support of its conclusion the cases of *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 33 S. Ct. 17, 18, 57 L. Ed. 221; *Bear Lake v. Garland*, 164 U. S. 1, 17 S. Ct. 7, 41 L. Ed.

327; and *Kerckhoff-Cuzner Mill Co. v. Olmstead*, 85 Cal. 80, 24 P. 648.

The first case cited was an action upon a bond given to a school district of Minnesota, conditioned that the general contractor would pay all claims for work, etc., furnished for the completion of a certain school building. On the date when the bond was executed, the law of Minnesota (Rev. Laws 1905, § 4539) provided that: "No action shall be maintained on any such bond unless within ninety days after performing the last item of work, or furnishing the last item of * * * material, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim * * * nor unless the action is begun within one year after the cause of action accrues."

On April 22, 1909 (Laws 1909, c. 413), this provision was amended so as to require the notice of claim to be given within 90 days "after the completion of the contract and acceptance of the building by the proper public authorities," and was further amended by requiring the action to be begun within one year "after the service of such notice."

Plaintiff in that case performed services and furnished materials for use in the construction of said building during July and August, 1909. He gave notice of his claim in time to comply with the amended act, but not in time to comply with the law as it stood at the time the bond was executed.

The Supreme Court of Minnesota (115 Minn. 382, 132 N. W. 289) sustained the right of the plaintiff to recover on the bond, and overruled the contention of the surety company to the effect that the statute, if made applicable to the plaintiff's claim, impaired the obligation of the contract contained in the bond, and was therefore unconstitutional.

In affirming the decision of the Minnesota court, Mr. Justice Pitney, delivering the opinion for the United States Supreme Court, said in part:

"The argument for plaintiff in error is to the effect that since the right of action by a third party upon such a bond is of statutory origin, and since the statute in force at the time the bond in suit was given required a preliminary notice given to the obligors within a certain time, which notice (under *Grant v. Berrisford* [94 Minn. 45, 101 N. W. 940, 1133]) constituted a condition precedent to the action as much as if it had been set out as a proviso in the bond, a subsequent act of legislation dispensing with such notice, or changing the time within which it was required to be given, impairs the validity of the contract within the meaning of § 10 of art. 1 of the Constitution. * * *

"Nevertheless, granting, for the sake of the argument, the contention of the plaintiff in error that the contract in suit, so far as per-

tains to its obligation, is of statutory origin, it by no means follows that the provision respecting a preliminary notice to the obligors, as a condition precedent to suit thereon, although contained in the law as it stood at the time the bond was given, cannot be constitutionally modified by subsequent legislation. The decision must turn, we think, upon the familiar distinction between a law which enlarges, abridges, or modifies the obligation of a contract, and a law which merely modifies the remedy, by changing the time or the method in which the remedy shall be pursued, without substantial interference with the obligation of the contract itself.

"As Chief Justice Marshall observed in *Odgen v. Saunders*, 12 Wheat. 213, 349, 6 L. Ed. 606, 653, the obligation and the remedy originate at different times: 'The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a pre-existing obligation.'

"The distinction was well expressed by Mr. Justice Harlan, speaking for this court, as follows: 'It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the legislature may not withdraw all remedies, and thus in effect destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass enforcement of rights under the contract, according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the legislature may modify or change existing remedies, or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract.' *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 439, 47 L. Ed. 249, 250, 23 S. Ct. 234, citing many previous cases. * * *

"In the case now before us, we agree with the Minnesota supreme court in the view that the requirement of a preliminary notice to the obligors as a condition precedent to an action upon the bond affects the remedy, and not the substantive agreement, of the parties. And although the statute as it stood when the bond was given (*Rev. Laws 1905*, § 4539) must, under *Grant v. Berrisford*, be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation. Therefore, the subsequent statute (*Gen. Laws*

1909, chap. 413) effected merely a change in the remedy, without substantial modification of the obligation of the contract."

In *Colma Vegetable Ass'n v. Bonetti*, 91 Cal. App. 103, 267 P. 172, the plaintiff, a co-operative marketing association, instituted suit to recover liquidated damages against the defendant, one of its members, and for specific performance of, and injunctive relief upon, a contract entered into between the parties. The plaintiff association was organized under a statute known as the Co-operative Marketing Act (*St. 1921*, p. 460). After the contract upon which said action was based had been entered into, said act was amended (*St. 1923*, c. 103, p. 222) so as to authorize recovery of liquidated damages specified in any contract made between such association and any member thereof, and said amendment further empowered the courts to direct specific performance of said contracts and to enjoin the breach thereof.

In affirming a judgment of the trial court awarding the relief authorized by this amendment, the District Court of Appeal, in course of its opinion, declared at page 112 of 91 Cal. App., 267 P. 172, 176:

"It is the contention of the appellant that the legislation above named increased the liability of the defendants under their contract. Remedial statutes which are retrospective in character do not impair contracts or interfere with fixed liability. They are not unconstitutional and the legislature may from time to time change or modify the remedy provided. In so doing it does not affect any vested right. It may be generally said that when the defendant signed the agreement which is here sued upon he obligated himself to deliver all his agricultural products to the plaintiff when he fails to do that he commits a legal wrong and thereby submits himself to the remedies provided by law.

"*Cooley's Constitutional Limitations* (7th Ed.) p. 515: 'As a general rule, every state has complete control over the remedies which it offers to suitors in its courts. * * * It may give a new and additional remedy for a right or equity already in existence. And it may abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains.'

"In the case of *Aikins v. Kingsbury*, 110 Cal. 674, 679, 680, 151 P. 147, 148, the Supreme Court of this state says: 'The passage of an act providing a new remedy for the state as a contracting party does not necessarily deprive the other party to the contract of his rights. * * * A remedy may be given where none existed before and it follows that a new and more liberal remedy may be substituted for one which was in effect at the time the contract of sale was made. * * * In the proposition often stated in the decisions that

parties contract with reference to existing laws, and that such laws become a part of the contract, the reference is to those laws which determine and fix the obligation of the contract, the correlative rights and duties springing from it and not to laws of mere procedure prescribing remedies. With reference to these, there is ordinarily no obligation arising, but the contract is made in contemplation of the power of the Legislature to change them. Of course, all remedy cannot be taken away, nor can the existing remedy be so altered as to take away or impair any of the rights given by the contract as interpreted by existing law.' * * *

"The distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."

"In the case of *Brown v. Staple Cotton Co-operative Ass'n*, 132 Miss. 859, 96 So. 849, the court says:

"It is true that said Co-operative Marketing Act, having been adopted after the contract here considered was entered into, does not and could not undertake to control the substantive rights of the parties to this cause. It is not true, however, that the remedies therein provided are not applicable to past as well as future transactions. It is too well settled to merit discussion that a remedy afforded by a statute passed subsequent to the date of the contract in question may be invoked by a party to the contract who has been wronged by its nonperformance. Such legislation does not impair the obligation of a contract. The obligation of a contract has reference alone to the rights of the parties arising thereunder and not to any remedy for their enforcement. A law creating a remedy applies to prior as well as future contracts and is constitutional."

Again, as stated in the case of *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 315, 283 P. 298, 305: "When a law only affects the remedy or procedure, 'all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law and without regard to whether the suit had been instituted or not, unless there is a saving clause as to existing litigation.' *People ex rel. Foote v. Clark*, 283 Ill. 221, 119 N. E. 329."

Applying the views expressed in the foregoing decisions, we conclude that the amendment of July 23, 1925, in no way impaired the obligation assumed by the defendant in its bond that said act merely effected a change in the procedure whereby the remedy afforded under the law, as it existed at the time the

bond was executed, might be secured, and hence relieved the appellants of the necessity of filing any claim with the Los Angeles city school district as a condition precedent to commencing suit on the bond.

For the foregoing reasons, the judgments entered in these actions are reversed, and the trial court is directed to enter judgments in favor of the respective plaintiffs as prayed for in the respective complaints, with attorney fees in a sum to be fixed by the court.

We concur: CONREY, P. J.; YORK, J.

110 Cal. App. 746

EDMUNDS et al. v. HYSONG et al.
Civ. 5951.

District Court of Appeal, Second District,
Division 2, California.
Jan. 2, 1931.

1. Statutes ⇨267(2).

Statute affecting procedure only is applicable to actions pending when it becomes effective.

2. Courts ⇨190(6).

Where statute was effective before order of superior court was made directing municipal court clerk to transmit exhibits, order held proper, although made after notice of appeal was filed (Code Civ. Proc. § 988b).

Under Code Civ. Proc. § 988b, superior court may require production of certified copies of papers which were before municipal court but not contained in record on appeal.

3. Appeal and error ⇨1011(1).

Judgment based on conflicting evidence could not be disturbed, although appellate court might not have decided issues as they were decided.

4. Vendor and purchaser ⇨307.

Where vendors had not performed conditions of escrow at time escrow expired and purchaser demanded return of deposit, vendors could not recover purchase price (Civ. Code, § 3440).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by John R. Edmunds and another against C. E. Hysong and another. From a

judgment of the superior court reversing a judgment of the municipal court of the city of Los Angeles for plaintiffs, plaintiffs appeal.

Affirmed.

Sloan Pitzer, of Alhambra, for appellants.

Marcus C. Clark, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

This is an appeal from a judgment of the superior court reversing a judgment of the municipal court of the city of Los Angeles and ordering a new trial.

Appellants brought suit in the municipal court against respondents for the sum of \$883.50 and interest on the purchase price of a gasoline service station claimed to have been sold by plaintiffs to the defendants. The municipal court awarded plaintiffs judgment in the sum of \$848.50, which judgment was appealed to the superior court and reversed on the ground of insufficiency of the evidence to sustain the verdict and a new trial ordered. Defendants submitted as a part of their statement on appeal the complaint and a transcript of the testimony taken on the trial, which statement on appeal was filed in the superior court July 12, 1927, together with a transcript of the docket in the municipal court and the notice of appeal, which recites that it is taken on questions of law. Thereafter, and on August 2, 1927, an affidavit was filed in the superior court by defendants with the request that an order issue to the clerk of the municipal court directing such officer to transmit certain exhibits mentioned therein which were introduced in evidence at the trial, and an order was made pursuant thereto, as a result of which certified copies of all such exhibits were made and transmitted to the clerk of the superior court and appear in the record before us. The statement on appeal refers to the answer as being a part of it, but the record shows that a certified copy of such answer was filed in the superior court August 16, 1927. It is contended by appellant that the superior court erred in ordering such certified copies of the exhibits, as well as the answer, to be filed.

[1, 2] The appeal in this case was filed with the clerk of the municipal court June 3, 1927. On July 29, 1927, section 988b of the Code of Civil Procedure became effective, which reads in part as follows: "If it appear that there is any paper or record in the custody of the clerk of the municipal court which was before said court but which is not included in the record on appeal, and that an examination of such paper or record will assist in the determination of the appeal on its merits, the superior court may, on motion of either party, or on its own motion, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of

the record on appeal." Such amendment affords ample authority for the addition to the record of the papers objected to, but counsel urges that it is not applicable because it was not in existence at the time the appeal was taken and is not expressly declared to be retroactive. Such an amendment affecting procedure only and not substantial rights is applicable to actions pending when it becomes effective (*Maguire v. Cunningham*, 64 Cal. App. 536, 222 P. 838); and, as the amendment was in effect before the order was made, even though after notice of appeal filed, there was no error in making the order.

It was the contention of the plaintiff in the trial court that the service station in question, with the fixtures, equipment, stock in trade, good will, and leases, was sold and delivered to the defendants for the agreed price of \$700 cash and the assumption and payment by the latter of balances of \$148.50 and \$35 due, respectively, on a gasoline pump and a cash register, all of which was unpaid. The defendants denied that they bought the property mentioned, and alleged that the plaintiffs represented to them that they owned the service station free and clear of incumbrances, except the unpaid balances on the pump and cash register; that they would arrange for the payment of such balances by the defendants in monthly installments, and would remain at the service station while the escrow was pending. The parties executed an escrow agreement into which defendants placed the \$700 cash. The escrow agreement provided that plaintiffs were to place therein a notice of sale of the service station, together with a bill of sale of same and three assigned leases. The notice of sale was to be recorded immediately. It provided, in substance, that plaintiffs intended to sell to defendants the stock in trade, etc., of said service station, located at 4707 North Huntington drive, Los Angeles, "and that a transfer and assignment of the same will be made, and the purchase price will be paid on Friday, the 21st day of January, 1927," at the office of the escrow holder, and complied in other particulars with section 3440 of the Civil Code. The escrow agreement also provided that the bill of sale and assigned leases were to be held until Friday, January 21, 1927, at 10 o'clock a. m., at which time, unless bills of creditors had been filed in excess of the \$700 deposited, they were to be delivered to the vendees, and also that, "in the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at the earliest date possible thereafter unless I shall have made a written demand upon you for the return of the money and instruments deposited by me." On the reverse side of such agreement, and made a part of it by reference, among other provisions was the following: "No rescission

of this escrow or modification of its terms or any notice or demand shall be of any effect without joint consent in writing subscribed by the parties hereto and assented to by California Bank." After the time so fixed for the closing of the escrow, respondents made written demand on the escrow holder for the return of their papers and money; the demand stating that Edmunds and Ayers had not complied with the terms of the escrow agreement to be performed by them.

[3, 4] There is a conflict in the evidence so far as the alleged agreement of plaintiffs to remain at the service station while the escrow was pending is concerned, and also as to whether or not a lease executed by the appellants to one Hardy of a part of the ground covered by the leases to be assigned to respondents was in force and effect while the escrow was pending; also as to whether or not appellants were to arrange with the parties from whom the pump and cash register were being purchased for the payment of the balance in monthly installment payments. The judgment of the trial court as to each contention cannot be disturbed on appeal, for the reason that the appellate court might not have decided them the same way. The evidence shows, without conflict, both appellants so testifying, that at least two of the leases called for by the escrow agreement were not delivered to the escrow holder until after January 21, 1927, at 10 o'clock a. m., and after demand had been made for the return of their money by respondents.

Counsel for appellants urges, however, that, inasmuch as the plaintiffs and the escrow holder did not consent in writing to the rescission of the agreement between the parties as required by the provision of the escrow agreement above quoted, it became a complete contract upon the deposit in escrow of the required leases, and respondents were liable for the purchase price agreed upon. The two provisions of the escrow agreement, quoted above, do not seem to be in conflict. There was no rescission of the escrow under the paragraph relied upon by appellants. The escrow expired by its own provision. It is true that, in the absence of a demand by one or both of the parties for a return of the papers or money deposited, the escrow holder was authorized to complete the same even after the expiration date, but that authority was terminated by the demand made by respondents, the appellants not having at the time of such demand complied with the conditions to be performed by them. Under the circumstances of the case, the superior court did not err in reversing the judgment of the municipal court and in ordering a new trial of the case.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

HAWES v. LUX et ux.

Civ. 7709.

District Court of Appeal, First District, Division 2, California.

Jan. 6, 1931.

Rehearing Denied Feb. 5, 1931.

1. Vendor and purchaser ⇨50.

Deposit receipt and escrow instructions dated four days later should be construed together in determining whether property was sold subject to record restrictions (Civ. Code, § 1642).

2. Contracts ⇨164.

Generally, several papers concerning one subject-matter, though executed at different times, are construable together if later instrument is only to modify earlier one (Civ. Code, § 1642).

3. Vendor and purchaser ⇨335.

Even in absence of express contract provision, vendor is entitled to retain purchaser's payment made before purchaser's unexcused default.

4. Vendor and purchaser ⇨335.

Purchaser abandoning contract held not entitled to recover payment on ground deposit receipt did not mention restrictions.

Purchaser showed neither a tender nor excuse for her failure to tender balance of purchase price, but merely abandoned contract because she changed her mind and admitted that she set up recorded restrictions which were not mentioned in deposit receipt merely as technical objection to title, and by purchaser's abandonment of contract vendors were never called on to perform and were never in default.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by Susan Salling Hawes against John Lux and wife. Judgment for plaintiff, and defendants appeal.

Reversed.

Laughlin & Laughlin, H. Sidney Laughlin, and Charles H. Clark, all of Los Angeles, for appellants.

Frankley & Spray and Armand H. Blum, all of Los Angeles, for respondent.

SPENCE, J.

Plaintiff brought an action for money had and received seeking to recover the sum of \$7,000 paid to defendants as a deposit on the purchase price of certain real property. Trial was had before the court sitting without a jury. From a judgment in favor of plaintiff, defendants appeal.

The property involved consisted of a dwelling house in Beverly Hills owned by defendants. The purchase price was \$68,100. Plaintiff paid to defendants a deposit of \$7,000 and agreed to take the property subject to a mortgage of \$17,000 and to pay the balance of \$44,100 within ninety days after May 14, 1926. Thereafter plaintiff abandoned the contract and made no tender of the balance of the purchase price. While on a trip to Wisconsin during the ninety-day period plaintiff wrote two letters to defendants' real estate agent. In the first letter written July 15, 1926, she said: "Have decided not to complete deal on home at 906 Bedford Drive and have written Security Trust Co., to that effect. Prefer to lose the 7000 paid Mr. Lux and pass the deal. Find I cannot use house at present." Apparently in response to a letter from the agent, she again wrote on August 11, as follows: "No—my letter was final—I find it isn't sensible for me to buy a home without an elevator as the stair-climbing is too much for me. * * * I am sorry to lose \$7000.00 but I can better afford to do that. * * * " Nothing further was done until plaintiff demanded the return of the \$7,000 in January, 1927. Defendants refused to return the deposit and plaintiff brought this action.

Upon the trial plaintiff disclosed that she was claiming the return of the deposit on the theory of a failure of consideration. In support of this claim evidence was introduced showing that there were certain conditions and restrictions of record contained in a deed to one of defendants' predecessors in interest. These conditions and restrictions were similar to those frequently found on property in residence districts. Plaintiff frankly conceded that at the time of the transaction she did not give any consideration to the question of restrictions and in fact did not know that there were any restrictions on the property until after this action was filed. This was many months after she had abandoned the contract and after the ninety-day period had expired. It is equally frankly conceded by counsel for plaintiff that in attempting to recover the deposit money plaintiff "is standing on technical rights."

In order to determine the respective rights of the parties, we will proceed to a consideration of their agreement. Two instruments relating to this transaction were signed by the parties consisting of a deposit receipt dated May 14, 1926, and escrow instructions dated May 18, 1926. These instruments are of some length. The first covers three pages and the second covers nine pages of the transcript. Both provided for the payment of the purchase price in the manner above set forth. Each contained many terms not contained in the other. In the deposit receipt no reference was made to conditions and restrictions. It provided for the payment of the balance of the purchase price within ninety days "into escrow." The escrow instructions made no ref-

erence to the deposit receipt but provided, among other things, that the balance of the purchase money should be used to carry out the escrow provided instruments had been filed enabling the escrow holder to procure a guarantee of title showing title vested in plaintiff free of encumbrances except " * * * Conditions, restrictions, reservations, rights, rights of way and easements, now of record, if any. * * * "

[1, 2] It is the contention of appellants that these two instruments signed by the parties should be construed together, and so construed, the agreement of the parties was for the purchase of the property subject to conditions and restrictions of record. We believe this contention must be sustained. Civ. Code, § 1642. The general rule referred to is supported by an abundance of authority and is well summarized in 6 California Jurisprudence, 298, as follows: "As a general rule, when several papers concerning one subject matter are separately executed by the same parties, all are to be construed together as one contract. The intention of the parties is to be gathered from all the instruments, taken together, and the recitals in each may be explained or corrected by reference to any other. This rule is adopted as part of the statute law by the provisions of the Civil Code, § 1642. 'Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.' The several contracts must be so construed as to give effect, as far as practicable, to every part of each instrument. This is true although two contracts are made at different times, providing the later is not intended to entirely supersede the first, but only modifies it in certain particulars. The two are to be construed as parts of one contract, the later superseding the earlier one wherever it is inconsistent therewith."

In an effort to defeat the effect of the exception in the escrow instructions relating to conditions and restrictions, respondent relies upon *Zlozower v. Lindenbaum*, 100 Cal. App. 766, 281 P. 102, and *Morgan v. Dibble*, 43 Cal. App. 116, 184 P. 704. The facts in those cases differ essentially from the facts in the present case and it is sufficient to point out that in neither of the cases were the escrow instructions signed by both parties during the time provided for the consummation of the sale.

[3, 4] It is further contended by appellants that the motion for nonsuit should have been granted even though the deposit receipt alone is construed as the agreement between the parties. We are of the opinion that this contention must likewise be sustained as respondent showed neither a tender nor excuse for her failure to tender the balance of the purchase price. The deposit receipt provided for the retention by appellants of the amount paid in the event of the failure of respondent to pay the balance, but even in the absence of

such express provision it is well settled that the seller is entitled to retain the payments made prior to the unexcused default of the purchaser. *Tuso v. Green*, 194 Cal. 574, 229 P. 327; *Glock v. Howard*, 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; 25 Cal. Jur. 797. Respondent attempts to excuse her default on the ground that the conditions and restrictions constituted a defect in the title which could not be removed, citing *Prentice v. Erskine*, 164 Cal. 446, 129 P. 585, and *Whelan v. Rossiter*, 1 Cal. App. 701, 82 P. 1082. We find no evidence to sustain respondent's position. So far as the record discloses these conditions and restrictions might have been removed by quitclaim as was done in *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 117 P. 677, 37 L. R. A. (N.S.) 5. Neither of the cases cited by respondent is in point. In *Prentice v. Erskine*, supra, the title was defective by reason of a perpetual right of way for a public road which defect, as pointed out by the court, could not be removed by purchase or any ordinary method of business negotiation. In *Whelan v. Rossiter*, supra, the seller, when called upon to remove the restrictions and incumbrances, stated that he could not do so. In the present case respondent simply changed her mind, abandoned her agreement, and made no tender of the balance of the purchase price. By reason of respondent's abandonment of the contract appellants were never called upon to perform and were never in default. Respondent's default was not excused by reason of the alleged defective title of appellants at the time the agreement was made and she was not entitled to recover back the deposit money. *Backman v. Park*, 157 Cal. 607, 108 P. 686, 137 Am. St. Rep. 153; *Hanson v. Fox*, 155 Cal. 106, 99 P. 489, 20 L. R. A. (N.S.) 338, 132 Am. St. Rep. 72; *Joyce v. Shafer*, 97 Cal. 335, 32 P. 320; *Easton v. Montgomery*, 90 Cal. 308, 27 P. 280, 25 Am. St. Rep. 123.

The judgment is reversed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

110 Cal. App. 698

HUNTER et al. v. SANTA BARBARA COUNTY.
Civ. 4139.

District Court of Appeal, Third District,
California.

Dec. 29, 1930.

Rehearing Denied Jan. 28, 1931. Hearing Denied by Supreme Court Feb. 19, 1931.

1. Appeal and error $\Rightarrow$ 544(1).

Appeal on judgment roll alone presents no question as to sufficiency of evidence to sustain judgment.

2. Highways $\Rightarrow$ 113(3).

Contract, if created by bid and advertisement for highway construction was void, where referring only to portion of road for which bonds were voted, leaving insufficient funds for balance of road.

Road to be constructed was specifically described in all proceedings leading up to bond election, which was for construction and improvement of particular road as a whole. Road specified in bond election notices constituted a single continuous highway, but board of supervisors advertised for bids for construction of two separate portions of road. Bid for improvement of portion of road was accepted, leaving balance of funds insufficient to construct remainder of road.

3. Highways $\Rightarrow$ 113(3).

Addition to contractor's bid for highway construction to save bank purchasing highway bonds from loss because of difference between par and market value of bonds vitiated bid and subsequent proceedings (Pol. Code, $\S$ 2765).

4. Highways $\Rightarrow$ 113(3).

Bids for public work should be free from fraud.

Appeal from Superior Court, Santa Barbara County; John L. Hudner, Judge.

Action by Sam Hunter and another, copartners doing business under the name and style of Hunter & Richardson, against the County of Santa Barbara. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Chickering & Gregory, of San Francisco, and Griffith & Thornburgh, of Santa Barbara, for appellants.

Clarence C. Ward, Dist. Atty., of Santa Barbara, for respondent, Vincent E. Morgan.

LUTTRELL, Justice pro tem.

Plaintiffs and appellants brought this action in the superior court of Santa Barbara county to recover the sum of \$98,670.95 as damages for breach of contract. A trial was had resulting in a judgment for defendant and respondent. This appeal is from such judgment and is brought here upon the judgment roll alone.

The facts of the case, as found by the trial court, are as follows: Some time prior to January 5, 1920, a permanent road division known and designated as the Permanent Road Division of Lompoc had been regularly created covering a portion of Santa Barbara county. On January 5, 1920, a petition was presented to the board of supervisors of said

county asking for the improvement of certain specified roads in said road division, and on February 2 of that year said board of supervisors, by proper resolution, ordered that an election be called and held in the district for the purpose of submitting to the electors thereof the question of the issuance and sale of bonds in the amount of \$400,000 for the purpose of raising money to carry on and complete the work of improving the roads so specified and described in said petition. The election, so called, was, after due notice given, held and resulted in favor of the bonds in the amount specified. The bonds so voted were to run from one to twenty-four years and were to bear $5\frac{1}{2}$ per cent. interest. On the day of calling the election the board of supervisors, by proper action, set aside from the general fund of the county, to be used in connection with the money so to be raised by such bond issue, in the making of said road improvements, the sum of \$100,000, and also set aside from the road district fund of District 4 of said county the sum of \$11,000 for the same purpose. The published and posted notices calling said bond election specifically stated that the money to be raised by such bond issue was to be used in the improvement of roads within said permanent road division located as follows: "Beginning at the junction of the county road with the right-of-way of the Southern Pacific Railroad Company at Lompoc Junction; thence running in an easterly direction along what is known as the westerly extension of Ocean avenue and the county road known as Ocean avenue to the west boundary line of the city of Lompoc and Ocean avenue through the city of Lompoc, and on easterly to the Robinson bridge across the Santa Ynez river; also the road running from Robinson bridge northwesterly to what is known as the Four Corners; also the road from the Four Corners running in a general easterly direction through Santa Rita and through Santa Rosa Rancho and through the lands known as the lands of the Danish-American Colony to where said road intersects the easterly line of said Permanent Road Division; also H street in the city of Lompoc from the center line of Walnut avenue to the center line of Cypress avenue." Said election notices then stated in detail just how said described roads were to be improved by specifying the materials to be used, thickness and width of pavement, methods of drainage, and other details, and referred the voters to the petitions, orders, plans, maps, detail sheets, estimates, and specifications on file in the office of the board of supervisors for a more particular description of the work to be done. In the plans and specifications adopted by the board for such road improvement the roads to be improved were divided into sections known respectively as sections 1, 2, 3, 4A1, 4A2, and 4B, said sections altogether comprising all of the roads described in the bond election no-

tices. The said roads specified in the bond election notices, petition, and plans and specifications constitute, as found by the court, a single and continuous road or highway from the west to the east end of the district and are not separate, distinct, and indivisible roads, and the work of improving and constructing said roads as also found by the court, constituted a single and indivisible scheme or plan of road construction and improvement.

On or about August 1, 1921, the board of supervisors, notwithstanding the fact that the county treasurer of said county, with whom the bonds which had been voted by the district had been placed for sale, had been unable to sell any of same at par plus accrued interest, advertised for sealed bids for the construction and improvement of the roads described in the bond election notice and in the plans and specifications. In such advertisement the board asked for bids for the furnishing of necessary tools, machinery, labor, and material to complete all of said sections and roads described in the bond election notice, and also for alternative bids for the construction and improvement of each of two separate portions of said roads; the said separate portions being specified in the advertisement. The advertisement for bids contained the usual clause notifying prospective bidders that a bond for faithful performance of the contract would be required of the successful bidder and also that each bidder must accompany his bid with a certified check as a guarantee that the bidder, if successful, would enter into the contract and give the required bond. The right to reject any and all bids not deemed advantageous was reserved.

On or about August 22, 1921, which was within the time specified in the advertisement, plaintiffs filed with the clerk of the board of supervisors their three separate bids for the road construction and improvement, as called for in said advertisement, and accompanied each of said bids with the necessary certified check. In one of such bids or proposals, plaintiffs offered to construct and improve, according to the plans and specifications, that certain portion of the said roads described in the advertisement as sections 4B-4A2-4A1-3 and that portion of section 2 between the westerly town limits of Lompoc and the westerly end of section 3 for the sum of \$485,380.55.

In another bid submitted they offered to do the required work covering section 4B-4A2-4A1-3-2 for the sum of \$528,204.92, and in a third and separate bid they offered to construct and improve the entire road described in the notice and in the plans and specifications for the sum of \$715,326.64. On August 22, 1921, the board of supervisors, at a regular meeting thereof, proceeded to open plaintiffs' said bids. There were no other bids sub-

mitted. Upon opening the bids, the board considered all of them excessive and upon motion duly made and carried, rejected all of them.

A motion was then made and seconded to reconsider the action of the board in rejecting said bids. A vote was taken upon this motion and resulted in a tie. The board then adjourned until 2 o'clock in the afternoon of the same day, and upon reconvening at said hour a motion was again made to reconsider the action of the board in rejecting plaintiffs' bids. This motion was thereupon carried, and the board then by a three to two vote decided to accept plaintiffs' bid to construct and improve the particular sections of the highway to be improved, designated as sections 4B-4A2-4A1-3 and that portion of section 2 lying between the westerly city limits of Lompoc and the westerly end of section 3, for said sum of \$485,380.55, so bid for such work. This particular portion of the highway constituted about two-thirds of the entire project for which the bonds had been voted. Upon such vote being taken by the board accepting such bid the chairman of the board declared the motion to accept such bid carried and declared the contract awarded to plaintiffs on their said bid, upon their entering into a contract and giving bond for the fulfillment thereof, as provided by law. The aforesaid action of the board was duly entered in the minute book of the board, and the district attorney of the county prepared, in proper form, a written contract for execution, covering the said work. This contract was duly signed by plaintiffs, and they furnished the required bond; but the contract was never signed by the chairman and clerk of the board, nor by any one on behalf of the county. Neither was plaintiffs' bond ever approved. No other action was taken by the board upon either of the other two bids submitted by the plaintiffs.

At the time of this action of the board accepting plaintiffs' said bid for the construction and improvement of only a portion of the roads for which bonds had been voted, the total amount provided and set apart for the construction and improvement of all of the roads specified in the bond election notice was the sum of \$511,000, being, as heretofore shown, the \$111,000 appropriated by the board from the county and the road district funds, plus the \$400,000 voted at the bond election. It is also a fact, as before stated, that when the action of the board accepting plaintiffs' bid was taken, as aforesaid, none of the bonds which had been voted by the electors of the road division had either been issued, or sold, for the reason that same were not salable at par plus accrued interest.

It is also true, as found by the trial court, that the amount left of the \$511,000, provided for the construction and improvement of the entire road system in the road division specified and described in the bond election notice,

after deducting the \$485,380.55, the amount of plaintiffs' bid for the construction and improvement of the portion of the road specified therein, would be wholly insufficient to construct and improve the balance of said roads, for which said bonds had been voted.

It is a conceded fact in the case, and so found by the court, that before submitting their bids to the board of supervisors for doing said road work plaintiffs entered into an arrangement with the County National Bank of Santa Barbara, which bank was engaged in the banking business in such city, by which arrangement it was agreed between plaintiffs and such bank that plaintiffs would submit their bid or bids to the board of supervisors of said county for the construction and improvement of said roads of said permanent road division, or certain portions thereof, as called for in the advertisement for bids, and that in submitting such bid or bids, they would add to the amount thereof the sum of \$60,000, which sum was estimated by plaintiffs and said bank to be the difference between the par value and the market value of said bonds, and that, in the event that plaintiffs' bid was accepted by the board and they secured the contract for doing said road work, said bank would purchase all of the said bonds of said permanent road division at the par value thereof, plus accrued interest, and that the \$60,000, so to be added to plaintiffs' said bid or bids was for the purpose and was to be used to compensate said bank for the loss to be sustained by it in purchasing said bonds at their par value and reselling same at their market value. Under the aforesaid arrangement, as stated, the bank was only to purchase said bonds after and in the event that plaintiffs' bid for said road work should be accepted.

It is also a conceded fact, and so found by the trial court, that pursuant to such arrangement between plaintiffs and the bank, plaintiffs did file their said bid in the sum of \$485,380.55, as hereinbefore mentioned, and that in figuring and estimating the said amount of such bid, they did add and make a part thereof, said sum of \$60,000 for the purpose aforementioned.

The trial court found that at least three of the supervisors of the county, at the time of the opening of the bids of plaintiffs and the action thereon, as heretofore related, knew nothing of such aforesaid arrangement between the plaintiffs and the bank, and had no knowledge that the plaintiffs, in submitting their bid, had added to the amount thereof, said sum of \$60,000 for the purpose of compensating the bank for loss sustained, as aforesaid. After plaintiffs' said bid was accepted by the board of supervisors, the bank, pursuant to its agreement with plaintiffs, purchased all of the said bonds of such road division, paying therefor \$400,000, the par value there-

of, plus accrued interest, and afterwards sold all of the said bonds for the sum of \$346,000. The court further found that said bank would not have purchased said bonds, but for the aforesaid action of the board of supervisors in accepting plaintiffs' bid for such road construction work and but for its said agreement with plaintiffs to so add the \$60,000 to their bid for said work, and with said sum so added, compensate it for its loss in so purchasing the bonds.

On September 6, 1921, the board of supervisors, at a regular meeting thereof and over the protest of plaintiffs, rescinded its previous action in accepting the said bid of plaintiffs and rejected plaintiffs' said bid. Santa Barbara county never tendered back to said bank nor to plaintiffs any part of said sum so paid by the bank to the county for said bonds, and the court found that plaintiffs have agreed to reimburse the bank for its said loss in the purchase and resale of said bonds and that plaintiffs are indebted to the bank in said amount.

After rejecting plaintiffs' said bid on September 6, 1921, the board of supervisors proceeded to advertise for bids for the construction of said roads as specified in the bond election notice, as an entirety, and on December 5, 1921, accepted a bid which had been submitted pursuant to such advertisement, by Fairchild, Gilmore & Wilton Company, for the construction of all of said roads so specified and described in the bond election notice, and awarded the contract therefor to said last mentioned company. Thereafter, on December 13, 1921, plaintiffs filed in proper form with the clerk of the board of supervisors their demand for their claimed damages for breach of contract in said sum for which this suit was brought. This demand was, on March 6, 1922, rejected by the board of supervisors and the present action followed. It was found by the trial court that upon plaintiffs' said bid being accepted by the board of supervisors on August 22, 1921, for the construction work therein described, plaintiffs filed the required bond and proceeded to procure certain equipment with which to do said work and have at all times been ready and willing to proceed with said construction work, but that said board of supervisors refused to proceed further in the matter of the acceptance of plaintiffs' bid and the awarding of the contract to them.

From the facts thus related and found by the trial court, the conclusion was there drawn that the roads described in the notice of bond election constituted one continuous, indivisible highway, and the work of constructing and improving said roads, so specified and described, constituted one indivisible scheme or plan of highway improvement, and that the board of supervisors was not authorized to advertise for bids for the construction

and improvement of any part or portion of said roads, or for any work less than the work of constructing and improving said roads in their entirety, and had therefore no legal authority to accept plaintiffs' said bid for the construction and improvement of only a portion of said roads.

The further conclusion was drawn that the said bid of plaintiffs and the action taken thereon by the board did not constitute a contract for the construction and improvement of said roads, or any portion thereof. The trial court further concluded that the agreement entered into between the plaintiffs and the bank, as mentioned in the facts found in the case, was entered into for the purpose of evading the law which requires bonds of a permanent road division to be sold for not less than their par value and accrued interest, and that plaintiffs' said bid having been filed pursuant to such agreement was illegal and void, and the action of the board with reference to such bid, was illegal and unauthorized. As heretofore stated, the judgment of the trial court in defendant's favor followed.

[1] The appeal having been taken upon the judgment roll alone, of course, no question is presented as to the sufficiency of the evidence to sustain the judgment.

In seeking a reversal of the judgment appellants rely upon three propositions: First, that a binding and enforceable contract arose between the plaintiffs and the county immediately upon the acceptance of their bid by the board of supervisors, even though the formal written contract, prepared by the district attorney, was never signed on behalf of the board. Secondly, that said alleged contract was not vitiated by the arrangement between the plaintiffs and the bank and the inclusion of the discount on the bonds in the amount of plaintiffs' bid. Thirdly, that said claimed contract is not invalid because of the fact that it was let for the construction of only a portion of the entire road project.

In meeting these contentions, and in support of the judgment, the respondent claims: First, that no binding and enforceable contract was ever entered into by and between the parties so as to give rise to an action for damages in favor of appellants. Secondly, that the board of supervisors of the defendant county lost jurisdiction to make a valid award to appellants by reason of the unrevoked finding that appellants' bids were excessive. Thirdly, that appellants by adding the amount of \$60,000 to the amount of their bid for the work in question, to enable appellants to reimburse the bank (the purchaser of the bonds), for the loss to be sustained by said bank in reselling said bonds for less than the par value thereof, pursuant to an agreement therefor made prior to the filing of said bids and the purchase of said bonds, entered into a

fraudulent conspiracy to evade the law with respect to the purchase of bonds for less than the par value plus accrued interest and that such bid so filed was therefore illegal and void. Fourthly, that the appellants' bid, purported to have been accepted by the board of supervisors, was one for only a portion of the work for which the bonds were voted and therefore illegal and void. Fifthly, that the county of Santa Barbara is not liable in damages for the actions of its board of supervisors when acting for a local improvement district.

It is self-evident that if counsel for respondent are correct in any one of these five contentions, the judgment in the case must be upheld.

In their briefs counsel on both sides have given much space to a discussion of the question as to whether or not the submission by appellants of their written bid in response to the advertisement of the board of supervisors, and its subsequent acceptance by the board and the minute entry thereof in the board's records, constituted a contract between the parties.

In the view we have taken of the case it matters not whether such acts constituted a contract between the parties, or whether, as claimed by respondent, a formal, written document signed and executed by both parties was necessary.

[2] Assuming that such acts of the parties did constitute a contract, we feel that same was illegal and void particularly by reason of the fact that it called for the construction and improvement of only a portion of the road for the construction and improvement of which the bonds had been voted, and left an amount of money in the fund wholly insufficient to construct and improve the balance of the road. The road to be constructed and improved having been specifically described in all of the proceedings leading up to the bond election, and particularly in the notice of the bond election itself, we believe that the taxpayers of the road division voted the bonds for the construction and improvement of that particular road as a whole, and not any particular part or portion thereof, and that when these bonds were so voted a status favoring of a contractual relationship at once arose between the voters on the one hand and the road division represented by the officers charged with the duty of carrying out the improvement for which the bonds were voted on the other, and that the contract, if such it may be called, which thus came into being, could not be altered by one party without the consent of the other. In this case, therefore, when the board of supervisors sought to do only a portion of the work with the funds which the voters had provided for the doing of the work in its entirety, said board exceeded its authority and violated this contractual

relationship which had arisen. Obviously it was the intention of the electors of the road division in having same formed and in later voting the bonds to have the entire highway specifically described in all of the proceedings, constructed and improved in the particular manner specified, and not merely such portion of same as the board of supervisors might see fit to designate. The entire road was wanted by the electors, and nothing else, as they clearly signified in voting the bonds. It may well have been that had the voters known that the board of supervisors had the power, or would have used the bond money to construct and improve only two-thirds of the road involved, leaving the entire project incomplete and possibly ineffective, they would not have voted the bonds. The construction and improvement of only two-thirds of the road for which the bonds were voted might, and no doubt would have, deprived many of the taxpayers of the division of any, or of at least that benefit to which they were entitled as recompense for voting the bonds and paying their portion of the taxes necessary to redeem same. In other words, had the board of supervisors proceeded to construct and improve only the portion of the road specified in the accepted bid of plaintiffs, it might well have meant that only a portion of the division would have been benefited by the improvement, whereas the entire division would have been obligated to pay for same. Indeed, we can readily conceive of how the construction or improvement of only a portion of the road might entirely destroy the possibility of any benefit accruing therefrom to a large portion of the taxpayers of the division. Such action on the part of the officials would create an inequitable division of the benefits without a corresponding equalization of the burdens.

In reaching these conclusions in the premises, we earnestly feel that we are not only carrying out the letter, but the very spirit of the law governing such matters. We also believe that our conclusion is amply supported by the decisions in this state. To our minds a similar situation to the one in the instant case upon this point was involved in the well-considered case of *O'Farrell v. County of Sonoma*, 189 Cal. 343, 208 P. 117, 119. In that case the electors of Sonoma county, at a general bond election called by the board of supervisors, were called upon to vote on the question of issuing bonds of the county in a large sum of money for the purpose of building highways in the county. One of the highways included in the resolution of the board calling the bond election, and in the notice of the bond election, was described as follows:

"Sebastopol to Freestone.

"Beginning at a point in the present Sebastopol-Freestone Road 1.1 mile westerly from the limits of the Town of Sebastopol; said point at the end of the present oil road;

thence along the present road to its intersection with the present Freestone-Valley-Ford Road.

"Distance 4.0 miles. \$85,000.00."

Other highways proposed to be constructed were similarly designated and described. The bond election carried and the bonds were sold. When it came to the construction of this Sebastopol to Freestone highway, the highway engineer of the county prepared and submitted to the board plans and specifications and estimates calling for the construction of only a portion of the four miles of highway connecting the two towns. His plans covered 1.93 miles of said highway and his estimate of the cost of construction of such portion was \$81,500, which would leave an insufficient amount out of the \$85,000 voted to complete the said road. The board adopted the engineer's plans and specifications and proceeded to advertise for bids for the construction of said 1.93 miles of said highway. Bids were received and the board was about to let a contract when an injunction was sought to restrain such action. In seeking the injunction the plaintiff contended that under the facts as they existed the board could only ask for bids for the construction of the road from Sebastopol to Freestone as an entity, and that if the bids were too high the board could not proceed without further authority from the electors. The defendant contended that the board had a discretionary power to spend the entire \$85,000 on any part or portion of the road, as such board might deem meet and proper.

In passing upon the point the Supreme Court said: "We think that 'discretionary powers' are a false issue in this case. When the defendant board was contemplating a bond issue on the 16th day of April, 1919, it had the statutory right to make its order just as broad, and just as narrow, and just as specific as it was willing to be bound by, so long as the provisions of the statute were complied with. At that time it could have asked generally for the consent of the electors to issue bonds in the sum of \$1,640,000, for constructing roads in Sonoma county, but it did not do so; on the contrary, it specified road by road, name by name, and length by length, of each piece of road that was to be constructed. When, in the order, it specified Sebastopol to Freestone, four miles, designating the point of beginning and the point of the ending, any question of discretion as to division or subdivision into sections was, as to these elements, exercised once and for all and as a finality. When thereafter, pursuant to that order, the defendant board published a notice to the electors in exact accord with its order, every elector had the right to assume that the statement contained in the order to the effect that a road would be constructed from Sebastopol to Freestone meant the entire distance between those two points—

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not one end, or the other end, or any part or portion, but the whole." Continuing further on in the opinion the court used this language: "The electors must have also known that ordinarily a board of supervisors has many discretionary powers; but, nothing to the contrary appearing the electors had the right to assume that after the election the board of supervisors would call for bids for the construction of a road four miles in length between Sebastopol and Freestone as described in its order and costing not to exceed \$85,000. The order calling the election and the ratification of that order by the electors constituted a contract between the state and the individuals whose property was thereby affected. *Peery v. City of Los Angeles*, 187 Cal. 753, 19 A. L. R. 1044, 203 P. 992. After the contract had been made, it could not be altered by one of the parties, only, but by all of the parties thereto. When by its order, duly accepted by the vote of the electors, the length of the road had been specifically defined, its terminals specifically located, and the cost of the whole established, these elements became a part of the contract. As to them the board, acting alone, could not redivide the contract. Neither could it directly expend the moneys on only a portion of the road. What it could not do directly it could not do indirectly. Such fact is of the utmost importance to the interested parties. It is the only hold the taxpayers have for specifically enforcing the contract as made by them. The very gist of the plaintiff's complaint is that the defendant board has not asked for, and has not obtained, a bid for constructing the whole road. For this reason the plaintiff may complain. If the defendant board has the statutory right to let contracts to build said road in sections, then, as the defendant argues, all of the funds may be spent on one mile in the discretion of the board. But the board may not let the contracts piecemeal. It has waived its right to do so."

We have thus quoted at length from the Sonoma County Case for the reason that the situation in that case seems so analogous to the one before us, the decision there seems controlling in the case here.

The principle involved is also supported in the following cases: *Jenkins v. Williams*, 14 Cal. App. 89, 111 P. 116; *McMahon v. Board of Supervisors*, 46 Cal. 214; *Peery v. City of Los Angeles*, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044; *McBean v. Redick*, 96 Cal. 191, 31 P. 7; *Treanor v. Houghton*, 103 Cal. 60, 36 P. 1081; *Kutchin v. Engelbret*, 129 Cal. 635, 62 P. 214.

Counsel for appellants contend that the *O'Farrell v. County of Sonoma* Case is not in point here, but that the late case of *Williams v. City of Stockton*, 195 Cal. 743, 235 P. 986, decided by the Supreme Court after judgment was rendered in the instant case, is decisive of the point under consideration. In making this

contention they rely upon the similarity of the statutory provisions under which the action was taken by the board of supervisors in the case at bar and by the city council of the city of Stockton in the Williams Case and upon the claimed difference in the statutory provisions in our case and the Sonoma County Case. Appellants' counsel also assert that the cases of McBean v. Redick, Treanor v. Houghton and Kutchin v. Engelbret, *supra*, are not in point here for the reason that in those cases street improvement proceedings were involved and consequently the proceedings were in invitum, requiring a strict pursuance of all proceedings leading up to the levy and collection of the tax, whereas, the proceedings in the case before us are not in invitum for the reason that the bonds for the work to be done had already been voted by the taxpayers.

We have examined all of these cases and find ourselves unable to agree with the contentions of counsel for appellants. To our minds the marked distinction between the Williams v. City of Stockton Case and the Sonoma County Case and the one under consideration is that in the letting of the contracts for the construction and equipment of the city hall in Stockton involved in the former case, all taxpayers of such city who had provided the money for such improvement were treated exactly alike. The action of the city council did not result in an inequitable division of benefits and burdens. The taxpayers of the city were not by such action divided into two classes, one receiving the benefits of the improvement, while the other received none. As heretofore pointed out, just the contrary would have resulted in the Sonoma County Case had the action of the board in proposing to let a contract for a portion of the work only, been upheld, and will also result in the instant case unless the judgment rendered is upheld upon this point. We can see other marked differences between the Williams v. City of Stockton Case and the one before us, but deem it unnecessary to discuss them.

As to the claim of the appellant in the case at bar that the McBean, Treanor and Kutchin Cases above mentioned, are not in point, suffice it to say that we deem them important upon the general proposition of the contractual relationship which arose out of the proceedings taken, which question we have heretofore discussed in this opinion.

[3, 4] We feel that we could safely rest our decision in this case upon this single question of the authority of the board of supervisors to let a contract for one portion of the work only instead of for the work in its entirety, but deem it advisable to give at least a brief consideration to one other important question involved in the appeal; that of whether or not the adding of the \$60,000 to their bid by the plaintiffs for the purpose of saving the

bank (the purchaser of the bonds) from loss on account of the difference between the par and the market value of the bonds vitiated plaintiffs' bid and nullified all of the subsequent proceedings with reference thereto. We believe that it did and that upon this conceded fact alone the judgment in the case might well be affirmed. It would seem that in the interests of public policy, if nothing else, bids for public work should be honest and free from any taint or suspicion of fraud. The taxpayers in this instance who voted the bonds which became, when issued, a lien upon their land, certainly had a right to expect that such bonds would be legally sold at their par value, plus accrued interest, and that every single dollar thus received would be honestly expended in making the improvement for which the bonds were voted. It is self-evident that such would not have been done, had the scheme which was initiated been accomplished. Certainly \$60,000 of the taxpayers' money would not have gone into road construction and improvement. Under the circumstances may it not well be concluded that plaintiffs' bid for the work was excessive, at least, to the extent of this \$60,000 which the bidders themselves never intended should go into the actual road construction. The law required that these bonds be sold at not less than their par value, plus accrued interest. Pol. Code, § 2765. Did not the agreement entered into between the bidders and the bank result, and was it not designed to result, in a sale of the bonds at less than par? Did not this agreement result indirectly in accomplishing that which could not be accomplished directly? A similar situation was before the court of Civil Appeals of Texas in the case of Wilson v. Hebert, 174 S. W. 861, 863. The law of that state requires that the bonds involved be sold at not less than par and accrued interest. The court said: "If, then, a bidder, in view of the fact that the market value of the bonds is lower than the par value, places his bid at a sum higher than he would have done * * * so as to permit him to pay the difference, the effect is the same as if the bonds had been sold below par. * * * The result is that the taxpayer who must ultimately pay the bonds, instead of getting par value for the bonds in work, gets in work only the market value, which is less. This method is only the doing indirectly of that which the law positively forbids, and cannot be tolerated."

In the case of Ogg v. Dies (Tex. Civ. App. 176 S.W. 638, 640, the point was disposed of in the following strong language: "The statute forbids the sale of bonds of this character for less than par value and accrued interest; and, if a contractor bids for both the work and bonds, and the evidence justifies the conclusion that the bid for the work is not made upon a cash basis, but fixed at an amount suf-

ficiently in excess for what the work could be procured to be done for cash to recoup the contractor for a portion of the amount which he agrees to pay for the bonds, such bids should not be accepted, because this method of selling the bonds is a clear evasion of the statute, which forbids their sale for less than part and accrued interest."

These, and other authorities which might be cited, seem decisive upon the point. When the plaintiffs and the bank entered into the arrangement under which the bank was not to purchase the bonds unless the plaintiffs secured the contract, and the plaintiffs were to add \$60,000 to the amount of their bid solely for the purpose of insuring the bank against loss in the transaction, thus depriving the taxpayers of the road division of \$60,000 worth of road construction and improvement, to which they were entitled under the bond issue and the appropriations made by the board of supervisors, surely a fraud upon such taxpayers was in the contemplation of plaintiffs and the bank, which fraud was only prevented by the timely action of the board in rejecting plaintiffs' bid on September 6, 1921. Appellants assert that such arrangement between the plaintiffs and the bank and the carrying out thereof did not vitiate the claimed contract for the reason that the board of supervisors had no knowledge of the inclusion of the \$60,000 item in plaintiffs' bid and that proof of collusion between the plaintiffs and the bank on the one hand and the county authorities on the other is essential to make the transaction illegal. The further assertion is made that the practice indulged in here between the plaintiffs and the bank is a common one among contractors, and that a regular, systematized, and generally recognized method of financing construction programs will be invalidated if the instant case is decided against appellants on the question of the methods used to enable the bonds to be sold. With reference to the last assertion, sufficient it is to say that if the transaction is illegal, we have no concern with what effect this decision may have upon future contracting or the sale of bonds for public improvements. With the contention that proof of collusion on the part of the board of supervisors was essential to vitiate the transaction, we find ourselves, under the circumstances of this case, unable to agree for the reasons heretofore discussed. However, upon this point raised by the appellants, the express finding of the court that at least three of the supervisors of the county did not know of the arrangement between plaintiffs and the bank heretofore adverted to, or of the adding by plaintiffs of the \$60,000 to their bid, at the time of the opening of the bid or the board's action thereon, is worthy of note. This finding naturally implies that the other members of the board did have such knowledge, which, if true,

would according to appellants' own contention, as we understand it, nullify the whole transaction.

Believing that the judgment of the trial court must be sustained for the reasons herein given, we deem it unnecessary to further extend this opinion by a discussion of other questions involved in the appeal.

The judgment is affirmed.

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**James T. BARCLAY, Petitioner, v. SUPERIOR
COURT OF LOS ANGELES COUN-
TY, Respondent.
Civ. No. 7136.**

**District Court of Appeal, Second District, Divi-
sion 1, California.**

March 25, 1930.

**Rehearing Denied April 22, 1930. Hearing De-
nied by Supreme Court May 22, 1930.**

Proceeding in mandamus to compel the
Superior Court of Los Angeles County, Elliot
Craig, Judge, to grant a motion to perfect an
appeal in forma pauperis. Writ denied.

James T. Barclay, in pro. per.

PER CURIAM.

On the authority of the decision of this
court in *Rucker v. Superior Court*, 104 Cal.
App. 683, 286 P. 732, in which the opinion was
this day filed, the petition for writ of man-
date is this day denied.

A petition for a rehearing of this cause was
denied by the District Court of Appeal on
April 22, 1930, and an application by petition-
ers to have the cause heard in the Supreme
Court, after judgment in the District Court
of Appeal, was denied by the Supreme Court
on May 22, 1930.





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